The Alternative Dispute Resolution, Employment and Litigation Sections proudly present:

#3: ARBITRATING EMPLOYMENT DISPUTES:
NEW LAW, REALITIES & PRACTICAL STEPS

Margaret Grover, Partner, Wendel, Rosen, Black & Dean, LLP
Patricia Kelly, Principal, Law Offices of Patricia Kelly
Mark LeHockey, Mediator & Arbitrator, Judicate West
Shannon Walpole, Of Counsel, Ferber Law

Agenda

1. Considerations and concerns about arbitration
2. The current law – scope and enforceability of employment arbitration agreements
3. Challenging arbitration – substantive and procedural issues
4. Selecting arbitrators, forums and the rules
5. Pre-arbitration mediation strategies
6. Setting the stage for a successful arbitration hearing
Speaker Biographies

Margaret Grover, Partner, Wendel, Rosen, Black & Dean, LLP: Margaret Grover is a partner in Wendel Rosen’s Employment Practice Group. During her more than 30 years as an employment attorney, she has represented both employers and employees, served as an expert witness, and assisted parties in resolving cases. Maggie has conducted numerous jury and bench trials, as well as arbitrations and administrative hearings. She is experienced in both federal and state courts and has represented clients before a variety of administrative agencies. Maggie represents clients in all phases of employment litigation, conducts trainings and workplace investigations, and serves as a mediator.

Patricia Kelly, Principal, Law Offices of Patricia Kelly: Patricia Kelly has been an employment attorney since 1981. Since 1995 she has been in private practice representing primarily employees. Previously she worked for private law firms representing management. Pat has litigated and provided advice on a broad range of employment issues, including discrimination, harassment, retaliation, wrongful termination-public policy, arbitration and employment and severance agreements. She also has represented employees in sixteen class action/collective action/representative action (PAGA) wage and hour lawsuits. Pat is a Past President of the CCCBA Women’s Section and Past President of the Robert G. McGrath American Inn of Court. She currently is a member of the Board of the CCCBA Employment Law Section, a member of the Executive Committee of the Robert G. McGrath American Inn of Court and a member of the Editorial Board for the Contra Costa Lawyer Magazine. Pat also is the editor of the CCCBA Solo Section Maverick. The Law Offices of Patricia M. Kelly are located at 700 Ygnacio Valley Rd., Suite 300, Walnut Creek, CA 94596; telephone (925) 818-3305; email patriciakelly@pacbell.net; website www.patriciakellylaw.com.

Mark LeHocky, Mediator and Arbitrator, Judicate West: Mark has been mediating since the 1990s, and working as a full-time mediator and arbitrator since 2012. Previously, Mark served as general counsel and senior vice president to Dreyer’s Grand Ice Cream, Inc. and Ross Stores, Inc., where he managed all litigation – employment and otherwise -- for his companies. Prior to his general counsel work, Mark spent two decades litigating, arbitrating and trying business, intellectual property, consumer class actions and employment disputes for individual and corporate clients ranging from small businesses to Fortune 100 companies. Named among the Best Lawyers in America for Mediation for three years running by U.S. News—Best Lawyers©, Mark has also taught Mediation Advocacy at the University of California, Davis’ School of Law. His full profile is on www.marklehocky.com.

Shannon Walpole, Of Counsel, Ferber Law: Shannon Walpole is an experienced legal professional with 14 years of labor and employment law experience. Shannon began her career at Littler Mendelson, a nationwide labor and employment defense firm where she represented companies of all sizes in a vast array of industries including tech, retail, hospitality, healthcare, waste management and property management. Following her stint in BigLaw, Shannon worked for nearly 10 years as an in-house employment specialist where she managed individual and class employment litigation, advised executives on employment compliance and developed and implemented compliance programs. Shannon now represents both corporate and individual clients in labor and employment matters. Shannon is knowledgeable about all areas of labor and employment law including wage and hour, discrimination, harassment, retaliation, wrongful discharge, leave management, disability accommodation, workplace violence and arbitration.
ARBITRATING EMPLOYMENT DISPUTES: NEW LAW, REALITY & PRACTICAL STEPS

CONTRA COSTA COUNTY BAR ASSOCIATION
ADR, EMPLOYMENT AND LITIGATION SECTIONS
NOVEMBER 18, 2016

2 OUR PANEL

- Margaret ("Maggie") Grover, Wendel, Rosen, Black & Dean, LLP (Oakland)
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- Mark LeHockey, Mediator & Arbitrator, Judicate West (San Francisco)
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3 AGENDA

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- The law – scope and enforceability of employment arbitration agreements
- Challenges to arbitration provisions – substantive and procedural issues
- Selecting arbitrators, forums and the rules
- Pre-arbitration mediation strategies
- Setting the stage for a successful arbitration hearing

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For more than 15 years, California courts have defined and reshaped the standards for determining whether and when employment disputes may be resolved through arbitration. Employees have asserted that various provisions of arbitration agreements are unconscionable. Employers revise those provisions and the courts weigh in. California appellate courts hand down several decisions in the area each year. In the last few years, the California Legislature has added its voice to the mix.

The California Supreme Court laid the groundwork for analyzing the arbitrability of employment claims in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (Cal. 2000). The Court explained that any type of type of arbitration imposed on the employee by the employer as a condition of employment should be analyzed for unconscionability, regardless of the type of claim being arbitrated. The Court also provided minimum requirements for the arbitration of unwaivable statutory claims, such as those arising under the Fair Employment and Housing Act. These two prongs of *Armendariz* provide the foundation for determining whether an employment dispute is arbitrable.

1. **General Principles of Unconscionability as Stated in *Armendariz***

The *Armendariz* decision recognized that unconscionability can provide a valid reason to refuse to enforce an arbitration provision under either California Code of Civil Procedure Section 1281 or Section 2 of the Federal Arbitration Act, 9 U.S.C. Section 2. *Armendariz*, 24 Cal. 4th at 114. “Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion.” *Id*. at 113. “The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Id. citing Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694 (1961). When an arbitration agreement is imposed on employees as a condition of employment, and there is little or no opportunity to negotiate, it will likely be a contract of adhesion.

“[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement. While arbitration may have its advantages in terms of greater expedition, informality, and lower cost, it also has, from the employee’s point of view, potential disadvantages: waiver of a right to a jury trial, limited discovery, and limited judicial review. Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a ‘repeat player’ in the arbitration system.”

*Armendariz*, 24 Cal. 4th at 111.

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A contract of adhesion is procedurally unconscionable. However, "unconscionability has both a 'procedural' and a 'substantive' element," the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results. "Id. at 114. Both procedural and substantive unconscionability must "be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.'" Id. at 114 (citations omitted).

The Court explained that the arbitration agreement at issue was substantively unconscionable because it lacked mutuality and did not permit the full recovery of damages for employees, while placing no such restriction on the employer. Id. at 119-21. Finally, the Court determined that the unconscionable provisions or provisions contrary to public policy permeated that agreement, such that the arbitration agreement as a whole could not be enforced. Id. at 122-26.

2. Minimum Requirements for Arbitration of FEHA Claims

The California Supreme Court also provided a list of criteria for enforceability of an agreement to arbitrate non-waivable rights, such as those granted under the Fair Employment and Housing Act. "[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA." Armendariz, 24 Cal. 4th at 101. Such an arbitration agreement is lawful if it "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum. Thus, an employee who is made to use arbitration as a condition of employment "effectively may vindicate [his or her] statutory cause of action in the arbitral forum." Id. at 102, citing Cole v. Burns Intern. Security Services, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

3. Arbitration of Class Claims May Be Compelled

The arbitration agreement will control whether the parties can pursue a class claim through arbitration. In enforcing a class action waiver in a consumer arbitration agreement, the United States Supreme Court held that the Federal Arbitration Act preempted state courts from refusing to enforce agreements containing such waivers on the grounds that they were unconscionable. ATT Mobility, LLC v. Concepcion, 563 U.S. 333 (2011) (Concepcion).

"Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id. at 344. Classwide arbitration "sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Id. at 348. Class arbitration also "greatly increases risks to defendants" and "is poorly suited to the higher stakes of class litigation" (Id. at 334) because of the lack of judicial review, "thus rendering arbitration unattractive" to defendants. Id. at 334, n. 8.

In the wake of Concepcion, the California Supreme Court revisited its prior decisions refusing to enforce arbitration agreements that prohibited arbitration of class claims on grounds that such agreements violated public policy or were unconscionable. Iskanian v. CLS Transportation, 59 Cal. 4th 348, 359 (2014). The Court recognized that, under Concepcion, a state's refusal to
enforce such a waiver is preempted by the FAA and that its prior holding in Gentry v. Superior Court. 42 Cal. 4th 443 (2007) had been abrogated. Id. at 359-60.


4. Class Action Waivers under the National Labor Relations Act

The California Supreme Court and the Ninth Circuit have reached different conclusions when analyzing whether a class action waiver in the employment context violates the National Labor Relations Act, 29 U.S.C. § 151 et seq. (NLRA). The matter was addressed by the California Supreme in Iskanian, which held that a class action waivers of employment claims do not violate the NLRA, stating: “if the Board’s rule is not precluded by the FAA, it must be because the NLRA conflicts with and takes precedence over the FAA with respect to the enforceability of class action waivers in employment arbitration agreements.” Iskanian v. CLS Transportation, 59 Cal. 4th 348, 372 (2014). “[I]n light of the FAA’s ‘liberal federal policy favoring arbitration,’ that sections 7 and 8 of the NLRA do not represent ‘a contrary congressional command’ overriding the FAA’s mandate. This conclusion is consistent with the judgment of all the federal circuit courts and most of the federal district courts that have considered the issue.” Id.

In contrast, in August 2016, the Ninth Circuit decided that requiring employees to sign agreements that contained an agreement to pursue legal claims against Ernst & Young exclusively through arbitration, and arbitrate only as individuals and in “separate proceedings” was a “concerted action waiver” that violated Sections 7 and 8 of the NLRA. Morris v. Ernst & Young, LLP, ___ F.3d ___, 2016 WL 4433080 (Aug. 22, 2016). In so doing, the Ninth Circuit relied upon the National Labor Relations Board’s interpretation of the NLRA, stating:

“In sum, the Board’s interpretation of § 7 and § 8 is correct. Section 7’s ‘mutual aid or protection clause’ includes the substantive right to collectively “seek to improve working conditions through resort to administrative and judicial forums.” Under § 8, an employer may not defeat the right by requiring employees to pursue all work-related legal claims individually.”

2016 WL 4433080 at 5 (citations omitted).

“Applied to the Ernst & Young contract, § 7 and § 8 make the terms of the concerted action waiver unenforceable. The “separate proceedings” clause prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else. The result: interference with a protected § 7 right in violation of § 8. Thus, the ‘separate proceedings’ terms in the Ernst & Young contracts cannot be enforced.”

Id.

“The [FAA] does not dictate a contrary result. The ‘separate proceedings’ provision in this case appears in an agreement that directs employment-related disputes to arbitration. But the arbitration requirement is not the problem. The same provision in a contract that required court adjudication as the exclusive remedy would equally violate
the NLRA. The NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration."

Id. at 6.

5. Employee Cannot Be Compelled to Arbitrate PAGA Claims

Employers may not require arbitration of claims under the Private Attorneys General Act of 2004 (PAGA) (Cal. Lab. Code, § 2698 et seq.). PAGA authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the State. The California Supreme Court concluded “that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy.” Iskanian v. CLS Transportation, 59 Cal. 4th 348, 378-89 (2014).

The Court also found that the Federal Arbitration Act’s goal of promoting arbitration as a means of private dispute resolution does not preclude the California Legislature from deputizing employees to prosecute Labor Code violations on the state’s behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract. Id. at 390-91.

6. Decisions Regarding Arbitrability

In July 2016, the California Supreme Court addressed the issue of who should decide whether class arbitration is permissible, a court or an arbitrator. Sandquist v. Lebo Automotive, Inc., 1 Cal. 5th 233 (2016). The Court recognized that “[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute [citations], so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about that matter.” Id. at 243, citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995). “[S]o the question who has the power to decide the availability of class arbitration turns upon what the parties agreed about the allocation of that power.” Sandquist, 1 Cal. 5th at 243.

“[T]his examination must be conducted, at least initially, through the prism of state law. ‘When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.’” Id. at 244.

The parties had three different arbitration agreements, with clauses defining the scope of arbitrable matters which varied slightly, but were materially the same. The first stated:

“I and the Company both agree that any claim, dispute, and/or controversy (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable
law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers’ Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration.”

*Id* at 244-45.

The arbitration provisions contained inclusive clauses that define the range of disputes that must be submitted to and determined *exclusively* by binding arbitration. Two of the agreements provided a specific, limited set of disputes that were withdrawn from the arbitrator’s purview. The question of class action arbitrability was not listed among those.

The Supreme Court noted that “[t]hese features of the arbitration clauses suggest the ‘who decides’ question is an arbitrable one, but they are by no means conclusive.” *Id.* at 246. The Court determined that the arbitration provision was ambiguous and continued its analysis by applying “other principles applicable to the interpretation of arbitration clauses and contracts generally.” *Id.* Those other principles included: the parties’ likely expectations about allocations of responsibility; when the allocation of a matter to arbitration or the courts is uncertain, doubts are resolved in favor of arbitration; and, ambiguities in written agreements are to be construed against their drafters. Applying these principles, the Court concluded, “as a matter of state contract law, the parties’ arbitration provisions allocate the decision on the availability of class arbitration to the arbitrator, rather than reserving it for a court.” *Id.* at 248.

7. **Opt-Out Provisions**

Some employers have added opt out provisions to arbitration agreements, on the theory that an opportunity to opt out of arbitration will prevent a court from finding procedural unconscionability. The Ninth Circuit held that an arbitration agreement is not adhesive if there is an ability to opt out of it in *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002).

In the highly publicized Uber Technologies’ class action, the Honorable Edward M. Chen of the Northern District of California found that the right to opt out of the Uber Technologies arbitration agreement was illusory, rendering the arbitration agreements signed by the drivers adhesive. In rejecting this conclusion, the Ninth Circuit stated:

“The district court's conclusion that the right to opt out of the 2013 Agreement was illusory fares no better. ‘An illusory promise is one containing words ‘in promissory form that promise nothing’ and which ‘do not purport to put any limitation on the freedom of the alleged promisor.’ *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 912 (9th Cir. 2003) *(quoting 2 Corbin on Contracts 142 (rev. ed. 1995)). While we do not doubt that it was more burdensome to opt out of the arbitration provision by overnight delivery service than it would have been by e-mail, the contract bound Uber to accept opt-outs from those drivers who followed the procedure it set forth. There were some drivers who did opt out and whose opt-outs Uber recognized. Thus, the promise was not illusory. The fact that the opt-out provision was “buried in the agreement” does not change this analysis. *Mohamed*, 109 F.Supp.3d at 1205. As we noted in Ahmed, ‘one who signs a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument.’”
Two California published decisions have held that an arbitration agreement containing an opt-out provision can be procedurally unconscionable. *Gentry v. Superior Court*, 42 Cal. 4th 443, 470-72 (2007) and *Sanchez v. Western Pizza Enterprises, Inc.*, 172 Cal. App. 4th 154, 174-75 (2009). Both of these cases were abrogated on other grounds by *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 359-60 (2014).

8. Ability to Appeal Arbitration Decisions

To avoid the risk of decisions that do not apply applicable law or are one-sided, some employers have added rights of appeal in their arbitration agreements. The California Supreme Court found one such provision to be unconscionable in *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1073 (2003). The clause at issue provided that “[a]wards exceeding $50,000.00 shall include the arbitrator's written reasoned opinion and, at either party's written request within 20 days after issuance of the award, shall be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial.” Id. at 1070.

The right of review attached only if the arbitrator entered a large award in favor of the employee. The court noted that “in some respects appellate review is more favorable to the employer attempting to protect its interests. It is unlikely that an arbitrator who merely acts in an appellate capacity will increase an award against the employer, whereas a trial or arbitration de novo at least runs the risk that the employer would become liable for an even larger sum than that awarded in the initial arbitration.” Id. at 1074. Although the arbitral appeal provision was unconscionably one-sided and could not be enforced, the Court determined that it could be severed and the rest of the arbitration agreement enforced. Id. at 1075-76.

9. Arbitration Agreements Contained in Employee Handbooks

Arbitration agreements contained in employee handbooks have been both enforced and rejected by California appellate courts. An arbitration agreement that was attached as Appendix A to the Employee Handbook was found to be an enforceable agreement in *Harris v. TAP Worldwide, LLC*, 248 Cal. App. 4th 373 (2016). In that case, the Plaintiff had signed a written Acknowledgement of Receipt confirming receipt of TAP’s Alternative Dispute Resolution Agreement for current employees; and Employee Handbook. Id. at 377. In finding that there was an enforceable agreement to arbitrate, the court rejected the Plaintiff’s arguments that: (1) there was no valid arbitration agreement because he did not sign any such agreement; (2) the agreement was illusory because the Employee Handbook permitted TAP to change or rescind “any and all policies, practices, and benefit programs which are described in this [Employee] Handbook,” except for the “employment at-will” relationship; and (3) any arbitration agreement was unconscionable and unfairly one-sided because the agreement could be rewritten by TAP Worldwide, LLC without notice. Id. at 379-90. The court noted that the obligation to arbitrate was printed in bold underscored letters and, upon commencing employment, the employee was deemed to have consented to the agreement to arbitrate by virtue of acceptance of the position. Id at. 383-84.

In contrast, an arbitration provision in an Employee Handbook was held not to create a mutual agreement to arbitrate in *Esparza v. Sand & Sea, Inc.*, 2 Cal. App. 5th 781 (2016). The Court
pointed out the following facts in support of its conclusion: (1) the handbook indicated that it was not intended to establish an agreement; (2) the acknowledgement form did not state that the employee agreed to abide by the arbitration agreement within the handbook. Instead, the policy acknowledgement stated that the handbook “is designed to provide information to employees ... regarding policies, practices and procedures that apply to them including our Arbitration Agreement; (3) the handbook language required the employee to read it within a week, thereby acknowledging that the employee had not read the handbook and therefore had not read the arbitration provision, before signing the acknowledgement; and (4) the acknowledgement gave the employee no notice that it created an agreement binding the employee to any of the handbook provisions after her employment ended. *Id.* at 790-92.

10. **Incorporation of External Documents**

Many arbitration agreements do not contain all of the arbitration rules and procedures but, instead, make reference to external rules that will govern the arbitration. Several California appellate decisions have held that the failure to provide a copy of the arbitration rules to which the employee would be bound supported a finding of procedural unconscionability. See, *e.g.*, *Trivedi v. Curexo Technology Corp.*, 189 Cal. App. 4th 387, 393 (2010) and cases cited therein.

Recently, the California Supreme Court held that an arbitration agreement incorporated the American Arbitration Association rules, but those rules were not provided. *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237 (2016). In so doing, the Court noted that “Baltazar’s argument accordingly might have force if her unconscionability challenge concerned some element of the AAA rules of which she had been unaware when she signed the arbitration agreement. But her challenge to the enforcement of the agreement has nothing to do with the AAA rules; her challenge concerns only matters that were clearly delineated in the agreement she signed. *Forever 21*’s failure to attach the AAA rules therefore does not affect our consideration of Baltazar’s claims of substantive unconscionability.” *Id.* at 1246. The Court did not overrule *Trivedi* or other cases that found failure to provide the rules unconscionable, but explained that “[t]hese cases thus stand for the proposition that courts will more closely scrutinize the substantive unconscionability of terms that were ‘artfully hidden’ by the simple expedient of incorporating them by reference rather than including them in or attaching them to the arbitration agreement. *Id.* at 1246.

11. **Legislative Efforts**

California Code of Civil Procedure Section 1282.5 will become effective on January 1, 2017. Under Section 1282.5, a party to an arbitration has the right to have a certified shorthand reporter transcribe any deposition, proceeding, or hearing as the official record. A party requesting a certified shorthand reporter is required to make his or her request in a demand, response, answer, or counterclaim related to the arbitration, or at a pre-hearing scheduling conference at which a deposition, proceeding, or hearing is being calendared. The party requesting the transcript bears the expense of the certified shorthand reporter, except as specified in a consumer arbitration.

In 2015, the California Legislature passed Assembly Bill 465, which would have prohibited the use of mandatory arbitration agreements as a condition of employment. In vetoing the Bill, Governor Brown stated:
“California courts have addressed the issue of unfairness by insisting that employment arbitration agreements must include numerous protections to be enforceable, including neutrality of the arbitrator, adequate discovery, no limitation on damages or remedies, a written decision that permits some judicial review, and limitations on the costs of arbitration. See, e.g., Armendariz v. Foundation Health Psychcare Services, Inc. 24 Cal. 4th 83 (2000). If abuses remain, they should be specified and solved by targeted legislation, not a blanket prohibition.

In addition, a blanket ban on mandatory arbitration agreements is a far-reaching approach that has been consistently struck down in other states as violating the Federal Arbitration Act ("FAA"). Recent decisions by both the California and United States Supreme Courts have found that state policies which unduly impede arbitration are invalid. Indeed, the U.S. Supreme Court is currently considering two more cases arising out of California courts involving preemption of state arbitration policies under the FAA. Before enacting a law as broad as this, and one that will surely result in years of costly litigation and legal uncertainty, I would prefer to see the outcome of those cases.”

Senate Bill 1078 sought to impose additional disclosures by arbitrators in civil proceedings, including disclosure, in a consumer arbitration case, of any solicitation made within the last 2 years by, or at the direction of, a private arbitration company to a party or lawyer for a party. The bill would have prohibited the solicitation of a party or lawyer for a party during the pendency of the arbitration. The bill would also have prohibited an arbitrator, from the time of appointment until the conclusion of the arbitration, from entertaining or accepting any offers of employment or offers of new professional relationships. In vetoing the Bill, Governor Brown stated:

“Arbitrators in California are already subject to stringent disclosure requirements under existing state law and Judicial Council standards. I am reluctant to add additional disclosure rules and further prohibitions without evidence of a problem. Further, the existing Judicial Council procedure for amending arbitrator ethics standards is a deliberative and public process that can more appropriately consider additional requirements.”