

RESOLUTION 04-05-2018

DIGEST

Employment Arbitration: Require Employers to Pay for Arbitration Fees

Amends Code of Civil Procedure section 1284.2 to require employers to pay for an arbitrator, and to allow the employee to file a court case if the employer refuses.

STATEMENT OF REASONS

The Problem: Case law makes clear that where an employee is forced to sign an arbitration agreement in many employment actions (such as discrimination under FEHA or wage claims), the employee only needs to pay the arbitration fee to the extent the employee would have had to pay filing fees if he filed in court. However, the problem arises where the employer, who was the one who required the employee to agree to arbitration, fails to pay the arbitration fees, either initially or as the case progresses.

The Solution: This clarifies underlying case law that the employer is required to pay the arbitration fees and provides consequences for failing to do so. An injured employee is entitled to have his claims adjudicated and an employer who cannot bear the cost of the arbitration, which can bring the arbitration to a halt, should not be punished for a forum selection that the employee likely had no choice over in the first place. This gives the employee the right to pursue his claims in court if the arbitration does not proceed due to nonpayment.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1284.2 to read as follows:

- 1 § 1284.2
- 2 (a) Except as provided by subsection (b), unless ~~Unless~~ the arbitration agreement
- 3 otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration
- 4 shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other
- 5 expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel
- 6 fees or witness fees or other expenses incurred by a party for his own benefit.
- 7 (b) In employment cases that are subject to arbitration, the employer shall pay for the
- 8 expenses and fees of the neutral arbitrator, together with other expenses of the arbitration
- 9 incurred or approved by the neutral arbitrator. Counsel fees or witness fees may be awarded to
- 10 the prevailing party in accordance with the underlying statutory or case law. If an employer does
- 11 not pay the fees and the arbitrator declines to proceed with the case, then the employee may re-
- 12 file the case in a court having jurisdiction over the matter.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION

None known.

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**RESOLUTIONS COMMITTEE RECOMMENDATION:
APPROVE IN PRINCIPLE**

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 1284.2 to require employers to pay for an arbitrator, and to allow the employee to file a court case if the employer refuses. This resolution should be approved in principle because it is fair to require an employer, who required the employee to agree to arbitrate disputes, to pay for the arbitrator and related costs, and if the employer fails to pay the arbitrator, then the employee should have the option of filing the case in court.

In *Armendariz v. Foundation Health Pscycare Services Inc.* (2000) 24 Cal.4th 83, the California Supreme Court concluded, among other things, “that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.” (*Id.* at 110-111.) By requiring the employer to pay the arbitrator’s fees and costs imposed by the arbitrator, the resolution would codify the existing law and practice.

Arbitration provisions generally appear in employment agreements that are crafted by the employer. If the employer fails to pay the fees and expenses associated with an arbitration dispute involving the employee, and the neutral arbitrator declines to proceed with the arbitration because of that failure or refusal by the employer, that is a material breach. The employee should be freed from the arbitration provisions and allowed to re-file his or her case and proceed in court. The resolution acknowledges that right.