



Client Alert

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CALIFORNIA SUPREME COURT INVALIDATES CLASS ARBITRATION WAIVER

What This Means For California Employers

The Issue: May California employers require employees to arbitrate employment disputes and also waive the right to class arbitration?

The Stakes: Many California employers favor arbitration of employee disputes for a variety of reasons, including avoiding jury trials and resolving disputes privately, more quickly and less expensively. Many of these same employers would prefer to limit employee arbitrations to individual cases, rather than face a single arbitration brought by a class of employees, which would create the potential for large aggregate damage awards and potential abuses from the arbitration equivalent of a strike suit.

The New Rules: On August 30, 2007, the California Supreme Court, in *Gentry v. Superior Court* (the real party in interest was Circuit City Stores, Inc.), held that class arbitration waivers in employee arbitration agreements are unenforceable if they would apply to unwaivable statutory rights (such as the right to overtime pay) and if a court determines that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration. In making this determination, courts must consider (1) whether an individual employee's damages are potentially modest in size, such that the expense of litigation would discourage individual claims; (2) the potential for employer retaliation against an employee bringing a claim individually; (3) whether individual employees may be ill-informed about their rights; and (4) other "real world obstacles" to the vindication of employee rights through individual arbitration. Courts must also consider whether the arbitration agreement is "procedurally unconscionable," meaning whether the employee had some meaningful choice in deciding whether to agree to arbitration and whether the employee was fairly advised of both the advantages and the disadvantages of the particular arbitration agreement proposed by the employer.

The Practical Implications: Class arbitration waivers are unlikely to be enforceable in most employee disputes, most particularly those disputes in which their advantages to employers are most pronounced, such as class claims under the California Labor Code for such things as alleged overtime pay or meal and rest period violations. The reason has much to do with why employers may favor them: a class arbitration waiver is likely to place a substantial obstacle in the way of some employee claims. However, because class arbitration waivers may be enforceable in some situations, the California Supreme Court has also made it clear that employers are not to be penalized for such provisions. If a court determines that a class arbitration waiver is invalid, it may be severed from the agreement and the rest of the arbitration agreement enforced.