

Client Alert.

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***Sonic Calabasas A, Inc. v. Moreno*: California Supreme Court Rules That Arbitration Agreements Do Not Preempt the Administrative Wage Claim Procedures of the Labor Commissioner**

By **Lloyd W. Aubry, Jr.**

Yesterday the California Supreme Court ruled in a 4-3 decision that an employee who has a wage claim against his or her employer but is subject to an arbitration agreement has the right to first use the Labor Commissioner's administrative processes in a so-called Berman hearing before arbitration of the wage claim can be required. The Court held that waiving the Berman process in an arbitration agreement is unconscionable and therefore cannot be enforced. The Berman process calls for various informal procedures to resolve wage claims, including a hearing before a decision is reached. When a decision is reached, the losing party has the right to appeal *de novo* to the superior court, where the case is essentially retried. The Supreme Court held that at this point the employer could require arbitration of the appeal but also held that the statutory protections subsequent to the Berman process would have to be followed including allowing the Labor Commissioner to represent the employee in the arbitration and requiring the employer to post a bond to appeal the decision of the Labor Commissioner to arbitration.

BACKGROUND

Frank Moreno, a former employee of Sonic Calabasas, filed a claim with the Labor Commissioner for unpaid vacation pay, thus invoking the administrative procedures of the Labor Commissioner to resolve his claim in a Berman hearing. When he began his employment, Moreno signed an arbitration agreement committing him to resolve any and all such claims in an arbitral forum. He specifically waived any right to use a judicial "or other governmental dispute resolution forum" with some exceptions, not including the Labor Commissioner. After Moreno filed his claim with the Labor Commissioner, Sonic Calabasas filed a petition to compel arbitration that was denied by the trial court. On appeal, the Court of Appeal reversed, holding that a recent U.S. Supreme Court decision, *Preston v. Ferrer*, which involved the Labor Commissioner's jurisdiction over Talent Agency Act controversies, compelled a finding that the Labor Commissioner did not have jurisdiction over a wage claim subject to an arbitration agreement. The Labor Commissioner's jurisdiction was preempted by the Federal Arbitration Act (FAA), which embodies a national policy favoring the arbitration of disputes when the parties agree to do so.

HOLDING

Moreno appealed the Court of Appeal's decision to the California Supreme Court, which issued its decision yesterday. The Court resolved two issues:

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(1) Can a mandatory employment arbitration agreement be enforced prior to the conclusion of an administrative proceeding conducted by the Labor Commissioner concerning an employee's statutory wage claim? The Court answered, No.

(2) Was the Labor Commissioner's jurisdiction over the employee's statutory wage claim divested by the FAA under *Preston v. Ferrer* (2008) ___ U.S. ___, 128 S.Ct. 978, 169 L.Ed.2d 917? The Court answered, No.

IMPLICATIONS

Many employers have mandatory arbitration agreements which cover wage claims. Under this decision, if an employee files with the Labor Commissioner, the employer will no longer be able to avoid the administrative process by invoking arbitration. And, if the employee is successful at the administrative level, in order to invoke arbitration, the employer will have to post a bond for the amount of the award. Moreover, the employee may well be represented by a lawyer from the Labor Commissioner's office in the arbitration.

THE DISSENT

The three dissenting justices strongly disagreed with the majority's view that waiving the Berman process was unconscionable and against public policy. The dissent pointed out that the majority, by finding the administrative advantages of the Labor Commissioner's processes determinative, essentially held that arbitration provisions can be easily avoided in the future by pointing to these so-called administrative advantages in other statutory schemes. They believe this is inconsistent with the state policy favoring arbitration. In addition, the dissent believes that the *Preston v. Ferrer* case controls this case and should have required affirming the Court of Appeal's decision that all the Labor Commissioner procedures are preempted by the FAA. This raises the possibility of a petition for certiorari to the U.S. Supreme Court.

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