Not Quite Status Quo

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Q: How will employment arbitration change as a result of the California Supreme Court's recent decision in *Armendariz v. Foundation Psychare Services, Inc*., 24 Cal.4th 83 (2000)? How much does *Armendariz* improve things for plaintiffs?

A: Both camps of employment lawyers—those who represent employees, and those who represent employers—believe, on the whole, that *Armendariz* will not dramatically alter the employment arbitration terrain. But the camps have dramatically different rationales for this belief, and dramatically different feelings about it. Interestingly, defense counsel tend to believe, in the words of Lloyd Loomis of Sonnenschein, Nath & Rosenthal, that "arbitration agreements basically met the standards set forth by the court way before this decision came out," so that *Armendariz* will not result in any significant changes. Plaintiff attorneys, on the other hand, believe that nothing will change post-*Armendariz* because employment arbitration is inherently unfair, and the Supreme Court did nothing to change that.

The big question, according to Sonnenschein's Loomis, former Sr. Labor Counsel at ARCO, is "whether employers can require employees to sign pre-dispute arbitration agreements that cover Title VII claims in light of the recent district court decision in the *Luce Forward* case." Marvin Krakow, a Los Angeles lawyer representing individuals, agrees with Loomis: "I expect considerable litigation over the neutrality of the process, an area which the California Supreme Court left somewhat unsettled; they did, however recognize and accept the reality that arbitrators generally award less than do juries." Michael Faber, a Santa Monica attorney specializing in the representation of plaintiffs in employment litigation, adamantly expresses his dislike of mandatory arbitration: "The right to jury trial has always been considered the bedrock of a democratic society, and I think it is shameful for a court, any court, to affirm compulsory arbitration as the price of employment."

Los Angeles employee rights advocate Jeff Winikow believes that on balance *Armendariz* is favorable to employees insofar as it requires employers to bear the forum costs, thereby "removing a chilling effect that has, in practice, stifled the exercise of rights." However he believes that on balance it was employers who won in Armendariz because "they received judicial approval for their compulsory arbitration schemes."

There exists the possibility that plaintiffs' counsel will take advantage of the fact that employers are footing the bulk of the arbitration bill, by engaging in vigorous motion practice. There is the hope on the part of employers' attorneys that arbitrators will curtail such tactics by imposing sanctions on counsel who bring frivolous motions.

Larry Michaels, a labor and employment law attorney with Mitchell Silberburg & Knupp, believes that *Armendariz* will benefit employer and employee alike. "Arbitration has been proven as an effective method of resolving workplace disputes," notes Michaels.

"Plaintiffs' attorneys may not like arbitration because it limits the prospects for large jury verdicts, but arbitration makes it easier for employees to get a quick and inexpensive resolution of their claims." Michaels observes, however, that *Armendariz*' cost-shifting provisions may result in the bringing of "shop floor" issues to arbitration, even when the employee cannot find legal representation. He believes that employers may respond to *Armendariz* by limiting the use of arbitration to more significant employment claims, rather than pay for an arbitrator to resolve every workplace disagreement.

Employers are legitimately concerned that employees may take advantage of the "free bite" at arbitration afforded by *Armendariz*, and challenge virtually every employment action, up to and including minor challenges to performance reviews. The response may well be a combination of circumscribing the types of claims employers are willing to arbitrate, and increased use of mediation for smaller claims.

In terms of utililizing the due process protections ensured by the decision, Winikow anticipates that plaintiff lawyers will aggressively argue that *Armendariz*' assurance of due process entitles them to pursue discovery on a par with that available in state court. Krakow agrees: "The opinion provides for broader discovery than has been the norm in employment arbitrations."

In particular, in light of the *Armendariz* court's recognition of the possibility of "repeat player" bias in arbitration, Winikow anticipates legal skirmishes over the issue of parties' right to pre-selection discovery of potential arbitrators' awards, akin to the information about trial judges that is available to trial lawyers, in order to determine whether he or she is truly neutral.

Certainly *Armendariz* represents a leveling of the playing field between employer and employee. Still unresolved issues include the scope of discovery permissible in an employment arbitration, as well as the extent of reasoning required in the award. Do the *Armendariz* protections apply to all employment claims, such as wrongful termination, or only statutory ones? Can the employer require the employee to share in the cost of non-FEHA claims? If so, will arbitrators be asked to allocate costs among the FEHA and non-FEHA claims? Will arbitrators, fearful of having their awards overturned, resort to "litigizing" arbitration proceedings to such a great extent that the process collapses of its own weight?

Because *Armendariz* will result in the bulk of the arbitrator's fees being paid by the employer, Michaels raises the possibility of abuse by unethical arbitrators who put more time into a matter than it requires because of the ease of collecting from the employer. In the long term, though, Michaels asserts, if employers sense that any given arbitrator is "milking" the process by failing to firmly control the pace and conduct of the proceedings, that arbitrator will be excluded from future consideration.

For now, Krakow sums it up this way: "Where there is a sizable amount at stake, the uncertainty of arbitration awards will, for a

time, make it more likely that claimants will try their claims rather than settle for a greatly reduced percentage of full and fair compensation."

Deborah Rothman is a nationally known mediator and arbitrator based in Santa Monica. She is on the American Arbitration Association's Large Complex Case Panel, as well as its employment and commercial law panels. Jeff Kichaven is an independent mediator in Los Angeles, an adjunct professor at Pepperdine University School of Law and a Fellow of the International Academy of Mediators.