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Arbitration Agreements under California Law

Summary of Required and Prohibited Provisions

By law, arbitration agreements cannot:

- Waive rights to any substantive or procedural relief;
- Subject claims under the Private Attorney General Act to private arbitration;
- Waive the right to public injunctive relief in any forum (i.e. a court order to cease unlawful wage and hour practices); or
- Waive the right to bring, participate in, or recover damages from a wage and hour class action without an opt-out provision.

The California Supreme Court case *Armendariz v. Foundation Health Psychare Services, Inc.* held that to be enforceable, arbitration agreements must: (1) provide for neutral arbitrators; (2) more than minimal discovery; (3) require a written decision by the arbitrator; (4) allow for all types of relief available in court; and (5) require the employer to pay all costs unique to arbitration, such as the arbitrator's fees.

Challenges to Arbitration Agreements

California public policy and federal law both favor arbitration of disputes in order to preserve crucial court resources. Accordingly, under *Armendariz*, a court will only invalidate an employment arbitration agreement if it is both *substantively* (i.e. waives things that can't be waived as a matter of law) and *procedurally* (i.e. is offered on a mandatory basis). Required arbitration agreements are automatically found to be procedurally unconscionable, and therefore enforcement turns on whether an agreement is substantively unconscionable.

Employers can still require employees to sign arbitration agreements as a condition of employment; however, employees often challenge such agreements as unconscionable. Judges are increasingly requiring evidentiary hearings to evaluate whether the agreement was offered under circumstances that were coercive, such as the threat of firing an employee, even without first ruling on whether the agreement is substantively unconscionable.

Things to Watch for in 2018

In October 2017, the United States Supreme Court held oral arguments in the case *Epic System Corp. v. Lewis* which will determine whether employers can legally compel employees to sign arbitration agreements with class action waivers. A decision is expected in March 2018.

In 2016, Governor Brown vetoed two pieces of legislation that would have prohibited employment arbitration agreements in California. In light of the public focus on sexual harassment claims and arbitration agreements, lawmakers in California may attempt to revisit the issue.

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California Labor Commissioner & Local Laws Update for 2018

State Minimum Wage Update:

- $11.00 for employers with 26 or more employees; $10.50 for employer with 25 and less
- San Diego remains at $11.50

SB 306 & Retaliation Investigations:

SB 306: Labor Commissioner is authorized to investigate an employer—with or without a complaint being filed—when, during a wage claim or other investigation, there is suspicion of retaliation or discrimination.

- Labor Commissioner or an employee can now seek injunctive relief (that the employee be reinstated pending resolution of the claim) upon a mere finding of "reasonable cause" that a violation of the law has occurred.
- Injunctive relief, however, would not prohibit an employer from disciplining or firing an employee for conduct that is unrelated to the retaliation claim.
- Allows Labor Commissioner to cite employers even when no complaint has been filed- i.e., during audits.

Notable Labor Commissioner Decisions:

- **1/9/2018** – The California Labor Commissioner's Office has issued citations totaling $7,137,036 to the operator of six adult care facilities in Los Angeles for wage theft and other labor law violations.
- **8/16/2017** –The Labor Commissioner's Office cited a Chula Vista restaurant more than $274,000 in back wages and penalties to six workers who worked an average of nine hours per day, five days a week without breaks, and paid them a straight daily wage of $50.00. The Restaurant was also fined $110,150 in civil penalties, workers' compensation penalties and wage statement penalties for under reporting how many employees it had working for it.
- **8/9/2017** – Jack in the Box franchise operator in Sacramento area was cited $903,084 for misclassifying 40 managers as exempt because the managers spent less than half their time performing managerial duties
- **7/26/2017** – Two towing companies covering 187 workers fined $4,874,661 to cover employees working 12 hour days 7 days a week with no breaks, and typically paying a straight rate of $110 per day.

San Diego City Enforcement of Minimum Wage and Paid Sick Leave:

- Enforcement division investigating and issues fines, penalties and wages.
- Penalties are capped at $10,000.00 each for minimum wage violations and sick leave violations.
- Employees are also entitled to liquidated damages, back wages (times 2), and administrative costs.
- Cases get referred by employees and unions trying to unionize.
- The city has doubled its investigatory staff, making this a large priority for the City.

Government Audits & Investigations Best Practices:

- Make sure your internal business units understand to get HR involved IMMEDIATELY upon learning about any of these audits including routine payroll audits.
- Seek legal advice if retaliation investigation is opened by the Labor Commissioner.

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Employee Leave Rights

Employers have an affirmative obligation to engage in the interactive process to provide reasonable accommodation to qualified individuals, unless doing so would cause an undue hardship.

Best Practices

- Clear Company Policies & Procedures
- Mandatory Manager Training regarding Employer Obligations
- Evaluate Information Provided, including source
- Identify Applicable Laws
- Actively Manage Employee Absences
- Facilitate the Interactive Process
- Support Employees Returning to Work
- Follow up & Monitor

Laws that (MIGHT BE) at Play

- Worker's Compensation
- Paid Sick Leave (State & Local)
- Fair Employment & Housing Act (FEHA)
- Wage Supplements
- California Pregnancy Disability Leave (PDL)
- Parental Leave Act (SB 63)
- California Family Rights Act (CFRA)
- Family & Medical Leave Act (FMLA)
- Americans with Disabilities Act (ADA)
- Uniformed Services Employment and Reemployment Rights Act (USERRA & Cal-USERRA)
- California Protected Leaves

Navigating an employee leave rights can be complex and stressful for any employer. Consulting with knowledgeable legal counsel is always recommended. In any one case multiple employer obligations could exist. A happy outcome begins with clear (and legal) company policies and procedures.

Highlight: A New Leave Law for 2018: Parental Leave Act (SB 63)

Effective: Jan 1, 2018

Applies to employers with 20 or more employees.

Requires employers to provide up to 12 weeks of unpaid parental leave to employees to bond with a new child within one year of the child's birth, adoption, or foster care placement.

- **EMPLOYEE ELIGIBILITY** – Employee must have at least 12 months service and 1250 hours of service within the prior 12 months, and must work at a worksite in which the employer employs at least 20 employees within 75 miles.
- Employer must maintain employee's group health coverage during leave on same terms as if the employee was actively reporting to work.
- Only for employees not already entitled to leave under FMLA / CFRA.

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IMMIGRATION: CALIFORNIA'S IMMIGRANT WORKER PROTECTION ACT

Roundtable Discussion Leads

Karine Wenger, Partner, serves as corporate immigration counsel to a wide range of clients, from small domestic entities to large multinational corporations in varying industries. She has proven leadership skills in building collaborative relationships, strategic thinking, and leading in times of change and growth, and provides cutting-edge immigration solutions to corporate clients and counsels them on all matters of U.S. immigration and nationality law, regulation, policy and compliance. Karine has practiced exclusively in the field of U.S. corporate immigration and nationality law since 1999.
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California's Immigrant Worker Protection Act (IWPA) – At a Glance

IWPA took effect January 1, 2018. The IWPA imposes the following immigration-related obligations on public and private employers with worksites in the state:

- ***Worksite access:*** Requires a judicial warrant before providing an "immigration enforcement agent" with access to nonpublic areas of their worksite.
- ***Records access:*** Requires a subpoena or a judicial warrant before providing an "immigration enforcement agent" with access to employee records.
- ***Notice:*** Requires notification to employees and labor union representatives before and after I-9 inspections.
- ***Reverification:*** Prohibits reverifying the employment eligibility of employees at a time or manner not required by federal law.

Penalties

Violations of the law could result in civil fines:

- $2,000 to $5,000 for a first violation of the worksite access, records access or notice requirements, and from $5,000 to $10,000 for each subsequent violation.
- Up to $10,000 for a violation of the reverification prohibition.

Looking Ahead

California employers are reminded to put in place procedures to ensure compliance with the law, including:

- Working with legal counsel to create a plan of action to use when federal immigration agents show up at the worksite and request access to nonpublic areas or employee records.
- Training frontline employees not to act on their own to grant access to federal immigration agents, but rather to escalate the matter internally and/or with counsel.
- Training employees who handle immigration-related matters to comply with the new posting and notice requirements triggered when a Notice of Inspection is received, as well as the post-inspection notice requirements triggered once the employer receives a notification from the government with any results of the inspection (whether or not the inspection is still ongoing).
- Training human resources staff on when it is appropriate to reverify employees' work authorizations.

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Danielle Moore Megan Walker

Mandatory Harassment Training

Form

Required for: Supervisors at California employers with 50 or more employees

When:

(1) Within first 6 months of becoming supervisor; and

(2) Every two years

Conducted by:

(1) an Employment Attorney; or

(2) a Human Resources Professional; or

(3) an Employment Law professor or instructor

with two or more years of relevant experience.

Length: Two Hours

Style

Must be interactive!

Use training modalities such as

- Role plays
- Case studies
- Group discussions

Substance

Must include:

- Definition of unlawful sexual harassment
- FEHA and Title VII statutory provisions
- Case law analyzing FEHA and Title VII
- Types of conduct constituting sexual harassment
- Remedies available for victims of sexual harassment in civil actions
- Potential employer and individual liability exposure
- Strategies to prevent harassment in the workplace
- Supervisors' obligation to report sexual harassment, discrimination, and retaliation
- Practical examples of harassment, discrimination, and retaliation
- Limited confidentiality of the complaint process
- Resources for victims of unlawful sexual harassment
- Steps necessary to take appropriate remedial measures to correct harassing behavior
- Training on what to do if the supervisor is personally accused of harassment
- Essential elements of an anti-harassment policy
- Review of the definition of "abusive conduct"
- Harassment based on gender identity, gender expression, and sexual orientation ***NEW***

Transgender Rights

What's In a Label? "Transgender" is an umbrella term that refers to individuals whose gender *expression* differs from the *sex* they were assigned at birth. Some transgender persons may use another term to describe themselves. It is important to avoid referring to someone as an adjective that they do not use for themselves.

What's In a Name? A court order is required for a legal name change. However, a person may socially identify as another name to conform to gender identity. You may require, however, legal proof of an official name change before changing the same in payroll, benefits, and other official records.

Transitional. Some transgender persons undergo physical transitions, some social transitions, and some both. Legally, a transgender person can be at any step of the process and still be protected.

No Discrimination Allowed. Gender identity and expression are protected categories under FEHA.

Post It. Employers are now required to display a poster regarding transgender rights in the workplace. ***NEW***

What to Wear? Unless there is a business necessity to require otherwise, transgender employees must be permitted to dress according to their gender identity or expression.

Where to "Go"? Employers may not require that employees use specific bathroom or locker room facilities. Employers are encouraged to provide privacy measures, such as stalls and curtains.

Follow Their Lead. An employer of a transgender individual should allow that employee to express their preferences as far as their name, preferred pronoun, and style of dress. Similarly, an employer should not ask a person if they are transgender.

Keep Up! The laws are constantly evolving when it comes to transgender rights and requirements. Sign up for alerts to ensure you're learning the latest and greatest.

Enemy at the Gates:
The IRS Is Enforcing the ACA Employer Mandate

WHAT'S HAPPENING?

The IRS has kicked off its ACA employer mandate enforcement effort with a bang. Employers are being assessed penalties – sometimes in the tens of millions of dollars – for ACA employer mandate failures, but often the assessments are based on mistakes the employers made in their filings. Are those mistakes correctible now? If so, how? This presentation will focus on the IRS enforcement effort, how it works, and how to prepare to deal with the IRS.

WHAT YOU WILL LEARN:

- How is the IRS enforcing the employer mandate?
- Who is receiving IRS letters from the IRS, and what are the size of penalties being assessed?
- If we haven't received a letter yet, are we in the clear?
- What's the IRS's process? What do we do if we receive a letter?
- What if we realize we made mistakes in our ACA filings?
- How much time is the IRS giving employers to respond?
- What kind of proof do we need to show the IRS to dodge penalties?
- What if we made mistakes on our 2015 filings...and the same mistakes on our 2016 filings?
- What happens once we respond to the IRS?
- What should we do now, even if we haven't received a letter (yet) from the IRS?

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Minding Your ERISA Fiduciary P's & Q's:

WHAT'S THE ISSUE?

ERISA imposes specific duties and responsibilities on plan fiduciaries, including health plan fiduciaries. Failure to comply can result in substantial penalties and personal liability. Health plan governance mistakes can happen, and often go undiscovered until a plan participant, a dependent, an out-of-network provider or a DOL investigator takes the plan and its fiduciaries to task through litigation or plan audits. It's more important than ever for plan sponsors to know what's at stake, and how to protect themselves. This presentation will focus on the fiduciary duties imposed by ERISA and what steps plan sponsors can take to ensure they are meeting their fiduciary responsibilities and avoid costly mistakes.

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WHAT YOU WILL LEARN:

- Who qualifies as a plan fiduciary, and what duties does ERISA impose on them?
- Why health plan governance should not take a back seat to retirement plan governance.
- How plan sponsors can protect themselves?
  - Establishing policies and procedures can help ensure fiduciaries are meeting their obligations with regards to:
    - Plan fees
    - Plan administration
    - Prohibited transactions
    - MLR and similar rebates
    - Reporting and disclosure
- Routine health plan "checkups" to ensure proper monitoring and implementation of the health plan can help protect against mistakes and keep the plan on the right track.

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California Commission Law & Paid Rest Breaks

JANUARY 16, 2018

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Under California law, a commission is a payment for services rendered in the sale of the employer's goods or services and based on a percentage of the sale price or of the profit made on the sale. While the name assigned by an employer to a payment structure is not relevant to whether or not a commission system exists, commissions notably do not include short-term productivity bonuses or temporary, variable incentive payments, nor do they include discretionary bonuses or piece-rate compensation structures.

Since January 1, 2013, California employers have been required to describe, in writing, all commission agreements for sales and services rendered within the state. The written agreements must set forth the method by which commissions are computed and paid and must be provided to and signed by all applicable employees. A commission plan is deemed to continue to remain in effect until it is superseded by a subsequent agreement.

California employers that utilize commission pay structures should be certain to clearly describe each plan's beginning and expiration dates, as well as the precise manner in which commissions are calculated, earned, and paid. Once conditions precedent to earning a commission are completed, a commission is deemed earned and must be paid to the employee in compliance with the executed plan.

In *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864, truck drivers sued their employer for, among other things, failure to provide paid rest breaks. The drivers were paid on a piece-rate basis, wherein their compensation was calculated based upon the number of miles driven, the time when the trips were made, and the locations where the trips began and ended. Although the employer maintained rest break policies authorizing and permitting drivers to take paid rest breaks, and argued that the piece-rate compensation was intended to account for time spent on rest breaks, the drivers were not provided any compensation for their rest break time independent of the piece-rate pay. The Court of Appeal determined that this arrangement violated state law. Under the Wage Orders, rest breaks are considered "hours worked." Under the minimum wage law, employees must be compensated for each hour worked at either the legal minimum wage or the contractual hourly rate, and compliance cannot be determined by averaging hourly compensation. In light of these authorities, a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law.

In *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98, the Court of Appeal extended *Bluford's* holding to all employees, including commissioned employees, who are paid pursuant to a compensation system that does not separately provide compensation for rest breaks and other nonproductive time.

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AB 168: Salary History Information

AB 168 adds Section 432.3 to the Labor Code, prohibiting California employers from asking job applicants about their salary histories.

This new law thrusts California yet again into the forefront of jurisdictions tackling pay equity through local legislation. Although the new law does not specifically reference pay equity, the law's authors justified the change as a means to eliminate pay gaps. The legislative commentary proclaims: "Gender wage discrimination is destructive not only for female workers but for our entire economy. Closing the wage gap starts with barring employers from asking questions about salary history so that previous salary discrimination is not perpetuated."

AB 168 not only prohibits salary history inquiries but also prohibits employers from relying on an applicant's salary history as a factor in determining whether to offer employment or determining what salary to offer in most cases.

Employers will be prohibited from seeking salary history information (including compensation and benefits data) about an applicant, either personally or through an agent.

Further, upon reasonable request, employers must provide an applicant with the pay scale for the position being sought. The law does not define "pay scale."

Although the law prohibits an employer from inquiring about an applicant's salary history, an applicant may still, voluntarily and without prompting, disclose his or her salary history information to a prospective employer. In such an instance, although the employer may not consider that information in determining whether or not to hire the individual, the employer may consider or rely on that information in determining his or her salary.

Practical Tips

As a result of this new development, all California employers may want to: revise their employment applications to remove requests for salary history; modify their screening and interview practices to eliminate questions about salary history; train hiring managers about permissible compensation questions to ask during an interview, as well as how to respond to requests for pay scale information and voluntary disclosure of salary history by an applicant; and produce pay scale information to applicants upon reasonable request.

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San Diego Human Resources Forum
2018 Annual Employment Law Update
January 16, 2018

Asking About Criminal History: Considering Employer Restrictions Under AB 1008

Employers in California and across the nation are faced with a constant influx of new laws and case law developments, particularly at the start of each year. Despite this ever-changing landscape, employers must still ensure compliance with procedures and operations. This discussion will focus on what employers need to keep in mind with regard to hiring practices and criminal history considerations under Assembly Bill 1008, which became effective on January 1, 2018.

Discussion Focus

- What Has Changed
- AB 1008 Considerations
- Individualized Assessment
- Notice Requirements
- Practical Advice to Check for Compliance

About the Presenter

Allison Capozzoli Garrett advises and represents employers in a broad range of employment and labor matters. Her practice includes defending corporate clients of various sizes against claims of discrimination, harassment, retaliation, wrongful termination and constructive termination, as well as wage and hour claims. Prior to joining Littler, she was an associate attorney at another law firm in San Diego, where she focused on education and employment law.

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Private Attorneys General Act—Updates and Trends

Lauren N. Vega—Procopio, Cory, Hargreaves & Savitch LLP
Nicholas Ferraro—Duane Morris LLP

- **What is a PAGA lawsuit?**
  - The Private Attorney Generals Act of 2004, or PAGA, gives employees' attorneys the ability to sue on behalf of all similarly "aggrieved" employees without having to go through all the procedures required of a class action lawsuit.
  - To bring a PAGA action, the employee must allege to have suffered some harm, although it does not always work this way.
  - Penalties per employee per pay period for each "violation"

- ***Williams v. Superior Court*, 3 Cal. 5th 531 (2017)**
  - The Supreme Court held that a PAGA plaintiff is entitled to the same discovery about other employees as a plaintiff in a class action.
  - This case makes it much more expensive for employers to defend against PAGA litigation – higher standard for establishing burdensome request given that employee contact information is now discoverable
  - The court did concede, however, that "in a particular case there may be special reason to limit or postpone a representative plaintiff's access to contact information for those he or she seeks to represent."

- **Mitigating PAGA Risks**
  - Settling individual claims with a PAGA representative, *Kim v. Reins International California Inc.*, Cal. Ct. App., No. B278642 (Dec. 29, 2017).
  - Arbitration agreements that require a stay of a PAGA action pending arbitration of an employee's individual claim (reduces duplicative costs)
  - Challenging discovery requests for overbroad employee contact information beyond what is required in *Williams*
  - Providing evidence of an undue burden when faced with a broad PAGA discovery request
  - Wage and hour audit

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San Diego Human Resources Forum – Legal Update 2018

Arbitration Agreements – the Good, the Bad & the Ugly

What Is An Arbitration Agreement in Employment Context?

Agreement that any and all disputes that arise between employer and employer will be submitted to arbitration rather than decided in court. Recent reports show that more than 50% of U.S. workers are subject to mandatory arbitration provisions.

Pros & Cons of Arbitration

Pros:

- Prevents employees from bringing class actions
  - However, employees still have rights to pursue "representative actions" under the Private Attorneys General Act (PAGA)
- Quicker process than litigation (savings of time and attorneys' fees)
  - Discovery streamlined as are discovery disputes
  - Motions, etc. can be heard much quicker/more open calendar
- Process is Confidential
- Parties have a say in choosing arbitrator rather than being assigned a judge
  - Particularly helpful in employment cases because can select arbitrator with specialized experience
- Finality – difficult to appeal

Cons:

- Expensive for the employer - employer must pay all of the arbitrator's fees in employment cases. Much larger expense in terms of costs than in court.
- Record of proceedings less complete
- Rules of Evidence don't apply potentially allowing in harmful hearsay and speculative evidence
- Arbitrator limited in ability to decide issues ahead of arbitration proceeding so must go through whole process
- Judicial review of an award is more limited than judicial review of a trial; limited recourse following decision

Current Law in CA –

- An arbitration agreement will not be enforced in California if it is both "procedurally unconscionable" and "substantively unconscionable."
    - Any arbitration agreement required as a condition of employment (i.e., any mandatory arbitration agreement) is automatically considered procedurally unconscionable
    - Thus, to be enforceable in California, the substantive provisions of the agreement must not be unfair to the employee (i.e., substantively unconscionable).
        - Examples of "substantively unconscionable" provisions:
            - One-sided agreement (i.e., the employer must also be required to arbitrate disputes)
            - Limits a substantive right that an employee would have had in litigation
            - Added costs or fees on an employee that would not have in litigation
            - Class Action waivers – enforceability unclear

- Labor Code Section 925 and prohibits employers from requiring California-based employees to enter into agreements (including arbitration agreements) requiring them to: (1) adjudicate claims arising in California in a non-California forum; or (2) litigate their claims under the law of another jurisdiction, unless the employee was represented by counsel. Any provision of a contract that violates this new law is voidable by the employee, any dispute arising thereunder shall be adjudicated in California under California law and the employee is entitled to recover reasonable attorneys' fees.

- Severability clause

Potential Changes Ahead – CA & U.S. Supreme Courts & Arbitration Fairness Act

- California striking down arbitration clauses that:
  - Include waiver of public injunctive relief (public injunction's primary purpose is to prevent conduct that is causing general vs individualized harm)
  - Include waiver of concerted activity
    - *Morris* case – "separate proceedings" runs afoul of substantive right NLRA

- *Epic System Corp. v. Lewis* currently before the U.S. Supreme Court re: whether an agreement that requires resolution of employment-related disputes through individual arbitration and waives class and collective proceedings is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act that provide substantive right to concerted activity.
  - Circuit Courts are split re: whether arbitration agreements with class action waivers are enforceable
  - U.S. Department of Justice changed its position to support class action waivers. Under Obama Administration, the DOJ supported the position taken by the NLRB that class action waivers found in arbitration agreements violated Section 7 of the NLRA. However, under the Trump Administration, the DOJ has changed its view and in the summer of 2017 filed an amicus brief explaining it now does not believe class action waivers violate the NLRA.

- (Proposed) Arbitration Fairness Act of 2017, proposing that pre-dispute arbitration agreements like those commonly included in employment agreements or handbooks be unenforceable for employment, civil rights and some other claims.
  - Al Franken among proponents; Anita Hill
  - Says arbitration agreements not meant to apply to employment disputes
  - Other similar proposed Acts have not successfully passed but with current social climate this could change

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San Diego Human Resources Forum – Legal Update 2018

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    - Any arbitration agreement required as a condition of employment (i.e., any mandatory arbitration agreement) is automatically considered procedurally unconscionable
    - Thus, to be enforceable in California, the substantive provisions of the agreement must not be unfair to the employee (i.e., substantively unconscionable).
        - Examples of "substantively unconscionable" provisions:
            - One-sided agreement (i.e., the employer must also be required to arbitrate disputes)
            - Limits a substantive right that an employee would have had in litigation
            - Added costs or fees on an employee that would not have in litigation
            - Class Action waivers – enforceability unclear

- Labor Code Section 925 and prohibits employers from requiring California-based employees to enter into agreements (including arbitration agreements) requiring them to: (1) adjudicate claims arising in California in a non-California forum; or (2) litigate their claims under the law of another jurisdiction, unless the employee was represented by counsel. Any provision of a contract that violates this new law is voidable by the employee, any dispute arising thereunder shall be adjudicated in California under California law and the employee is entitled to recover reasonable attorneys' fees.

- Severability clause

Potential Changes Ahead – CA & U.S. Supreme Courts & Arbitration Fairness Act

- California striking down arbitration clauses that:
  - Include waiver of public injunctive relief (public injunction's primary purpose is to prevent conduct that is causing general vs individualized harm)
  - Include waiver of concerted activity
    - *Morris* case – "separate proceedings" runs afoul of substantive right NLRA

- *Epic System Corp. v. Lewis* currently before the U.S. Supreme Court re: whether an agreement that requires resolution of employment-related disputes through individual arbitration and waives class and collective proceedings is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act that provide substantive right to concerted activity.
  - Circuit Courts are split re: whether arbitration agreements with class action waivers are enforceable
  - U.S. Department of Justice changed its position to support class action waivers. Under Obama Administration, the DOJ supported the position taken by the NLRB that class action waivers found in arbitration agreements violated Section 7 of the NLRA. However, under the Trump Administration, the DOJ has changed its view and in the summer of 2017 filed an amicus brief explaining it now does not believe class action waivers violate the NLRA.

- (Proposed) Arbitration Fairness Act of 2017, proposing that pre-dispute arbitration agreements like those commonly included in employment agreements or handbooks be unenforceable for employment, civil rights and some other claims.
  - Al Franken among proponents; Anita Hill
  - Says arbitration agreements not meant to apply to employment disputes
  - Other similar proposed Acts have not successfully passed but with current social climate this could change

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