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Discovery aimed at defeating an arbitration clause in employment cases

SEEKING PRE-HEARING DISCOVERY RELATING TO A DEFENDANT'S MOTION TO COMPEL ARBITRATION COULD MAKE THE DIFFERENCE IN KEEPING YOUR CLIENT'S CLAIMS IN COURT

It's a routine most employment litigators have unfortunately come to know all too well: You've been retained by a hardworking employee to pursue righteous claims against their employer. Before you file their lawsuit in court, you make a demand for your client's personnel records pursuant to Labor Code section 1198.5. After waiting 30 long days, the personnel file finally arrives. You whip through it, singularly focused on searching for two of the most despised words in the plaintiff lawyer's dictionary, anxious about what you might find. And then, to your grave disappointment, you see them practically jumping off the page in big, bold letters: *arbitration agreement*.

Does this crush all hopes of litigating in court? It's difficult not to feel pessimistic after decades of state and federal court opinions strengthening the grounds on which an employer can compel an employment dispute to arbitration. It's easy to feel like the cards are stacked against our clients. But, before resigning to pursuing the case in arbitration, you should consider all of the angles from which you can challenge the agreement and the tools available to do that, including (and in particular) pre-hearing arbitration-related discovery.

Query: Can the employer properly authenticate the agreement? Whose signature is on the agreement? How does the employer know it belongs to the employee? What are the company's policies and procedures regarding the maintenance of personnel records? And, more specifically, arbitration agreements? Was the employee given a meaningful choice about whether to enter the agreement? Or the right to negotiate its terms? Has the employer's agreement resulted in unfairly one-sided results in previous employment arbitrations?

If and when your client's employer files a motion to compel arbitration, you need not despair. Propounding even minimal discovery requests on these and other relevant topics could be the key to uncovering evidence that keeps your client's case in court.

Process for seeking arbitration-related discovery

As our friends from the defense bar love to remind us, California law favors the enforcement of a valid arbitration agreement. Among the many benefits afforded to the party seeking arbitration, the California Arbitration Act, Code of Civil Procedure sections 1280, et seq., *requires* the trial court – upon motion of a party – to order a stay of the case pending the determination of an application to compel arbitration. (See Code Civ. Proc., § 1281.4 [the court "shall" stay the case pending an application to arbitrate].)

Few defense attorneys actually *move* for a stay pending their arbitration motions. But, even when defense counsel properly seeks such a stay, you can – and should – request relief from the stay to obtain discovery regarding the authenticity and enforceability of the agreement they seek to enforce. To allow sufficient time to obtain the discovery, you may also consider requesting a stipulation and/or order to continue the arbitration motion hearing date and attendant briefing schedule.

In deciding a motion to compel arbitration, the trial court "sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach that final determination." (*Gamboa v. N.E. Community Clinic* (2021) 72 Cal.App.5th 158, 164 (quoting *Engalla v. Permanente Med. Grp., Inc.* (1997) 15 Cal.4th 951, 972).) Although it has fallen short of declaring that a party has the *right* to pre-hearing arbitration-related discovery, the California Supreme Court has impliedly recognized that it is, at the very least, within a trial court's discretion to grant discovery relating to an application to compel arbitration. (See *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413-14 [finding the plaintiffs did not establish that they were "unfairly denied discovery of anything they need to oppose the petition"].)

And several California appellate decisions have acknowledged instances in which trial courts permitted arbitration-related discovery. (See, e.g., *Fabian v. Renovate Am., Inc.* (2019) 42 Cal.App.5th 1062, 1065 [trial court continued the motion hearing "to allow the parties to conduct discovery as to whether [Fabian] electronically [signed] the subject contract" (modifications in original)]; *Espejo v. So. Cal. Permanente Med. Grp.* (2016) 246 Cal.App.4th 1047, 1055 [plaintiff took the deposition of the declarant in support of the motion to compel arbitration]; *Arguelles-Romero v. Sup. Ct.* (2010) 184 Cal.App.4th 825, 832 [trial court permitted limited written discovery and left open the opportunity for follow-up discovery, including a deposition]; *Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 959 [parties exchanged written discovery on the issue of arbitrability].)

When provided with these authorities, cooperative defense counsel may voluntarily agree to engage in limited arbitration-related discovery without the need for court intervention. Notwithstanding and considering there is no recognized *right* to such discovery, you should be prepared to articulate for defense counsel and for the court the relevance of the evidence you seek, including the applicable evidentiary

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2023

framework for authenticating an arbitration agreement and any defenses to enforcing the agreement.

Authentication of the arbitration agreement

The threshold question on any motion to compel arbitration is whether a valid agreement to arbitrate was formed. (See *Bautista v. Fantasy Activewear, Inc.* (2020) 52 Cal.App.5th 620, 656.) California courts use a three-step process to determine this. If the moving party meets its prima facie burden of producing evidence of a written agreement, the opposing party may challenge the authenticity of the agreement in several ways. "For example, the opposing party may testify under oath or declare under penalty of perjury that the party never saw or does not remember seeing the agreement, or that the party never signed or does not remember signing the agreement." (See *Gamboa*, 72 Cal.App.5th at 165 (citations omitted).) The opposing party must only meet a burden of producing evidence; the burden remains with the moving party to prove *by a preponderance of the evidence* that an agreement exists. (*Id.* at 165-166.)

Thus, if your client challenges the authenticity of the proffered arbitration agreement, the employer must meet its burden to prove that the agreement is valid. There is no strict requirement for authenticating a writing such as an arbitration agreement, and whether the employer has properly proven that a valid agreement exists will necessarily vary according to the circumstances. (See Evid. Code, §§ 1400, et seq. [recognizing the various ways a writing may be authenticated].)

Electronic signatures

These days, employers often purport to have obtained an employee's electronic signature to their arbitration agreement, whether through the DocuSign platform or by some other electronic means. Although an electronic signature has the same legal effect as a handwritten signature, the employer must prove that the electronic signature was an "act attributable" to the employee. (Civ. Code, § 1633.9, subd. (a).) The "act" may be shown "in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the . . . electronic signature was attributable." (*Ibid.*)

Where an employer seeks to compel arbitration using an electronic signature, you may consider deposing the individual who submitted a declaration in support of the employer's motion on the issue. Alternatively, you may consider noticing the deposition of the employer's "person most qualified" ("PMQ") on categories relating to the electronic signature. (Code Civ. Proc. § 2025.230 [requiring a deponent that "is not a natural person" to produce for deposition those individuals "who are most qualified to testify" on the subject matters identified in the deposition notice].)

Deposition questions that could prove helpful to challenging an electronic signature include:

- Did the employer require the employee to use a unique login and password to sign the document?
- If so, what evidence does the employer have that proves the unique login and password were used only by the employee?
- How can the date on the agreement be attributed to the date the employee allegedly executed the agreement?
- Did anyone see the employee electronically sign the agreement?
- Was anyone present when the agreement was electronically executed?
- In what specific geographic location was the agreement electronically signed?
- How did the employer infer that the employee was present at that geographic location when the agreement was signed?

Additionally, you may consider propounding requests for the production of documents relating to the authentication of an electronic signature, including:

- All documents, including policies and procedures, that relate to, pertain to, reflect, or otherwise evidence any security procedures used to determine the identity of the person who signed the agreement.
- All communications, including emails, text messages, and other electronic communications, that relate to, pertain to, reflect, or otherwise evidence the transmission of the arbitration agreement to and/or from the employee.
- All documents that relate to, pertain to, reflect, or otherwise evidence the identity of the individual who executed the proffered arbitration agreement, including, but not limited to, documents which reflect or otherwise evidence the date on which the agreement was executed and/or geographic location where it was executed.

Handwritten signatures

In other instances, the employer may seek to enforce an arbitration agreement which allegedly bears your client's handwritten signature. You should question whether the employer has produced testimony from someone with sufficient first-hand knowledge of the signature or, alternatively, whether the employer can authenticate the agreement through its custodian of records. (See, e.g., Evid. Code, § 1271 [a writing is not inadmissible hearsay if (a) it was "made in the regular course of business;" (b) it was "made at or near the time of the act, condition, or event;" (c) "the custodian or other qualified witness testifies to its identity and mode of its preparation;" and (d) "the sources of information and method and time of preparation were such as to indicate its trustworthiness"].)

Under these circumstances, you may consider deposing the employer's declarant and/or PMQ on the following:

- Did anyone see the employee physically sign the agreement?
- What evidence does the employer have that the employee signed the agreement?
- Does the witness recognize the employee's signature?
- Does the custodian of records have the necessary personal knowledge to attest to the employer's policies and

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2023

processes for executing and maintaining the arbitration agreement?

- What are the employer's policies and procedures for maintaining personnel files and, more specifically, arbitration agreements?
- Can the custodian of records identify when the agreement was executed?
- Can the custodian of records describe the process for how the employer presented the agreement to the employee?

You may also consider propounding document requests including:

- All documents, including policies and procedures, that relate to, pertain to, reflect, or otherwise evidence the employer's process for onboarding new employees, including all new-hire agreements required as a condition of employment.
- All documents, including policies and procedures, that relate to, pertain to, reflect, or otherwise evidence the employer's process for maintaining employee personnel files.
- All documents, including policies and procedures, that relate to, pertain to, reflect, or otherwise evidence the employer's process for obtaining employee signatures to the arbitration agreement.
- All documents that relate to, pertain to, reflect, or otherwise evidence the identity of the individual who executed the proffered arbitration agreement, including, but not limited to, documents which reflect or otherwise evidence the date on which the agreement was executed and/or the geographic location where it was executed.

Defenses to arbitration

Even in instances where the agreement has been or could be authenticated, you may consider propounding discovery requests relating to the employee's defenses to arbitration, including that the proffered arbitration agreement is unconscionable. Civil Code section 1670.5, subdivision (b) provides, "When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties *shall* be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination." (Emphasis added; see also *Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Sup. Ct.* (2005) 133 Cal.App.4th 396, 407 ["[A] claim of unconscionability often cannot be determined merely by examining the face of a contract, but will require inquiry into its commercial setting, purpose, and effect"].) If the employee *shall* have the opportunity to present evidence of the "commercial setting, purpose, and effect" of the agreement, it necessarily follows that the employee *should* be afforded the opportunity to gather such evidence through discovery.

Under California law, both procedural and substantive unconscionability must be present before an agreement will be deemed unconscionable. Courts apply a sliding scale to the two forms of unconscionability: the more substantively oppressive the agreement, the less evidence of procedural unconscionability is necessary to find the agreement unenforceable, and vice versa. (*Armendariz v. Found. Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 114.)

Procedural unconscionability

The issue of procedural unconscionability focuses on whether the weaker party had any meaningful choice to enter the agreement or the opportunity to negotiate its terms and whether the agreement contains an unfair element of surprise. (See *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145.) In considering whether the agreement's formation was oppressive, courts consider: "(1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126-27 (citations omitted).)

Questions of procedural unconscionability are fact specific and, thus, ripe for discovery. You may consider deposing the employer's declarant and/or PMQ on topics relating to how the arbitration agreement was presented to your client, including:

- How much time was the employee afforded to review and consider the agreement before being required to sign it?
- Was the employee permitted to negotiate the terms of the agreement?
- What specific terms, if any, were negotiable?
- Was the arbitration agreement presented to the employee with a stack of several other employment agreements?
- Did anyone explain to the employee the meaning of the terms of the arbitration agreement and its effect on any future disputes between the employee and employer?
- Was entering the agreement a condition of the employee's continued or future employment?
- Would the employee have been fired or otherwise penalized if they did not sign the agreement?
- Was the agreement presented in a language that the employee was fluent in and could read and fully understand?

Similarly, you may consider propounding document requests regarding the employer's policies for executing the arbitration agreement, including:

- All documents, including policies and procedures, that relate to, pertain to, reflect, or otherwise evidence the employer's process for presenting the arbitration agreement to employees.
- All documents, including policies and procedures, that relate to, pertain to, reflect, or otherwise evidence the length of time an employee is permitted to review and consider the arbitration agreement.
- All documents, including policies and procedures, that relate to, pertain

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2023

to, reflect, or otherwise evidence the consequences suffered by an employee who refuses to sign the agreement.

Substantive unconscionability

The issue of substantive unconscionability focuses on whether the terms of the arbitration agreement are "overly harsh," "unduly oppressive," or "unfairly one-sided" to the detriment of the party with the weaker bargaining position (i.e., in an employment dispute, the employee). (*OTO, L.L.C.*, 8 Cal.5th at 129-30.) While there are myriad ways of challenging the agreement as substantively unconscionable as a matter of law, there are also methods for challenging the agreement's overly harsh and unfairly one-sided results as it has been applied. For example, in at least one instance, a federal magistrate judge held that pre-hearing discovery relating to the outcomes of prior arbitrations could produce evidence relevant to determining whether the proffered arbitration agreement was overly harsh or would produce unjustifiably one-sided results under California law. (See *Newton v. Clearwire Corp.*, 2011 WL 4458971, at *6 (E.D. Cal. Sept. 23, 2011) [ordering the defendant to identify the outcomes of previous arbitrations that were conducted pursuant to the same arbitration clause it sought to enforce in a putative consumer class action].)

Accordingly, you may consider propounding interrogatories on topics relating to the effect of the arbitration agreement as it was applied in other cases, including:

- Identify all instances, including the case name and number, date it was filed, and arbitration service and arbitrator with which it was adjudicated, in which the employer prevailed in an arbitration against a current, former, or prospective employee that was conducted under the terms of the proffered arbitration agreement.
- Identify all instances, including the case name and number, date it was filed, and arbitration service and arbitrator with which it was adjudicated, in which a current, former, or prospective employee prevailed in an arbitration against the employer that was conducted under the terms of the proffered arbitration agreement.
- Identify all instances, including the case name and number, date it was filed, and court it was filed in which the employer elected not to use the arbitral forum to resolve a dispute against an employee and, instead, filed in court.
- Identify all instances, including the case name and number, date it was filed, and court or arbitration service with which it was filed, in which the proffered arbitration agreement was declared "substantively unconscionable" by a court or arbitrator.

Conclusion

As with all discovery methods, there is no one-size-fits-all set of discovery requests relating to an arbitration agreement. It is this author's hope that, by merely offering some examples, you are motivated to propound your own requests tailored to the issues presented in your case. Taking the time and effort to engage in pre-hearing discovery just might uncover the piece of evidence that causes the trial court to find no arbitration agreement exists or to void the agreement in its entirety.

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