

# Another Round of Restrictions for Employment Arbitration Agreements

By Scott A. Freedman

On Feb. 24, in *Sonic-Calabasas A, Inc. v Frank Moreno*, the state Supreme Court declared that mandatory employment arbitration provisions, which waive an employee's right to a "Berman" hearing, are contrary to public policy and unconscionable. Under California Labor Code Section 98, a "Berman" hearing is when an employee with a claim for unpaid wages seeks his right to an informal hearing in front of the Labor Commissioner. The Court further stated that such a ruling is not pre-empted by the Federal Arbitration Act.

Frank Moreno was a former employee of Sonic-Calabasas A Inc., which owns and operates an automobile dealership. As a condition of his employment with Sonic, Moreno signed a document entitled "Applicant's Statement & Agreement." The agreement set forth a number of conditions of employment, including consent to drug testing and permission to contact former employers, as well as a provision making the employment at will. Critically for this case, the agreement contained a paragraph governing dispute resolution. The agreement required both parties to submit their employment disputes to "binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act." The agreement applied to "all disputes that may arise out of the employment context...that either [party] may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum[,]...whether based on tort, contract, statutory, or equitable law, or otherwise." The agreement specified that it did not apply to claims brought under the National Labor Relations Act or the California Workers' Compensation Act, or to claims before the Employment Development Department. Furthermore, the agreement provided that the employee was not prevented from "filing and pursuing administrative proceedings only before the California Department of Fair Employment and Housing or the U.S. Equal Opportunity Commission."

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At some point, Moreno left his position with Sonic. In December 2006, Moreno filed an administrative wage claim with the Labor Commissioner for unpaid vacation pay pursuant to Labor Code Section 98.

In February 2007, Sonic petitioned the Superior Court to compel arbitration of the wage claim and dismiss the pending administrative action. (Code of Civil Procedure Section 1281.2.) Sonic argued that Moreno waived his right to a Berman hearing in the arbitration agreement. The Labor Commissioner intervened on Moreno's behalf, and arguing that the arbitration agreement, properly construed, did not preclude Moreno from filing an administrative wage claim under Section 98. The Labor Commissioner also claimed that resort to a Berman hearing was compatible with the arbitration agreement because the hearing could be followed by arbitration in lieu of a de novo appeal to the Superior Court, which is provided in Section 98.2 (a). The Labor Commissioner contended that a contrary interpretation of the arbitration agreement to waive a Berman hearing would violate public policy, relying on the state Supreme Court's decision regarding mandatory employment arbitration agreements in *Armendariz v. Foundation Health Psychcare Services Inc.* (2000) 24 Cal.4th 83.

The Superior Court denied the petition to compel arbitration as premature. Citing *Armendariz*, it stated that, as a matter of "basic public policy...until there has been the preliminary non-binding hearing and decision by the Labor Commissioner, the arbitration provisions of the employment contract are unenforceable, and any petition to compel arbitration is premature and must be denied." Sonic appealed from the order of denial. The 2nd District Court of Appeal, however, concluded that Moreno had waived his right to a Berman proceeding and that enforcement was not barred by *Armendariz* or *Gentry*.

The state Supreme Court reversed, finding the provision to be contrary to public policy and unconscionable. As the Court explained, "[i]f an employer fails to pay wages in the amount, time or manner required by contract or by statute, the employee has two principal options. The employee may seek judicial relief by filing an ordinary civil action against the employer...[o]r the employee may seek administrative relief by filing a wage claim with the commissioner..."

In the present case, however, the Supreme Court stated that the question is not whether the absence of statutory protections afforded by the Berman hearing and the potential post-Berman protections would significantly impair Moreno's ability to vindicate his unwaivable right to vacation pay in arbitration. Rather, the question is whether the employee's statutory right to seek a Berman hearing, with all the possible protections that follow from it, is itself an unwaivable right that an employee cannot be compelled to relinquish as a condition of employment. The Supreme Court concluded that it was.

The Supreme Court went on to state, "[a]lthough the statutory protections that the Berman hearing and the posthearing procedures afford employees were added piecemeal over a number of years, their common purpose is evident: Given the dependence of the average worker on prompt payment of wages, the Legislature has devised the Berman hearing and posthearing process as a means of affording an employee with a meritorious wage claim certain advantages, chiefly designed to reduce the costs and risks of pursuing a wage claim, recognizing that such costs and risks could prevent a theoretical right from becoming a reality. These procedures, including the employer undertaking and the one-way fee provision, also deter employers from unjustifiably prolonging a wage dispute by filing an unmeritorious appeal. This statutory regime therefore furthers the important and long-recognized public purpose of ensuring that workers are paid wages owed. The public benefit of the Berman procedures, therefore, is not merely incidental to the legislation's primary purpose but in fact central to that purpose. Nor can there be any doubt that permitting employers to require employees, as a condition of employment, to waive their right to a Berman hearing would seriously undermine the efficacy of the Berman hearing statutes and hence thwart the public purpose behind the statutes."

The Supreme Court therefore concluded the Berman waiver at issue was contrary to public policy. The Court's conclusion was the same when analyzed in terms of unconscionability, stating that "the arbitration agreement was a contract of adhesion indisputably imposed as a condition of employment."

The Court also held that the FAA did not pre-empt its finding that a predispute waiver of a Berman hearing in an arbitration agreement was contrary to public policy and unconscionable.

The decision makes clear that employers with similar arbitration agreements should not petition the court to compel arbitration of similar claims for unpaid wages brought before the Labor Commissioner until after a decision has been made by the Labor Board. An employee has the right to a Berman hearing despite the language in the arbitration agreement, and such arbitration agreements may be enforced after a Berman hearing has taken place.



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