Check Onboarding Docs To Protect Arbitration Agreements

By **Morgan Forsey and Ian Michalak** (June 7, 2023)

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On April 19, the California Court of Appeal issued a novel and surprising decision that warrants the immediate attention of all California employers who use arbitration agreements.

The California Court of Appeal, Second Appellate District held that an employer's arbitration agreement was unenforceable because of unconscionable terms found in other agreements provided to employees during the onboarding process.

In Alberto v. Cambrian Homecare[1] the Court of Appeal affirmed the trial court's decision that a stand-alone arbitration agreement was unconscionable based on terms contained within the employer's separate stand-alone confidentiality agreement and its addendum.

Because all three agreements were presented to the employee at the time of hire and "related to the employee's employment," the court held that the employer's confidentiality agreement and the addendum were part of the contract to arbitrate.

Therefore, to determine the enforceability of the employer's arbitration agreement, the three documents must be read together. The court then reasoned that unconscionable terms within the confidentiality agreement and its addendum permeated the arbitration agreement rendering it unenforceable. This decision was undoubtably costly for the employer, as Cambrian lost the benefit of its class and representative waivers.

The Alberto decision is an important development for employers utilizing arbitration agreements along with other types of employment-related agreements as it creates a new risk of losing the benefits of arbitration.

The Agreements at Issue

Cambrian Homecare hired Jennifer Playu Alberto in 2019. Cambrian is a provider of in-home care services. Alberto was hired as an administrative employee, presumably her job duties necessitated access to Cambrian's trade secrets, confidential information and employee data.

At the time of hire, Alberto was provided with Cambrian's onboarding documents and employment agreements for review and signature. As part of the onboarding process, Cambrian required employees, including Alberto, to sign the following: (1) arbitration agreement; (2) confidentiality agreement; and (3) confidentiality agreement addendum.

The Arbitration Agreement

As is typical and desirable, Cambrian's arbitration agreement required most claims arising out of the employment relationship to be submitted to binding arbitration. Pursuant to its terms, the agreement was mutual and specifically stated that claims for the "divulgence of trade secrets" were subject to arbitration.

The agreement also contained a class and representative action waiver that included a waiver of representative claims arising under the California Private Attorneys General Act, or PAGA.

Thus, both parties were required to submit claims to arbitration on an individual basis only.

The agreement carved out claims that are not lawfully subject to arbitration and contained severability and integration provisions. Alberto signed the arbitration agreement at the time of hire. Cambrian did not sign the arbitration agreement, a point the trial court focused on when evaluating enforceability, but the Court of Appeal did not reach this issue.

The Confidentiality Agreement and the Confidentiality Agreement Addendum

At the time of hire, Albert also signed Cambrian's confidentiality agreement and the confidentiality agreement addendum. As is common in confidentiality agreements, Alberto agreed to keep Cambrian's trade secrets and proprietary information confidential.

Cambrian defined its trade secrets broadly to include "compensation and salary data and other employee information." The addendum required employees to keep confidential "[a]ll ... employee information," including, without limitation, their "names ... addresses and phone numbers."

The confidentiality agreements did not have a carve-out for discussion on Alberto's own employment and wage information.

If there were an actual or threatened violation of the confidentiality agreements, Alberto was required to acknowledge that disclosure of Cambrian's confidential information "would cause irreparable injury" to Cambrian, and she must consent to an immediate court injunction "from any court of competent jurisdiction" without Cambrian posting bond.

Notably, the confidentiality agreements did not require the parties to arbitrate claims arising from the agreements. Rather, the agreements specified that enforcement would be through a court proceeding and further provided that if a lawsuit were filed to enforce the confidentiality agreement, the prevailing party was entitled to recover attorney fees.

The Lawsuit and Appellate Review

On Oct. 27, 2020, Alberto filed a proposed class action complaint against Cambrian in Los Angeles Superior Court alleging various wage and hour claims. On Jan. 25, 2021, Alberto amended her complaint to add a claim for penalties under the PAGA. Cambrian petitioned to compel Alberto's individual claims to arbitration pursuant to the parties' arbitration agreement.

The trial court denied Cambrian's petition on two grounds.

First, the trial court held there was no arbitration agreement formed because Cambrian failed to sign the agreement — an issue not reached by the Court of Appeal. Second, the arbitration agreement, which must be construed in conjunction with the confidentiality agreements, was procedurally and substantively unconscionable.

On appeal, the Second Appellate District affirmed the trial court's denial of the petition to compel arbitration on unconscionability grounds. In reaching its decision, the Court of

Appeal reasoned that the arbitration and confidentiality agreements and the addendum must be construed together pursuant to California Civil Code, Section 1642.

Section 1642 states that "several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."[2]

Though the arbitration agreement, confidentiality agreement and the addendum were stand-alone documents, the court nonetheless found the agreements were related under the statute because they:

- Were presented on the same day;
- Were entered into as part of Alberto's hiring; and
- Governed disputes related to the employment relationship.

Therefore, the court conducted its conscionability analysis reading the agreements as a single contract and affirmed the trial court's finding that the arbitration agreement was unconscionable due to terms contained in the confidentiality agreements.

The Court of Appeal concurred with the trial court that the agreement to arbitrate was procedurally unconscionable as a contract of adhesion and substantively unconscionable because it:

- Was nonmutual;
- Forbade Alberto from discussing her own compensation and salary information; and
- Required a wholesale waiver of Alberto's PAGA claims.

The court reasoned that the agreement to arbitrate was nonmutual because Alberto was required to submit her claims only to arbitration, while Cambrian was allowed to seek remedy for a breach of confidentiality in court, including an immediate injunction without bond.

The confidentiality agreements' prohibition on discussing employee compensation was held unconscionable because it contravened Labor Code Section 232 that expressly prohibits employers from requiring, "as a condition of employment, an employee refrain from disclosing the amount of his or her wages," and requiring an employee "to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages."[3]

The wholesale waiver of PAGA was based on language contained in the arbitration agreement itself.

Although the arbitration agreement contained an express severability clause, the court held that the trial court did not abuse its discretion by refusing to sever the unconscionable provisions and enforcing the remainder of the agreement.

In reliance on the California Supreme Court's 2000 ruling in Armendariz v. Foundation

Health Psychcare Services Inc.[4] the Court of Appeal held that the due to the "multiple defects" found within the arbitration agreement, when read in conjunction with the confidentiality agreement and the addendum, there was "no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement."[5]

In light of this, the trial court was under no duty to sever.

The court affirmed the trial court's denial of Cambrian's motion to compel Albert's wage and hour claims to individual arbitration.

Potential Impact of Alberto on Arbitration Agreements

This decision opens a new and unexpected avenue of attack on employment arbitration agreements in California. Employers should anticipate that employees will do exactly what Alberto did and attempt to use other employment-related agreements to render their otherwise enforceable arbitration agreements unenforceable.

Arbitration agreements with class and representative action waivers are an invaluable tool.

As employers are painfully aware, there is a vast difference between a single plaintiff wage claim that is subject to arbitration and the high stakes involved with a class and PAGA action.

Therefore, losing the ability to enforce an arbitration agreement means much more than having to litigate the claims in court. Given the stakes, employers are well advised that a careful review of all their employment agreements is essential.

Takeaways and Action Items for Employers

In light of the Alberto decision, employers should promptly review their onboarding documents and employment agreements to determine the potential effect these documents may have on their arbitration agreements. Specifically, employers should pay particular attention to agreements that employees are required to sign or accept by performance.

It is important that all agreements are consistent with the parties' agreement to arbitrate employment-related claims.

Employers must ensure that all agreements to arbitrate comply with the factors set forth in Armendariz, including:

- Mutuality;
- Ensuring that the employee does not bear any costs above that which he or she would have to pay in court;
- Providing for adequate discovery;
- Providing for all types of relief that would otherwise be available in a non-arbitration forum;
- Requiring a written arbitration award and adequate judicial review; and

- Providing for a neutral arbitrator.[6]

If a separate stand-alone agreement, such as a confidentiality or employment offer agreement, contains a summary of, or an arbitration agreement that is in addition to an existing stand-alone arbitration agreement, make sure the arbitration terms and conditions are identical.

For example, both agreements should cover the same claims, be governed by the same law — preferably the Federal Arbitration Act — should have the same process for initiating arbitration, and the same scope of written discovery.

Employers will want to confirm that their arbitration agreements state clearly that it is fully integrated and that no other contracts or policies are intended to alter the terms of the arbitration agreement. However, employers must also make sure that there are no conflicting employment agreements that will call integration into question.

If indeed, there are claims that would belong solely to the employer that the employer wishes to carve out from arbitration, it is important to evaluate whether this carve-out destroys mutuality.

Further, employers may consider reviewing their confidentiality, trade secret and other agreements to determine if their terms regulate protected speech. Such prohibitions include, employees' rights to freely discuss their wages, the terms and conditions of their employment, and engage in concerted activities.

Protected speech can also include internal and external complaints concerning working conditions or disclosure of personal compensation information.

Outdated or legacy agreements may contain provisions that were lawful when introduced, but could now be used to infect your arbitration agreement. Therefore, any employment agreement that is arguably in effect should be reviewed for the issues discussed above.

Conclusion

It is still unclear the extent to which the Alberto decision will alter the landscape of employment arbitration agreements.

The Alberto court conducted its review considering facts specific to Alberto's hiring process.

Nonetheless, employers utilizing arbitration agreements should be vigilant in ensuring their onboarding documents are consistent with their arbitration agreements to avoid losing the benefit of their otherwise enforceable arbitration agreements.

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[1] Alberto v. Cambrian Homecare (Apr. 19, 2023, No. B314192) ___Cal.App.5th___, certified for publication on May 10, 2023.

[2] Labor Code §1642

[3] Labor Code §203

[4] Armendariz v. Foundation Health Psychcare Services, Inc., (2000) 24 Cal.4th 83

[5] Armendariz at 124–125

[6] Armendariz, 24 Cal.4th. at 103-113.