

Arbitration, Confidentiality Agreement with Car Wash Workers was Unenforceable, California Court Rules

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An arbitration and confidentiality agreement provided to car wash workers was unconscionable and unenforceable, the California Court of Appeal has ruled, denying arbitration in a class action for alleged California wage-hour law violations. *Carmona v. Lincoln Millennium Car Wash, Inc.*, No. B248143 (Cal. Ct. App. May 9, 2014).

The Court pointed to “multiple defects demonstrating a systemic lack of mutuality” that favored the employer, including two provisions commonly found in confidentiality agreements, one allowing the employer to assert its claims for breach of the confidentiality provision in court and one presuming the employer was harmed by any such breach. Also of note, the Court found the agreement was procedurally unconscionable because certain provisions in it were written only in English, with no Spanish translation for a predominantly Hispanic workforce.

Background

Esteban H. Carmona and others (collectively, the “employees”) worked for Lincoln Millennium Car Wash, Inc. and Silver Wash, Inc. (collectively, the “car wash”). The employees’ native language is Spanish, and they could not read English. Upon hire, the employees’ managers provided them with an agreement requiring final and binding arbitration of any dispute arising out of the employees’ employment in accordance with “Employment Dispute rules of the American Arbitration Association” (the “agreement”). The agreement also required the employees to keep any information regarding their employment confidential and to address any concerns regarding their employment with the car wash’s management before divulging any information to third parties, including governmental agencies. The arbitration and informal resolution provisions were translated into Spanish.

In addition, the agreement included a detailed confidentiality provision and an enforcement provision permitting the car wash to obtain injunctive and other relief either in court or before an arbitrator in the event of a breach or threatened breach. This provision also allowed the car wash to recover its attorney’s fees and costs in any litigation or arbitration to enforce the confidentiality provision. This part of the agreement was not translated into Spanish.

The employees were required to sign the agreement to work at the car wash; however, their managers did not explain the agreement to them or explain that, by signing it, they were waiving their right to appear in court. The employees did not understand the English portions of the agreement and did not understand what arbitration is. The employees subsequently filed a class action against the car wash for alleged wage-hour violations, and the car wash asked the trial court to compel arbitration based on the agreement. The trial court denied the car wash’s motion, finding the agreement was unconscionable and unenforceable. The car wash appealed.

Applicable Law

In deciding whether to enforce an arbitration agreement, California courts examine whether its terms are both procedurally and substantively unconscionable. A sliding scale is used to assess procedural unconscionability in relation to substantive unconscionability: the more substantively oppressive a contract term, the less evidence of procedural unconscionability is required to conclude that the term is unenforceable, and vice versa.

A procedural unconscionability inquiry requires a court to examine two factors: oppression and surprise. “Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice,” while “[s]urprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them.”

Substantive unconscionability occurs when an arbitration agreement is “one-sided” in favor of the

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employer without sufficient justification.

Agreement Unenforceable

Although the car wash conceded that the agreements were procedurally unconscionable, the appellate court nevertheless emphasized the high degree of procedural unconscionability in the agreement. The Court noted the agreement was oppressive because the car wash drafted the agreement and the employees had no opportunity to negotiate its terms. The car wash also failed to provide the applicable arbitration rules or explain the meaning of the arbitration provision to the employees. The Court further found the agreement contained a high degree of surprise because the car wash “hid the enforceability clause and the entire confidentiality subagreement by failing to translate that portion of the agreement into Spanish.” With both oppression and surprise present, there was “no question” that the agreement was procedurally unconscionable.

Turning to substantive unconscionability, the Court found the agreement lacked mutuality because the employees were required to arbitrate any employment-related dispute, while the car wash had the option to bring a court action to enforce the confidentiality provisions or address their breach. The car wash argued the obligation to arbitrate was mutual because, if the employee commenced arbitration, it would assert any claims related to the confidentiality provisions in arbitration. The Court rejected this argument as unsupported by the agreement’s plain language. The agreement also lacked mutuality because it permitted the car wash to recover attorney’s fees whenever it instituted litigation or arbitration to enforce the confidentiality provision, not just when it prevailed. However, no reciprocal provision existed allowing employees to recover attorney’s fees and costs.

In addition, the Court found the agreement lacked mutuality because it presumed the car wash would suffer irreparable harm, but no similar presumption of harm favoring employees existed. Finally, the Court took issue with the confidentiality provision’s requirement that the employees first address any concerns with management. The Court observed that, while on its face the provision “may present a laudable mechanism for resolving employment disputes informally,” it also would allow the employer to obtain a “free peek” at the employees’ case and a potential advantage if the employees later demanded arbitration. Accordingly, the Court concluded the agreement was “permeated” with unconscionability and unenforceable.

Employers need to tailor their employment arbitration and confidentiality agreements for their workforce, limiting their terms and translating the agreements as appropriate. Because California courts continue to apply the law of unconscionability to employment arbitration agreements, employers should consider reviewing their arbitration agreements to ensure they are not overly one-sided or oppressive.

Jackson Lewis attorneys are available to answer questions about this case or arbitration agreements or provide assistance in reviewing or drafting agreements.

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