

New Requirement For Arbitration Agreements

03/05/2012

Last week, the Fourth Appellate District of the California Court of Appeal published an opinion, *Mayers v. Volt Management Corp.*, further clarifying the obligations on California employers with respect to the information that must be contained in arbitration agreements to make them enforceable.



Under California law, an arbitration provision will not be enforced if the plaintiff can demonstrate that it is both procedurally and substantively unconscionable. In *Mayers*, the employee signed multiple agreements containing arbitration provisions. The provisions required the employee to submit all employment-related claims to arbitration pursuant to the applicable rules of the American Arbitration Association of the state where the employee was last employed. However, the provisions failed to identify which specific rules of the AAA would apply, nor was the employee provided with a copy of the rules or advised where he could find them. The Court of Appeal found that these provisions “suffer from a high degree of procedural unconscionability” because they “constituted contracts of adhesion, were offered to plaintiff on a take-it-or-leave-it basis, and, most importantly, required plaintiff to submit claims to final and binding arbitration pursuant to an unspecified (and undetermined) set of rules promulgated by the AAA.”

The arbitration provisions in *Mayers* also contained a provision stating that the “arbitrator shall be entitled to award reasonable attorney’s fees and costs to the prevailing party.” The Court of Appeal found that these provisions contained a high degree of substantive unconscionability because they would expose plaintiff to greater risk than he would have if he pursued his claims in court. Under California authority interpreting the Fair Employment and Housing Act’s attorney’s fees provisions, a prevailing employer may only recover its attorney’s fees where the plaintiff’s action was frivolous, unreasonable, without foundation, or brought in bad faith.

Because the arbitration provisions were both procedurally and substantively unconscionable, the employer will instead be forced to litigate the plaintiff’s claims in court.

Based on the *Mayers* decision, employers should make sure that their arbitration provisions set forth which specific arbitration rules will apply and attach a copy of the applicable rules and/or set forth where the employee may find the rules. Employers should also make sure that their arbitration provisions do not contain an unlawful prevailing party attorney's fees clause.

We remain available to review your agreements to ensure that they are up to date and reflect the most current status in the law. If you have any questions about *Mayers* or your current arbitration agreement, please do not hesitate to contact any member of Greenberg Glusker's [Employment Law Group](#).