Arbitration Options For Calif. Employers After A Case Begins

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On Aug. 14, the California Court of Appeals for the Fourth Appellate District held in Victor M. Quiroz Franco v. Greystone Ridge Condominium et al. that an employer should have been allowed to compel to arbitration the claims of an employee whose claims and lawsuit predated his executed arbitration agreement.

In doing so, the court held that the signing of an arbitration agreement after the filing of a plaintiff's lawsuit does not on its own preclude compelling such claims to arbitration as long as the claims at issue are covered by the language in the arbitration agreement. This case, along with other recent decisions, should further encourage employers to review and, if prudent, revise existing arbitration agreements even while litigation may be pending.

In Quiroz Franco v. Greystone Ridge Condominium,[1] the plaintiff Victor M. Quiroz Franco was given the arbitration agreement at issue on March 9, 2018, followed by a Spanish-language translation of the same seven days later. Thereafter, on March 19, 2018, Quiroz Franco filed his complaint against the defendants alleging a series of employment-based claims, including allegations regarding purported violations of California's Fair Employment and Housing Act, the California Labor Code, and California's Business and Professions Code. Quiroz Franco then personally returned to the defendant-employer the executed arbitration agreement on March 21, 2018, which was dated with the same date.

The defendants then filed a motion to compel Quiroz Franco's claims pursuant to the executed arbitration agreement, which was denied by the trial court because the claims accrued prior to signing of the arbitration agreement and it had not been established that Quiroz Franco had agreed in advance to arbitrate such claims or that the arbitration agreement would be retroactively applied. The appellate panel reversed the trial court's decision by looking to the language of the agreement itself.

Specifically, the court focused on interpreting the language of the arbitration agreement that set out the claims covered by the agreement, and whether it provided for the arbitration of the claims in Quiroz Franco's complaint. In doing so, the court found that the language of the agreement was clear and without any qualifying language limiting it to claims that had yet to accrue.

This decision reiterates to employers the importance of carefully crafted arbitration agreements. Here, the court looked to interpret the language of the agreement itself, as it would with any other contract. As such, it highlights the importance of ensuring that arbitration agreements are drafted in a manner as to cover any and all potential claims, including claims that may have arisen prior to the execution of the arbitration agreement, such as prehire claims. In fact, the arbitration agreement at issue in Quiroz Franco included a reference to such prehire claims, which the court found further supported that the intent of the agreement was to cover all claims regardless of when they may have accrued.[2]

It is to be expected that employers may be emboldened by this opinion, along with other recent decisions, such as the decision issued by the National Labor Relations Board on the same day as the Quiroz Franco decision. In it, the NLRB found that it was legal for an employer to update its mandatory arbitration agreement, following the filing of a collective action, to include a provision requiring employees to agree not to file or opt in to a collective action, and allowing for the termination of any employee who did not sign the agreement.[3] Nonetheless, it is important for employers to recognize that there are additional considerations when updating any agreement, including an arbitration agreement.

Specifically, the Quiroz Franco court, relying on another recent California appellate decision, distinguished this case from those in which the employer unilaterally modified the arbitration agreement to apply to preexisting claims and, thus, failed to establish the employee had in fact agreed to arbitrate his or her claims. The court explained that, although employers may reserve the right to unilaterally modify an agreement, such unilateral modifications that apply retroactively to "accrued or known" claims may violate the implied covenant of good faith and fair dealing that applies to all contracts.[4] The court found that a series of prior cases have shown that "*in the context of unilateral modification of an arbitration agreement*, the implied covenant of good faith and fair dealing requires an employer to provide reasonable and express notice to employees regarding the applicability of such modifications to already existing claims."[5]

Accordingly, careful attention must be paid, not only to the language within an arbitration agreement, but also to how an employer chooses to modify an arbitration agreement, and if an employer, unlike the defendant-employer in Quiroz Franco, has knowledge about a pending or potential lawsuit at the time it enters into an arbitration agreement with the employee.

Employers should be aware that their conduct may serve to create arguments against the enforcement of the arbitration agreement, such as whether they had knowledge that the employee was represented by counsel at the time they entered into the agreement.[6] These are tricky questions that should be carefully navigated with the assistance of legal counsel, particularly in the case of class and collective actions.

There have been a lot of changes in the field of arbitration agreements in large part due to such recent landmark decisions from the U.S. Supreme Court in Epic Systems Corp. v. Lewis and Lamps Plus Inc. v. Varela, which have served to strengthen the application and enforceability of arbitration agreements.[7] Yet it is important to remember that because these cases are so recent, courts and agencies across the country are just now starting to interpret and apply them.

This means that, just like the few highlighted here, there are a variety of nuances and open questions that have yet to be interpreted or answered. As such, it is unclear how narrowly or broadly lower courts will apply such decisions that always arise out of a very particular set of facts.

Although employers may rightly be optimistic about the recent developments regarding their use of arbitration agreements, they should nonetheless proceed cautiously. As more and more employers implement new or modified arbitration agreements to encompass the recent changes in the law, it is to be expected that we will see more such cases further clarifying the enforceability of arbitration agreements not only based on the language within the agreement, but also how and when it was entered into.

Therefore, although the best practice would be for employers to review any existing arbitration agreements and consider implementing any revisions before any litigation arises, unfortunately that is not always the reality. Nonetheless, employers should be happy to know that there may still be options to further strengthen or enforce their arbitration agreements after litigation begins.

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[1] Franco v. Greystone Ridge Condo., No. G056559, 2019 WL 3811889 (Cal. Ct. App. Aug. 14, 2019).

[2] Id. at *5-6.

[3] Cordua Restaurants, Inc. & Steven Ramirez & Rogelio Morales & Shearone Lewis, 368 NLRB No. 43 (Aug. 14, 2019).

[4] Quiroz Franco, No. G056559, 2019 WL 3811889, at *6.

[5] Id. (emphasis in original).

[6] Salgado v. Carrows Restaurants, Inc., 33 Cal. App. 5th 356, 363, 244 Cal. Rptr. 3d 849, 854 (Ct. App. 2019) (remanding to determine whether the defendant "knew or should have known [plaintiff] was represented by counsel when she signed the arbitration agreement," and if so, whether it is enforceable).

[7] Epic Systems Corp. v. Lewis, 584 U.S. __, 138 S.Ct. 1612 (2018); Lamps Plus, Inc. v. Varela, __ U.S. __, 139 S.Ct. 1407 (2019).