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California High Court Places More Limitations on Arbitration Agreements, *SHRM, ft. Gabriel Rubin*

Gabriel Neil Rubin, attorney at Kaufman Dolowich and Voluck LLP in San Francisco, was quoted in a *SHRM article written by Lisa Nagele-Piazza on May 2, 2017.*

She wrote:

The California Supreme Court recently held that an arbitration agreement can't be used to waive the right to seek public injunctive relief under state law. This means employers should carefully review their arbitration agreements for compliance, especially since California law is sometimes at odds with the federal policy favoring arbitration.

The state high court's ruling in McGill v. Citibank, N.A., No. S224086, Cal. (April 6), underscores the trend in California to resist the U.S. Supreme Court's favorable view of resolving certain disputes through arbitration instead of in court. McGill involves a consumer arbitration agreement, but the case has important takeaways for employers.

Public Injunctive Relief

The California Supreme Court said public injunctive relief is meant to prohibit activities that "threaten future injury to the general public."

Through this type of relief, plaintiffs can ask the court to prevent a defendant from engaging in allegedly unlawful practice in the future, explained Gabriel Rubin, an attorney with Kaufman Dolowich & Voluck in San Francisco.

This means that—in addition to awarding monetary damages—the court can order a business to no longer pay employees at rates below the minimum wage or to cease engaging in other improper wage practices, for example.

More Limitations

"The FAA reigns supreme and pre-empts a lot of what the states can do," Rubin said. The U.S. Supreme Court has expanded the scope of enforceability for arbitration agreements, and California tries to find exceptions, he added.

The nation's high court has said that arbitration agreements should be on equal footing as any other contract, Rubin explained. Thus, in McGill, the state Supreme Court reasoned that it was applying principles of state contract law that would govern any contract—not just an arbitration agreement.

This isn't the first time the California Supreme Court has limited the reach of arbitration agreements under state law.

Employer Takeaways

Decisions like Iskanian and McGill affect how employers should structure their arbitration agreements, Rubin said. Employers can't have sweeping agreements in California.

Employers may also want to include a severability clause in their arbitration agreement, Rubin noted. This would state that if one portion of the agreement is found to be unenforceable or illegal, it can be severed, and the other provisions would remain in full force and effect.