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The Ninth Circuit Rules Employer's Arbitration Agreement Unenforceable Under California Law And Cautions Employers To Ensure Fairness In Arbitration Procedures

Today, the Ninth Circuit, in *Chavarria v. Ralphs Grocery Company* (Case No. 11-56673), issued a decision affirming the denial of Ralphs Grocery Company's motion to compel arbitration in an action by an employee asserting claims under California labor law on behalf of the plaintiff and a proposed class of other grocery employees.

The Ninth Circuit held that Ralphs' arbitration policy—to which all employees acceded upon submitting applications for employment with Ralphs—was unconscionable under California law and therefore unenforceable.

Applying California's general principle of contract unconscionability, the Ninth Circuit held that Ralphs' arbitration policy was both procedurally and substantively unconscionable.

- The court ruled the policy procedurally unconscionable because it was presented to employees on a "take it or leave it" basis with no opportunity to negotiate the terms and bound employees on submission of their employment applications with no requirement that they agree to the arbitration agreement's terms.

- The policy was also substantively unconscionable, the court held, because, among other things, the policy's arbitrator-selection provision favored Ralphs and the arbitrator's fees were to be apportioned between Ralphs and the employee at the very outset of proceedings and regardless of the merits of the employee's claims.

The Ninth Circuit rejected Ralphs' argument that the Federal Arbitration Act (FAA) and Supreme Court authority interpreting the FAA preempted the application of California's unconscionability doctrine in this context. The Ninth Circuit explained that the Supreme Court's recent decision in *American Express Corp. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)—which held that a class waiver provision did not foreclose the plaintiffs' effective vindication of their rights—expressly recognized that the result might be different if an arbitration provision requires a plaintiff to pay "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." Id. at 2310-11. The Ninth Circuit decided that the provision for imposing non-recoverable administrative and filing costs on employees in "Ralphs' arbitration policy presents exactly that situation."

Additionally, in considering whether the FAA preempted state law, the Ninth Circuit examined the "nuance" presented when determining whether a generally applicable state law (such as California's principle of

contract unconscionability) is unfavorable to arbitration. The court ruled that "[t]he Supreme Court's holding that the FAA preempts state laws having a 'disproportionate impact' on arbitration cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration." According to the Ninth Circuit, a state law must be able to "require some level of fairness in an arbitration agreement" and emphasized that "federal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power."

The Ninth Circuit's holding cautions employers to examine carefully the terms of their arbitration agreements with employees to ensure their compliance with state-law unconscionability principles and to confirm that their arbitration policies are not one-sided but provide employees with the ability to pursue their claims in arbitration.

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