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Another Employment Arbitration Provision Found Unconscionable

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In the latest in a rash of cases striking down arbitration provisions in employment agreements, the California Court of Appeal has done it again. In *Samaniego v. Empire Today, LLC*, the court found that the following facts showed the arbitration provision to be unconscionable and unenforceable:

- The employee, a carpet installer, was a Spanish speaker who did not speak English well. The employee asked for a Spanish copy of the employment agreement, but the employer failed to provide one.
- The employee was only given 24 hours to review and sign the employment agreement.
- The arbitration provision specified that the "commercial rules" of the American Arbitration Association applied, but the employer failed to attach a copy of those rules to the agreement. The court said, "[t]his is significant." The employee is being placed in a position to "go to another source to find out the full import of what he or she is about to sign − and must go to that effort *prior* to signing."
- The arbitration provision itself was neither first nor last, nor did it have a separate heading, nor was the employee required to separately initial the provision.

In view of all these factors, the arbitration provision was deemed "procedurally" unconscionable.

The court noted that the agreement also contained a substantively egregious element, namely, that the employer tried to limit the statute of limitations applying to any of the employee's claims to six months. The court was careful to say that this factor alone did not destroy the arbitration provision, but it could have. Therefore, it is difficult to interpret whether the procedural problems alone would have doomed the arbitration provision.

Nevertheless, as a take-away from this case, an employer can take a number of steps to increase the likelihood that the arbitration provision is deemed enforceable:

- Translate the agreement for non-English speakers;
- Give the employee a realistic amount of time (that at least includes a non-working weekend) to review the agreement prior to signing;
- Attach the arbitration rules or, at a minimum, specifically identify in the agreement the exact web page where the employee can access the rules;
- Make the arbitration provision conspicuous by:

    - making it a separate page to the employment agreement or including the provision last, in bold type, with all capital letters identifying the acknowledgment of the jury and class action waiver components;

  and

    - clearly identifying the provision with a heading, and have the employee separately sign or, at the very least, initial the provision.