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Top Ten Tips for Drafting Enforceable Employment Arbitration Agreements

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TOP 10 TIPS FOR DRAFTING ENFORCEABLE EMPLOYMENT ARBITRATION AGREEMENTS

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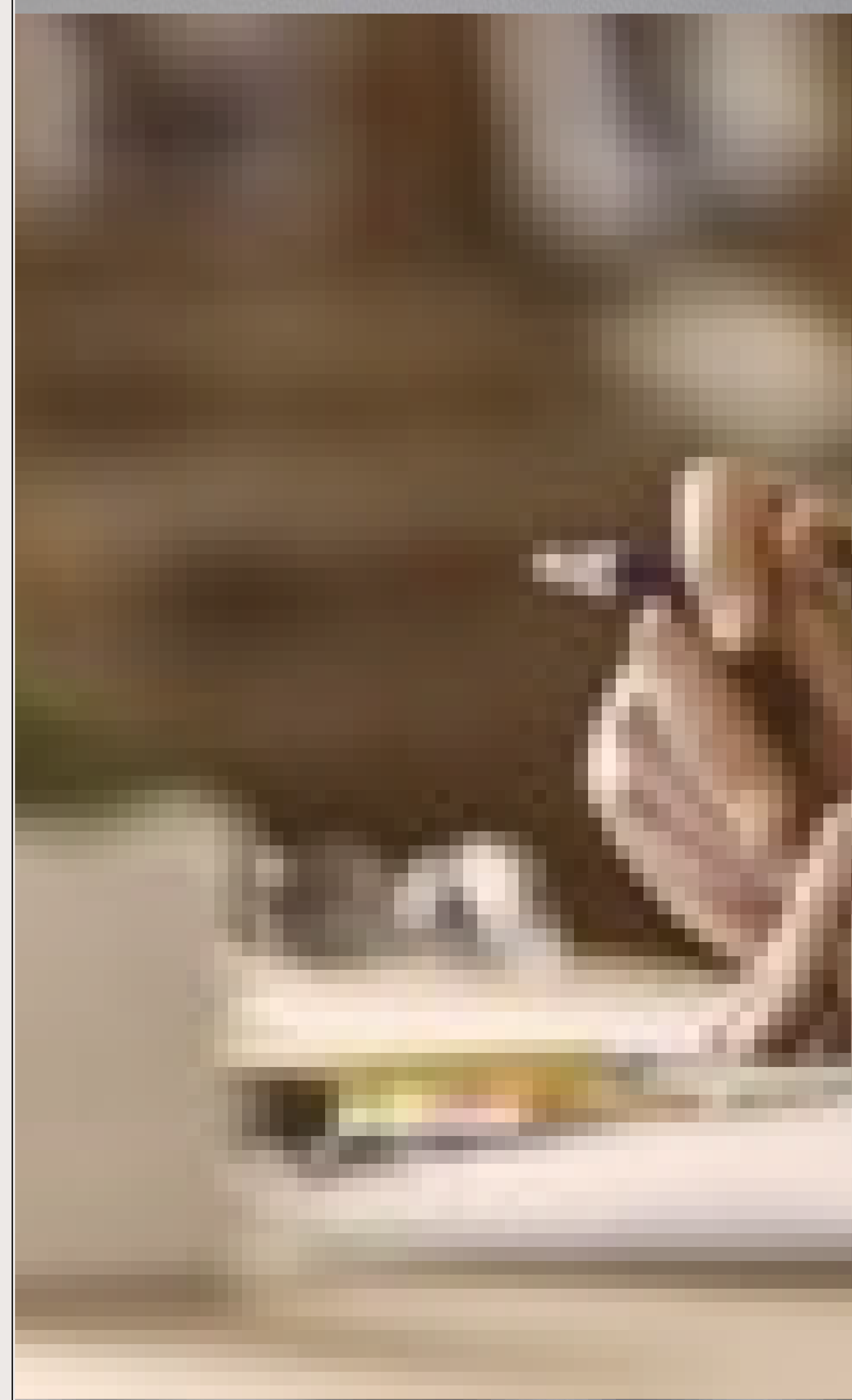
INTRODUCTION AND AGENDA

- ✓ Not a discussion of the pros and cons of mandatory employment arbitration (be careful what you wish for)
- ✓ Focus on drafting enforceable Agreements
- ✓ Both federal and California law (supposedly) are pro-arbitration
- ✓ But Employers have to get it right
- ✓ Common sense – fairness
- ✓ A few traps for the unwary employer
- ✓ "Template" CA Employment Arbitration Agreement

SPOILER ALERT: TOP 10 DRAFTING TIPS

1. Include a "Clear and Unmistakable" Delegation Clause
2. Use a Stand-Alone Agreement With a Verifiable Signature
3. Make the Agreement Clear and Understandable
4. Strive to Ensure Arbitrator Neutrality
5. Specify the Applicable Law and Procedural Rules
6. Include an Opportunity to Review and an Opt-Out Period
7. Maintain a Level Playing Field
8. Include Only Enforceable Waivers
9. Update the Agreement to Keep Current
10. Implement Sensible Protocols and Provide Regular Employee Training



Recent CA Supreme Court Decision – *Ramirez v. Charter Communications, Inc.*, 16 Cal. 5th 478 (July 15, 2024)

- Supreme Court ruled that several provisions in Charter's employee arbitration agreement were unconscionable.
- The court found the agreement unfairly limited discovery, shortened the statute of limitations for claims, and lacked mutuality, remanding the case to determine if these, clauses could be severed.
- "[T]he decision whether to sever unconscionable provisions and enforce the balance is a qualitative one, based on the totality of the circumstances. The court cannot refuse to enforce an agreement simply by finding that two or more collateral provisions are unconscionable as written and eschewing any further inquiry." Justice Corrigan, writing for the Court.

1. Include a "clear and unmistakable" delegation clause

- Delegation clauses should use plain language that specifically references the arbitration agreement and avoid overreach by not attempting to delegate issues that are statutorily reserved for judicial determination.
- Example: *Jack v. Ring LLC*, 91 Cal. App. 5th 1186, 1196-99 (2023): California Court of Appeal found that a delegation was not "clear and unmistakable" when one provision delegated determination of the agreement's validity to the arbitrator, while another suggested a court might find the contract unenforceable.

2. USE A STAND-ALONE AGREEMENT WITH A VERIFIABLE SIGNATURE

- *Mendoza v. Trans Valley Transport*, 75 Cal. App. 5th 748, 786 (2022): CA Court of Appeal held that an arbitration agreement contained in an employee handbook was unenforceable because the employer relied only on a generic handbook acknowledgment.
- The appellate court noted that other courts have refused to enforce arbitration agreements in handbooks or acknowledgment forms when other language indicated they:
  - *Were intended to be informational, not contractual;*
  - *Could be changed by the employer at any time; or*
  - *Did not create a contract of employment.*
- "To support a conclusion that an employee has relinquished his or her right to assert an employment-related claim in court, there must be more than a boilerplate arbitration clause buried in a lengthy employee handbook." *Id.*
- Verifying and retaining employee signatures on Arbitration Agreement (e-SIGN Act, Docusign).

3. Make the Agreement Clear and Understandable

- Arbitration agreements should be written in an understandable language, without legalese and boilerplate.
- Translate into Spanish.
  - *Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1145-46 (2012): Agreement presented only in English to workers with limited English proficiency was deemed procedurally unconscionable.
  - *Ramos v. Westlake Services LLC*, 242 Cal. App. 4th 674, 687-90 (2015): Spanish speaking employee received a Spanish translation of the employment agreement that omitted the arbitration provision, constituting fraud in the execution.
  - *Juarez v. Wash Depot Holdings, Inc.*, 24 Cal. App. 5th 1197 (2018): Employer's inadequate translation of an agreement from English into Spanish for a Spanish-speaking employee doomed its enforceability as to certain claims.

4. Strive to Ensure Arbitrator Neutrality

- The selection process should be neutral and provide both parties with a meaningful role in choosing the arbitrator.
- JAMS and AAA Employment Arbitration Rules and arbitrator selection processes.

5. Specify the Applicable Law and Procedural Rules

- Ambiguity regarding which law and procedural rules govern the arbitration is a recurring source of litigation.
- The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, will generally preempt conflicting state law where interstate commerce is implicated, but parties may elect to have the FAA apply even absent such a nexus. *Victrola 89, LLC v. Jaman Properties 8, LLC*, 46 Cal. App. 5th 337, 354-55 (2020)
- Conversely, if the agreement is silent or ambiguous, courts may default to state law, or the California Arbitration Act ("CAA"), Cal. Code of Civ. Proc. §§ 1280-1294.2, with potentially significant consequences for enforceability and scope.
    - *Perry v. Thomas*, 482 U.S. 483, 492 (1987).
    - *Metters v. Ralphs Grocery Co.*, 161 Cal. App. 4th 696, 701 (2008).

SPECIFY THE APPLICABLE LAW AND PROCEDURAL RULES (CONTINUED)

- The arbitration agreement should clearly specify whether the FAA, CAA, or both will govern.
- An arbitration agreement should also identify the procedural rules—such as AAA, JAMS, or bespoke procedures—that will control.
- "Bespoke" ➔ selected by the parties.
  - Processes that are completely customized to meet the specific, individual needs of the parties, rather than using a standard, one-size-fits-all approach. The term originates from 17th-century tailoring (specifically Savile Row), where a customer "bespoke" (or "spoke for") a specific bolt of fabric to be used for a garment.

6. Include an Opportunity to Review and an Opt-Out Period

- Unconscionability remains the primary state law defense to enforcing arbitration agreements.
- Under California law, both procedural and substantive unconscionability must be present, though not necessarily in equal measure.
- Offered on a “take-it-or-leave-it” basis, whether the employee had a meaningful opportunity to review or negotiate, and whether the terms were hidden in fine print or presented in a language the employee could not understand.

Include an Opportunity to Review and an Opt-Out Period (Continued)

- Substantive unconscionability involves an examination of whether the terms are unduly harsh, one-sided, or "shock the conscience."
  - ***Provisions that limit statutory remedies, impose excessive costs, restrict discovery, or designate a biased arbitrator are frequent targets.***
- Failure to provide adequate time for review creates procedural unconscionability.
  - *Carlson v. Home Team Pest Defense, Inc.*, 239 Cal. App. 4th 619, 632-33 (2015) for example, the court found an arbitration agreement procedurally unconscionable where the employer presented it as nonnegotiable and the applicant faced loss of unemployment benefits if she refused to sign.

7. Maintain a Level Playing Field

- Employers should resist the temptation to "tilt the playing field" through excessive discovery restrictions, fee-shifting, shortened statute of limitations, or limitations on damages.
- Instead, agreements should expressly provide for the same range of remedies and discovery as would be available in court—or at least not restrict them in a manner that is likely to be found unconscionable.
- *Dougherty v. Roseville Heritage Partners*, 47 Cal. App. 5th 93, 105-07 (2020).

8. Include Only Enforceable Waivers

- Class and collective action waivers, as well as compelling arbitration of an employee's individual Private Attorneys General Act ("PAGA") claim, are lawful tools to use to ensure an employee-employer dispute is limited in arbitration to only those parties.
  - *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 363 (2014), *overruled by Quach v. California Commerce Club*, 16 Cal. 5th 562 (2024), *abrogated by Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022); *see also Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018).
  - Cal. Lab. Code §§ 2698-2699.5 (PAGA).
  - Motion to stay "representative" PAGA action pending arbitration of the named plaintiff (or plaintiffs') individual claims.
    - If the Arbitrator finds in the employer's favor, then the current or former employee (named plaintiff) is not "aggrieved" and cannot represent "aggrieved employees" under PAGA.

INCLUDE ONLY ENFORCEABLE WAIVERS (CONTINUED)

- *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 559 U.S. 662 (2010), the Supreme Court held that a party to an arbitration agreement under the FAA may not be required to arbitrate on a classwide basis when the agreement is "silent" on the availability of class procedures; court emphasized that arbitration under the FAA is "a matter of consent."
- The Court reasoned that the "fundamental" differences between individual arbitration and class action arbitration are "too great for arbitrators to presume" and that "the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."

9. Update the Agreement to Keep Current

- Important case law interpreting and applying the FAA and the CAA almost every ***week***.
- To avoid being caught off guard, employers should make it a regular practice to review and update their arbitration agreements to ensure compliance with current law.
- Periodic updates also demonstrate good faith and can help with enforceability if challenged in court.

10. IMPLEMENT SENSIBLE PROTOCOLS AND PROVIDE REGULAR EMPLOYEE TRAINING

- Employers should train HR personnel and managers on the proper presentation and execution of arbitration agreements, including the importance of providing all required disclosures, ensuring language accessibility, and avoiding coercion.
- Implementation protocols should include procedures for tracking which employees have signed which versions of the agreement, and for updating agreements as needed.
- In addition, employers should hold training sessions with new arbitration agreements and maintain records showing that employees were informed of their rights and the process.

QUESTIONS?

THANK YOU!

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