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But we have an arbitration clause: Considerations when hiring Californians

by Chris Sabis

It's 4:45 p.m. on Friday. The human resources (HR) director calls and tells you that your company—or if you are outside counsel, your client—is finally expanding their sales operation to the West Coast. As part of that effort, the company is hiring a new employee, and the HR director needs a draft employment agreement by Monday morning. You ask for the particulars so you can assemble a standard agreement. Thirty minutes later, you receive the requested information and notice that, while your client is headquartered in, say, Nashville, Tennessee, the prospective employee lives and works in Sonoma County, California.

Saturday afternoon (while you could be at a barbecue), you are scrolling through the company's model employment agreement, adding information, and tweaking here and there. As you scroll faster through the standard legal provisions near the end, you note the arbitration clause and its Tennessee choice-of-law provision. You are not a California lawyer[1] and wonder if a California court will enforce the arbitration agreement and respect the Tennessee choice-of-law provision or a choice-of-law provision favoring any state's law other than California. The answer is more complex than you would hope.

California law on arbitration agreements

Your initial research tells you that California has a "strong public policy in favor of arbitration [and] any doubts regarding the validity of an arbitration agreement are resolved in favor of arbitration."[2] Even better, "California strongly favors enforcement of choice-of-law provisions . . . ."[3] But that is where the general policy statements end and the complications begin.

In California, an agreement presented to an employee "on a take-it-or-leave-it basis" is a contract of adhesion, and the employer is presumed to have had superior bargaining power.[4] Such agreements are particularly susceptible to California's unconscionability analysis. "Unconscionability refers to an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[5] "In deciding whether to enforce an arbitration agreement, California courts examine whether its terms are both procedurally and substantively unconscionable."[6] Unconscionability is a sliding scale: "The more procedural unconscionability is present, the less substantive unconscionability is required to justify a determination that a contract or clause is unenforceable. Conversely, the less procedural unconscionability is present, the more substantive unconscionability is required . . . ."[7] The ultimate question "is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement."[8]