

California Supreme Court Broadens Scope of Judicial Review of Arbitration Awards in FEHA Cases

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On April 26, in *Pearson Dental Supplies, Inc. v. Superior Court (Turcios)*, the California Supreme Court expanded the narrow scope of judicial review of an arbitration award in an employment case brought under California's Fair Employment and Housing Act (FEHA). Parting with precedent, and over the objection of a strong dissent, the court vacated an arbitration award on the ground that the arbitrator had made a legal error when he ruled that the employee's age discrimination claim was time-barred—a procedural error that precluded a hearing on the merits of the employee's claim.

In *Pearson*, the plaintiff, a 67-year-old janitor, filed an administrative charge with California's Department of Fair Employment and Housing (DFEH) and then a civil lawsuit alleging age discrimination in violation of FEHA. After five months of litigation, the employer moved to compel the case to arbitration pursuant to the parties' dispute resolution agreement (DRA). The DRA required the parties to submit all employment-related claims to arbitration within one year from the date the dispute arose. In opposing the employer's motion to compel the matter to arbitration, the plaintiff did not attack the substance of the DRA—he argued only that the employer had waived its right to demand arbitration by actively participating in the litigation. The court rejected plaintiff's argument and compelled the case to arbitration.

Once in arbitration, the employer promptly moved for summary judgment, contending that the employee's claims were time-barred based upon the one-year time limitation period prescribed by the DRA. In opposing the motion, the employee argued for the first time that the DRA's one-year limitations period was unconscionable and unenforceable because it was shorter than the statutory period provided by FEHA. Alternatively, he argued that the DRA's one-year limitation period had not expired because an applicable tolling statute (Cal. Code Civ. Proc. Section 1281.12) tolled the DRA's limitation period while the civil lawsuit was pending. The arbitrator rejected the employee's argument and entered summary judgment in favor of the employer.

The employer petitioned in Superior Court to confirm the award. In response, the employee filed a motion to vacate the arbitration award, arguing that the arbitrator had made a clear error of law in his misapplication of Section 1281.12. Agreeing with the plaintiff, the Superior Court vacated the arbitration award due to the legal error. The Court of Appeal reversed that decision on the ground that the arbitrator's error was "insulated from judicial review" and not a "proper basis upon which either to deny confirmation of the arbitration award or to vacate the award."

The California Supreme Court sided with the plaintiff and vacated the arbitration award. The court found that the arbitrator's interpretation of the tolling provision was clearly erroneous, an error that served as a proper basis for vacating the arbitration award under California Code of Civil Procedure Section 1286.2(a)(4). The court acknowledged that prior precedent had held that an arbitrator's legal error did *not* provide a proper basis for a court to review and vacate an arbitration award. But, based on the facts before it, the court departed from that precedent.

A key factor driving the court's decision was that the arbitrator's procedural error had resulted in the absolute forfeiture of a hearing on the merits of the plaintiff's nonwaivable statutory rights under FEHA based on the enforcement of a mandatory arbitration provision that the employee had little power to negotiate. The court expressly reserved ruling on whether it would expand the scope of judicial review for all legal errors committed by an arbitrator in cases brought under FEHA (or other statutes bestowing nonwaivable statutory rights) or only those involving procedural errors that entirely bar a hearing on the merits of such a claim in the context of an employer-imposed, mandatory arbitration agreement.

In the second portion of its opinion, the court held that the language of the parties' DRA did not unconscionably preclude the plaintiff from filing an administrative charge. The DRA contained a statement of purpose, which stated the parties' intention to "avoid the inconvenience, cost and risk that accompany formal administrative or judicial proceedings." However, the DRA did not expressly preclude the plaintiff from filing an administrative charge (and in fact, the plaintiff had done so). Nonetheless, the plaintiff argued that the statement of purpose had been interpreted to preclude him from seeking administrative remedies, and thus rendered the DRA unconscionable.

Although the court held that the plaintiff had waived his right to an appeal of the issue by failing to raise the issue earlier, it also addressed the merits and rejected plaintiff's argument. Relying on U.S. Supreme Court precedent, the court drew a distinction between arbitration provisions that limit an employee's ability to resort to an administrative agency that *prosecutes* statutory violations (for example, the EEOC) versus an administrative agency that acts as an adjudicator of employment claims (for example, the state Labor Commissioner). Under federal law, the latter limitation is acceptable but the former is not. Reasoning that ambiguous arbitration provisions should be construed in a manner that renders them lawful, the court construed the quoted language in the DRA to preclude the parties only from submitting their claims for adjudication to an administrative agency (not, for example, precluding the plaintiff from filing a DFEH charge).

The holding in *Pearson* is quite narrow, and it remains to be seen whether the California courts will broaden the standard of judicial review of arbitration awards in other contexts. But a few points can be drawn from the decision:

- The decision reflects the California courts' continued close scrutiny of, if not hostility toward, arbitration agreements in the employment context. In this judicial environment, litigating motions to compel arbitration can rival the cost of the entire arbitration itself. To minimize this risk, employers should evaluate their arbitration agreements to ensure fairness and mutuality to the employee, which will calm the courts' concern that employers' primary motive for using arbitration agreements is to impair employees' rights.
- The court expressed its view that an arbitration agreement that precluded employees from resort to an administrative agency that prosecutes statutory violations—such as the DFEH or EEOC—likely would render the agreement unconscionable. On the other hand, the decision suggested that an arbitration agreement can lawfully preclude employees from submitting their claims for

adjudication to an administrative agency such as the state Labor Commissioner. Consequently, employers should review their arbitration agreements to ensure compliance with this distinction.

- The decision is clear on one point: Once a plaintiff files a civil lawsuit in Superior Court, any time limitation period contained in an applicable arbitration agreement will be tolled under California Code of Civil Procedure Section 1281.12. Under this rule, the tolling starts once the lawsuit is filed. Once the tolling ends, whatever amount of time remains on the statute of limitations before the civil lawsuit was filed will then be available to the plaintiff. The *Pearson* case did *not* address, however, whether a provision in an arbitration agreement that shortened the statute of limitations for employees' employment-related claims would render the agreement unconscionable *per se*. There is mixed authority on this issue in California. But given the tone of *Pearson*, an employer's attempt to shorten the statute of limitations—especially on unwaivable statutory rights such as FEHA—will invite litigation and could place at risk the enforceability of the entire arbitration agreement.

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