



The Future of Arbitration

Part 3: Unique Arbitration Issues in California

April 26, 2022

Seyfarth Shaw LLP

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Agenda

01

Whether mandatory arbitration agreements are enforceable or permissible

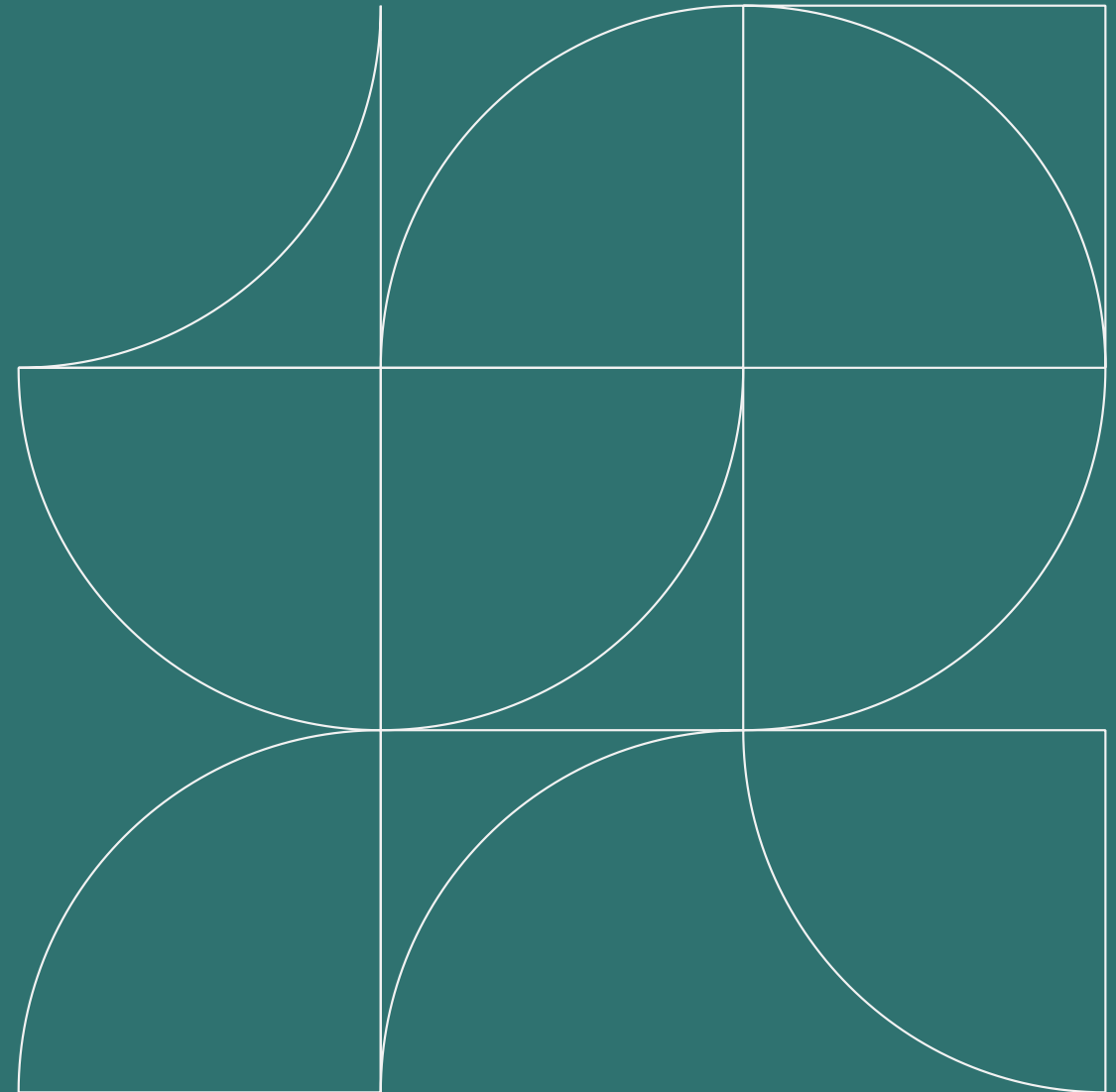
02

Strategies to avoid waiving the right to arbitrate by not timely paying arbitration fees

03

The increasing challenges to electronic signatures to arbitration agreements

Whether mandatory arbitration agreements are enforceable or permissible



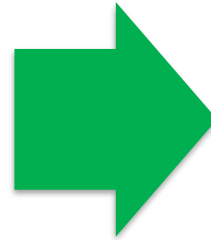


What Is Assembly Bill (AB) 51?

- AB 51 added Labor Code § 432.6 and Government Code § 12953
- Makes it unlawful to require arbitration agreements as a condition of employment, continued employment, or receipt of employment-related benefit.
- Also unlawful to threaten, retaliate, discriminate, or terminate applicant or employee for refusing to sign an arbitration agreement.
- Does not invalidate otherwise enforceable arbitration agreements covered by the Federal Arbitration Act.
- Potential civil and criminal sanctions and recovery of attorney's fees

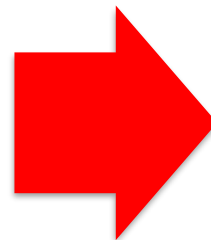
Ninth Circuit's Decision in *Chamber of Commerce v. Bonta*

Employee agrees to mandatory arbitration agreement



FAA Preemption and No Penalties

Employee refuses to enter into mandatory arbitration agreement




No FAA Preemption and Penalties Available

Post-*Bonta* Strategies



Voluntary agreements for new employees



Avoid providing new arbitration agreements to employees who signed agreements prior to January 1, 2020



Continued employment as assent

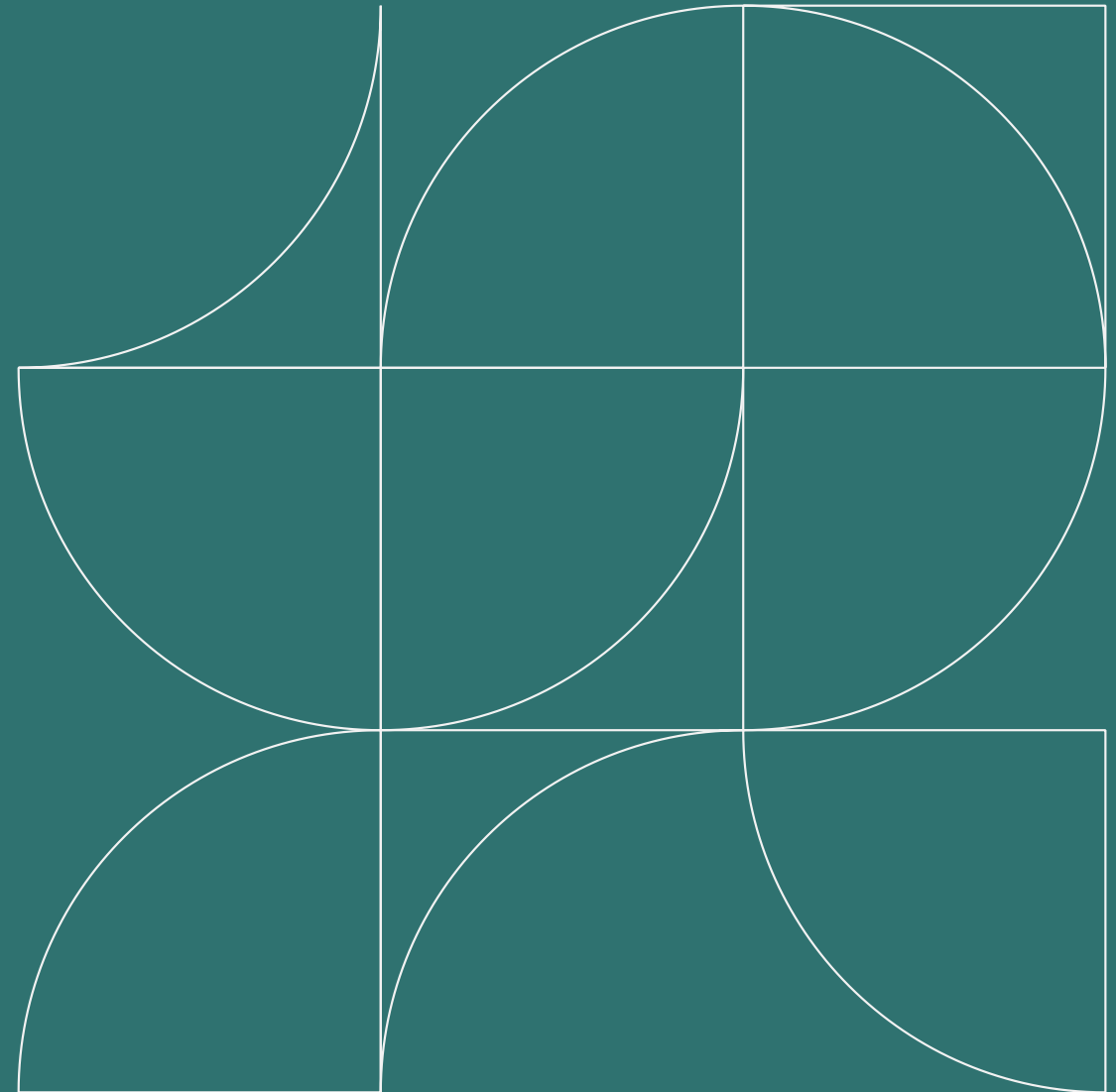


Silence on whether arbitration agreement is mandatory or voluntary



Arbitration agreement as a freestanding policy or in employee handbook

Strategies to avoid waiving the right to arbitrate by not timely paying arbitration fees



SB 707 (Effective Jan. 1, 2021) - added Sections 1281.97, 1281.98, and 1281.99 of the Code of Civil Procedure.

- 1281.97. (a) In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration administrator, the drafting party to pay certain fees and costs before the arbitration can proceed, if the fees or costs to initiate an 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 arbitration under Section 1281.2.*
- (b) If the drafting party materially breaches the arbitration agreement and is in default under subdivision (a), the employee or consumer may do either of the following:
 - (1) Withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction.
 - (2) Compel arbitration in which the drafting party shall pay reasonable attorney’s fees and costs related to the arbitration.
- (c) If the employee or consumer withdraws the claim from arbitration and proceeds with an action in a court of appropriate jurisdiction under paragraph (1) of subdivision (b), the statute of limitations with regard to all claims brought or that relate back to any claim brought in arbitration shall be tolled as of the date of the first filing of a claim in any court, arbitration forum, or other dispute resolution forum.
- (d) If the employee or consumer proceeds with an action in a court of appropriate jurisdiction, the court shall impose sanctions on the drafting party in accordance with Section 1281.99.

Sections 1281.98 and 1281.99

- Extends Section 1281.97 to fees or costs required to continue the arbitration proceeding.
- Tolls the statute of limitations with regard to all claims brought or that relate back to any claim brought in arbitration as of the date of the first filing.
- Permits the arbitrator or arbitration provider to institute a collection action at the conclusion of the arbitration for payment of all fees associated with the employment or consumer arbitration proceeding, including the cost of administering any proceedings after the default.
- Permits the employee or consumer to bring a motion, or a separate action, to recover all attorney's fees and all costs associated with the abandoned arbitration proceeding.
- Mandates sanctions on the drafting party, including up to terminating sanctions

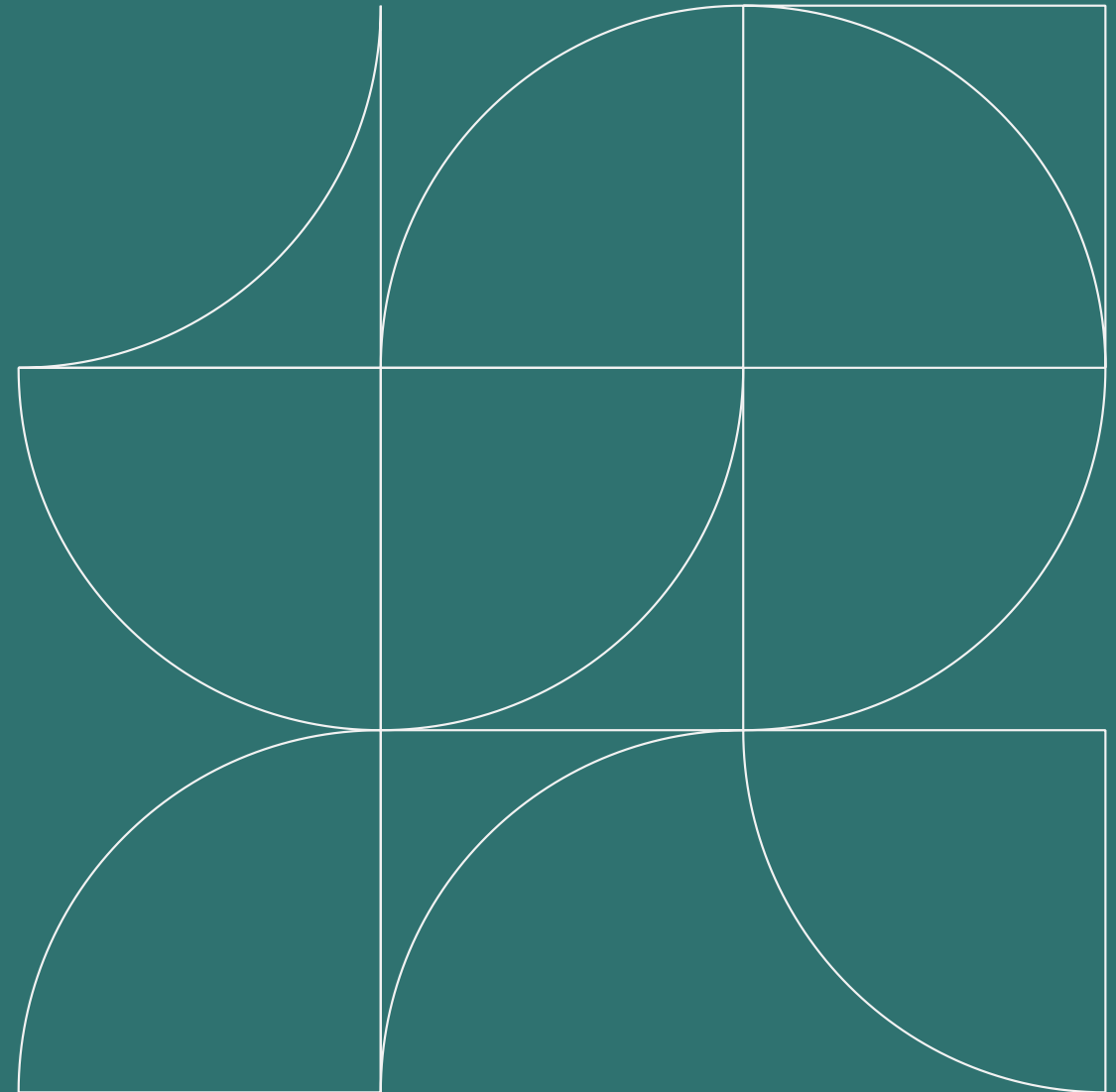


SB 762 (Effective Jan. 1, 2022) - added Section 1657.1 to the Civil Code, and amended Sections 1281.97 and 1281.98 of the Code of Civil Procedure.

- Requires the drafting party to pay any required fees within 30 days of their due date *or such other time as is provided in the arbitration agreement.*
- Requires the arbitration provider – immediately after an employee or consumer meets the filing requirements necessary to initiate an arbitration – to provide all parties to the arbitration an invoice, for any fees and costs required before the arbitration can proceed, by the same means on the same day.
- Failure to pay arbitration fees timely can result in a waiver of the right to compel arbitration, as well as an award of sanctions including attorneys' fees.
- Any extension of payment due dates must be agreed to by all parties to the arbitration.

SB 762 requires that any time frame specified in an arbitration agreement to be reasonable, to prevent unfair delays.

The increasing challenges to electronic signatures to arbitration agreements



3 Step Process to Authenticate an Electronic Signature

1

For initial burden, petitioner is not required to authenticate the opposing party's signature

If authenticity of signature isn't challenged, then simply attaching the agreement is sufficient

2

Burden then shifts to party disputing the agreement to challenge authenticity of the agreement

Plaintiffs often say they do not recall signing the agreement but may also affirmatively state that they did not sign the agreement

3

Once authenticity is challenged, the party seeking arbitration has the burden of proving by preponderance of the evidence that the electronic signature is authentic

Trial court rulings on the authentication of e-signatures are difficult to overturn on appeal



- Trial court's rulings are reviewed for abuse of discretion under substantial evidence test and therefore it is critical to put forth strongest evidence in connection with the petition to compel
- The question on appeal is whether the appellant's evidence was (1) uncontradicted and unimpeached; and (2) of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding
- An appellate court will not disturb a trial court's findings weighing conflicting evidence or the credibility of witnesses
- It is "almost impossible for the appellant to prevail on appeal by arguing that the evidence compels a judgment in that party's favor."

Evidence courts have found to be sufficient to authenticate an electronic signature

- Declarant is able to attest to seeing the plaintiff complete the e-signature process
- Employee required to log in using unique username and password
- An audit report identifies a transcript assignment date, a completion date, the user's name and ID
- IP address associated with the e-signature appears on multiple documents within short duration
- No evidence to show that any other person had access to username and password
- Use of a system that complies with the Electronic Signatures in Global and National Commerce Act (ESIGN) such as DocuSign or Adobe
- Employee only says that she doesn't remember signing the agreement

Evidence courts have found to be insufficient to authenticate an electronic signature

- Plaintiff affirmatively states that she did not sign the agreement as opposed to simply not recalling if she signed it
- Defendant's declarant "summarily asserts" that the plaintiff electronically signed agreement
- Declarant did not explain how, or on what basis the company inferred that the electronic signature was the act of the plaintiff; that the date and time printed on the agreement were accurate; that the electronic signature could only have been placed on the agreement by a person using plaintiff's unique ID number and password
- ID and PIN code was not employee specific
- HR manager had access to information necessary to access the onboarding portal via employee personnel records
- Simply noting that agreement was signed thru DocuSign without providing any evidence from or about DocuSign where plaintiff affirmatively stated that she did not sign the agreement
- Courts have declined to take judicial notice of how third party vendor systems operate based on statements in their websites

Key takeaways to ensure that a petition to compel arbitration is granted

- Evidence in declarations supporting petition must be admissible
- Make sure that declarant has personal knowledge and establish foundation for statements
- Just stating I could and would competently testify to the facts in the declaration is not sufficient
- If possible, have someone say that she saw the plaintiff go thru the e signature process
- Have declarant establish that they are the custodian of records
- Submit declaration from a systems consultant detailing security precautions regarding transmission and the use of an applicant's unique username and password as well as the steps the applicant would have to take to place his / her name on the signature line

Key takeaways to ensure that a petition to compel arbitration is granted, cont.

- Provide audit report showing time / date of signature and IP address of computer used and that other documents were electronically signed at the same time
- Declaration should be specific to plaintiff's situation not just a generic description of the process
- If possible, provide declaration from an HR employee who reviewed the completion of plaintiff's onboarding documentation to attest that they were completed at time of hire
- Use DocuSign or Adobe that create a digital signature and have someone explain the application of the software architecture and how data flow is controlled
- Consider the submission of an IT expert if plaintiff challenges the security protocols of the e-signature system
- Mere failure to recall electronically signing the agreement should not be enough to contradict or impeach an employer's showing that the plaintiff electronically signed an arbitration agreement

Thank you for attending

