Employer's Arbitration Agreement Passes Muster

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In *Peng v. First Republic Bank*, the California Court of Appeal for the First Appellate District rejected an employee's contention that a company's standard arbitration agreement was unconscionable.

Peng stands for the proposition that most boilerplate arbitration agreements contained in employment contracts will be upheld unless the employer enforces them in bad faith. For example, an employer may not unilaterally modify an agreement after an employee has filed a claim.

The facts underlying *Peng* are common to the hiring process. First Republic Bank (the "Bank") made Peng an offer for employment as an assistant manager in March of 2010. The offer was subject to Penn's agreement to be bound by several conditions and policies, including an arbitration agreement (the "Agreement").

Peng accepted the offer without expressing any concerns about the Agreement. She was fired one year later.

Peng subsequently filed a complaint alleging claims against the Bank for race and gender discrimination, equal pay/compensation discrimination, hostile work environment, retaliation, intentional infliction of emotional distress and wrongful termination in violation of public policy.

The Bank moved to compel arbitration. Peng opposed the motion, arguing that the Agreement was procedurally and substantively unconscionable, and therefore unenforceable.

The trial court denied the Bank's motion to compel, finding that the Agreement was "permeated" by unconscionability because:

1. it required Peng to abide by American Arbitration Agreement ("AAA") rules without specifying or attaching those rules; and
2. it allowed the Bank unilaterally to modify the Agreement.

The appeals court reversed. Regarding procedural unconscionability, the court held that the Bank could incorporate the AAA rules by reference without rendering the Agreement per se improper. Moreover, Peng had alleged no other unfair surprise or oppression to suggest procedural unconscionability.

The court held that the Agreement was substantively valid as well. Substantive unconscionability, the court explained, generally occurs when an arbitration agreement is unreasonably "one-sided." For example, if it subjects an employee's claims to arbitration, but not those of the employer.

Here, the fact that the employer could unilaterally modify the Agreement did not render it unconscionable, the court held. That's because the employer's power to modify carries with it the duty to exercise that right in good faith and in accordance with fair dealings. This implied covenant of good faith also precludes an employer from modifying an agreement once a claim has accrued.

Peng never alleged that the Bank improperly modified the Agreement or breached its duty of good faith in any way, the court held. Thus,

> **"[w]e are satisfied that the Agreement here is not substantively unconscionable as it is not so one-sided as to shock the conscience."**

The *Peng* ruling appears to affirm the facial validity of most standard arbitration agreements. Barger & Wolen attorneys are available if you would like to discuss any aspects of your company's employment contracts.

Topics

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