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Making Arbitration Provisions In Employment Agreements Cover Statutory Claims

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On March 29, 2013, in *Harris v. Bingham McCutchen*, the California Court of Appeal found yet another way to render a seemingly well-written arbitration provision in an employment agreement unenforceable. The arbitration agreement covered "any legal disputes which may occur between you and the Firm and which arise out of, or are related in any way to your employment with the Firm or its termination." The Court found that this arbitration provision was not clear enough to apply to statutory claims, as opposed to common law claims; and that the common law claims were so integrated with the statutory claims, that no claims could be arbitrated. Accordingly, the Court of Appeal affirmed a trial court ruling denying the firm's motion to compel arbitration.

How could the Court have found that such broad language somehow excluded statutory claims? Let's look at the facts. The plaintiff, a lawyer, worked at the international law firm of Bingham McCutchen, LLP. Her employment was terminated, and she claimed the reason was that she asked for an accommodation for her sleep disorder. She filed a civil complaint for six violations of the California Fair Employment and Housing Act, as well as common law claims.

In addition to applying to "any legal disputes" between the parties, the arbitration provision provided that it would take place in Santa Monica. Elsewhere in the employment agreement, however, there was a choice-of-law provision stating that the agreement would be governed by the laws of Massachusetts. The state supreme court in Massachusetts had held that state law barred the arbitration of statutory claims, unless the arbitration provision "clearly and unmistakably" applied to statutory claims; and merely stating that the provision applies to "all claims" does not pass that test. Although there was some dispute whether Massachusetts law applied in view of the context of the agreement as a whole, the Court construed the agreement against the law firm that drafted the document, and applied the Massachusetts rule.

Next, the law firm argued that the Massachusetts law has been preempted by the Federal Arbitration Act (FAA), as set forth in the seminal United States Supreme Court case of *AT&T Mobility v. Concepcion. Concepcion* held essentially that the FAA preempts state laws and state court decisions that are "hostile" to arbitration provisions, and that arbitration agreements should be enforced according to their terms.

The Court reasoned that its ruling did not violate *Concepcion*'s basic principle, citing to a footnote in the *Concepcion* opinion that stated: "Of course, states remain free to take steps addressing concerns that attend contracts of adhesion -- for example, requiring class-action waiver provisions in adhesion arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." The Court found that this footnote supported the idea that state court rules could provide that "contractual waivers of statutory antidiscrimination litigation rights must be expressly stated to be enforceable."

The Court did so without making any determination that the employment agreement was a contract of adhesion -- the only facts were that it was a letter agreement with a lawyer-plaintiff. Nor did the Court attempt to conform the language in the *Concepcion* footnote about making arbitration provisions conspicuous, with the concept that employers may need to add words to the arbitration provision to ensure that the seemingly expansive phrase "any legal disputes" also includes statutory claims.

In view of a slew of decisions coming out of the California Court of Appeal since *Concepcion* that have found arbitration provisions in employment agreements unconscionable, the result could very well have been the same under California law. That is, it is conceivable that a court could have found the arbitration provision unconscionable for not clearly and unmistakably stating that it applies to statutory claims.

In sum, arbitration provisions − particularly in employment agreements − should expressly state that they apply to all claims that may arise between the parties, “including, but not limited to, statutory claims.” Employers may even want to include an exhaustive list of potential statutory claims the employee might make, as is often done in settlement release agreements. Further, employers must be careful in including choice-of-law provisions that render their employment agreements subject to the laws of other states that may have unknown pitfalls. These points, however, merely address a few of the problems an employer faces in seeking to draft an enforceable arbitration provision. The California courts have found numerous other ways to strike down seemingly well written arbitration provisions. In view of the rapidly changing law in this area, any employment agreement with an arbitration provision should be routinely reviewed for update.