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See You Later, Arbitrator! A Guideline to Vacating Arbitration

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By Jonathan D. Roven

See You Later, Arbitrator!

A Guideline to Vacating Arbitration

AN EMPLOYEE IS WRONGFULLY TERMINATED, harassed, or just did not receive their earned wages. They hire an attorney, who takes the case on contingency, and files the case with the court, hoping one day to show the jury the wrongdoings of the employer. But then, an arbitration agreement arises, and after a motion to compel arbitration, the parties are ordered to arbitrate.

Arbitration is usually a problem for plaintiffs. Although it may result in a quicker disposition of an employee's case (depending on who the arbitrator is), the arbitrator is paid by the employer, which is an inherent bias. In an employment arbitration in the state of California, the employer is obligated to pay for arbitration. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. Since an arbitration can cost the employer tens of thousands of dollars (or more), some plaintiff attorneys believe that the high cost of arbitration will encourage the employer to settle the case early. However, employers are usually ready, willing and able to pay the evidentiary hearing fee rather than face a jury.

Arbitration is usually a solution for defendants (and their counsel). Arbitrators who may be career-lawyers or retired judges are likely less swayed by the emotion of a wrongful termination case by their counterpart jury. Defense attorneys can utilize discovery and endless meet and confer attempts to bill clients, and will rarely (if ever) be sanctioned by an arbitrator for misuse of the discovery process. At the end of an arbitration, the arbitrator can merely say, "I didn't believe the claimant" and award zero damages after days of evidentiary hearing, thousands of dollars organizing experts, and thousands of dollars the plaintiff attorney will invest in a case.

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Luckily, there is a mechanism for vacating an arbitration during the pendency of the action. California Code of Civil Procedure § 1281.97 was enacted as a part of Senate Bill No. 707 (2019). The Legislature expressed their concerns about situations in which a "company's strategic non-payment of fees and costs severely prejudices the ability of employees or consumers to vindicate their rights." Now, if the employer or other respondent in a consumer arbitration fails to pay the arbitration fee, the employee may move to vacate the arbitration altogether, and put their case potentially back in front of a jury.

When the employer receives a bill for the evidentiary hearing, which again can be tens of thousands of dollars, the clock starts ticking for when they will have to pay that bill to continue arbitration. As the *Armendariz* case emphasizes, the employer must pay the arbitration fee, and they must pay within 30 days after the due date. According to the California Code of Civil Procedure § 1281.98(a)(1), "…if the fees or costs required to continue the arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel the employee or consumer to proceed with that arbitration as a result of the material breach."

Simply put, if the employer fails to pay the arbitration fee within 30 days of the due date, the employee may move to vacate the order compelling arbitration.

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Exception for "Substantial Compliance"?

In the case of *Espinoza v. Sup. Ct.* (2022) 83 Cal.App.5th 761, the question was asked of whether substantial compliance was an exception to materially breaching the arbitration agreement by not timely paying the arbitration fees. The trial court initially granted arbitration and stayed litigation. During the arbitration, the defendant received an invoice and did not pay within 30 days of the due date. The plaintiff sought an order lifting the stay of the litigation. In defendant's opposition, they stated, "[d]ue to a clerical error, the request for cash flow was delayed and this prevented the accounts payable department from issuing a check for payment of the invoice," and that plaintiff made no mention of defendant's failure to pay during settlement discussions. Defendant later paid the invoice, albeit a few days late. The trial court denied plaintiff's motion because the defendant was in substantial compliance of the arbitration provision, and plaintiff suffered no prejudice as shown by not expressing a concern regarding nonpayment during settlement discussions.

The Court of Appeal reversed. They expressly ruled that "Section 1281.97 Contains No Exceptions for Substantial Compliance, Unintentional Nonpayment, or Absence of Prejudice" and that "[t]he language of section 1281.97 is unambiguous." *Id.* at 775-6. The court emphasized that the trial court erred in denying the plaintiff's motion because the statute does not provide that substantial compliance is an exception. The court also addressed that in an employment arbitration, the plaintiff's livelihood may be the subject of adjudication. In arbitrations involving big companies, missing a payment of a few hundred dollars may be a minor and immaterial mistake, however this mistake may delay the hearing on the employee's claims, which could be significant prejudice to someone who cannot pay bills or rent. The Court of Appeal instructed the trial court to reverse the ruling and address sanctions.

About a month later, the matter of *De Leon v. Juanita's Foods* (2022) 85 Cal.App.5th 740 was decided. In *De Leon*, again the defendant failed to pay the arbitration fees within 30 days after the due date. This time the trial court granted the plaintiff's motion to vacate the order compelling arbitration. The Court of Appeal concluded that a late payment constitutes a "material breach" based on the plain language of section 1281.98. The defendant raised many arguments, including Juanita's Foods was advised to pay all fees as soon as possible, that JAMS was willing to proceed with a management conference, and that *De Leon* was to blame because they forced Juanita's Foods to compel arbitration rather than simply agreeing to arbitrate. Juanita's Foods argued that the trial court erred by applying a "hyper-technical reading" of the section. The Court of Appeal disagreed, stating "the statute's language establishes a simple bright-line rule that a drafting party's failure to pay outstanding arbitration fees within 30 days after the due date results in its material breach of the arbitration agreement." *Id.* at 753.

Even as important, the Court of Appeal noted in *De Leon* that there is nothing in section 1281.98 that allows the trial court to consider factors such as delay or prejudice. The *De Leon* court affirmed the trial court's ruling that Juanita's Foods materially breached the agreement by failing to timely pay fees. Together, the *Espinoza* and *De Leon* rulings pave the way for a clear, bright-line rule that failing to pay arbitration fees within 30 days of the invoice due date is a material breach, allowing opposing parties to vacate arbitration.

Steps to Vacating Arbitration

1. Make Sure of the Invoice Due Date

The first important step is to look at the date that the invoice was sent to the opposing counsel. For example, Judicial Arbitration and Mediation Services, Inc. ("JAMS") may send the invoice using the JAMS Access system prior to following up with an email. The American Arbitration Association ("AAA") may send the invoice via mail. It is also important to look at the actual invoice. Some invoices may state "Due upon receipt" whereas others may give more time to pay the invoice. The breach does not occur until 30 days after the invoice due date. Also be sure to see whether the invoice due date is on a legal holiday, including weekends, because that could lead to a mistake regarding the actual due date. If one is unsure about the actual due date, they can call the case manager to see when the first time the invoice was actually sent and calculate 30 days from that date.

2. Confirm Nonpayment and Give Notice

Once the due date has been determined and has passed, send an email or call the case manager to see whether the invoice has been paid. It may take a few tries but be persistent about getting the information. After the invoice has been confirmed to be past due, have a discussion with the client about the potential option of vacating the arbitration. Afterward, send an email to both the employer's counsel, the case manager, and the arbitrator (if in direct communication) that the invoice has not been timely paid, the client unilaterally elects to vacate the arbitration and pursue the matter in superior court. Sample language is as follows: "Dear Arbitrator, Claimant is informed that the invoice dated [date of invoice] has not been paid. Pursuant to CCP § 1281.98, Claimant hereby elects to withdraw the claim from arbitration and pursue the matter in superior court." There is likely to be some confusion on the part of the employer as this is still a developing area of the law. However the case law is clear that there is no exception for substantial compliance or prejudice. Still, respondents will argue substantial compliance, applying common sense, lack of prejudice, and the parties may be in the midst of settlement discussions. As discussed above, these are not exceptions to the bright line rule.

3. File Your Motion to Vacate the Order

After you have correspondence to show that your client elects to pursue the matter in superior court, file the motion. The motion consists of the notice, the motion, the declaration, and the proposed order. As a part of the exhibits, be sure to include the order compelling arbitration, the invoice, and evidence that the invoice has not yet been paid. It is unlikely that the respondent would entertain a stipulation as waiver of arbitration could be tantamount to a plaintiff inadvertently waiving a jury. It is important to include the statutory language, along with the *Espinoza* and *De Leon* interpretations showing there is no exception for substantial compliance. For a copy of a sample motion, the author may be emailed.

At the hearing on the motion to vacate the order compelling arbitration, usually judges do not want to grant the motion. However, it is important to be clear that there is no exception for failing to pay the arbitration fee, that the drafting party is in material breach, and that the case law is clear that this is a bright line rule. Rarely will this motion be granted without some pushback from the judge, likely because this is a newly developing area of the law. However, the law is on the side of the party requesting to vacate arbitration.

4. File Your Motion for Costs and Sanctions

Once the motion to vacate the order is granted, the moving party may move for an order for reasonable attorney's fees and costs as a result of the material breach. CCP § 1281.99(a) states as follows: "The court shall impose a monetary sanction against a drafting party that materially breaches an arbitration agreement pursuant to subdivision (a) of Section 1281.97 or subdivision (a) of Section 1281.98, by ordering the drafting party to pay the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer as a result of the material breach." The law on what is "as a result of the material breach" is not yet clear. Therefore, it is important to provide descriptive billing entries and relate them to the material breach if they are related, to allow for the court to assess the reasonableness of the attorney's hours. It is also noteworthy to file a memorandum of costs if there were any costs associated with the material breach.

Takeaways

This is an exciting new area of law that is rapidly developing. To encourage more development in this field, motions should be filed to vacate arbitration when the opportunity presents itself. For many employees, they find themselves stuck in arbitration answering endless discovery and participating in a full-blown evidentiary hearing, only to get minimal results. By using this powerful tool, an employee or consumer can get their case back in front of a jury to attempt to obtain a fair verdict.