

STIMMEL, STIMMEL & SMITH QUARTERLY NEWSLETTER



Volume 1

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What's New

Happy New Years. We hope that you are well. Some people might have noticed the changes under foot at our offices. Perhaps the biggest news is our new location. We are now located on the 12th Floor of the Alexander Building on 155 Montgomery. It is about two blocks up from our old site. Please feel free to drop by and see the new office.

We are starting a quarterly newsletter. It can be delivered via email or postal service; if you have a preference please let us know by emailing Nila at nlavanaway@stimmel-law.com. In other news we been posting new information on the website at www.stimmel-law.com.

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JUSTICE REVEALED

ENFORCEABILITY OF MANDATORY ARBITRATION OF EMPLOYMENT DISPUTES

Historically the California courts have been reluctant to enforce mandatory arbitration agreements in the employment setting. The employment context has been one of the few exceptions to the otherwise generally stated policy of the courts to give every intendment of validity to arbitration agreements. However, given the unequal bargaining power of most prospective employees, the courts have been unwilling to enforce arbitration agreements in which the employee is required to waive substantial rights as a condition of employment. The California Supreme Court in the recent decision of Armendariz v. Foundation Health Psychcare Servs., Inc., for the first time offers practical guidance to California employers who wish to draft enforceable agreements for the arbitration of employment disputes. The Armendariz Court laid out the minimum requirements for compelling arbitration of employment discrimination claims under the California Fair Employment and Housing Act (FEHA).

1. Neutral Arbitrator. The dispute must be submitted to a neutral arbitrator. The agreement may not, for instance, require that the dispute be submitted to an official of the employer company for decision. An agreement which requires the dispute to be submitted to a professional alternative dispute provider, such as the American Arbitration Association should satisfy this requirement.

2. Provide for Adequate Discovery. The employee must be given access to discovery methods, such as obtaining relevant company documents and deposing company personnel with knowledge relating to the dispute. The court implied that incorporating the California Arbitration Act discovery provisions in the agreement would suffice.

3. Allow the employee all FEHA Remedies. The arbitration agreement cannot limit the damages otherwise recoverable under FEHA, including back pay, front pay, general damages, punitive damages, reinstatement and attorneys fees.

4. Written Award by the Arbitrator. The agreement must require the award of the Arbitrator be in writing.

5. Employer Pays Fees and Costs of Arbitration Because arbitration can be more costly for a complainant than a lawsuit in court, the employer must bear the costs and fees unique to arbitration.

In addition to these specific requirements, an agreement for the mandatory arbitration of employment disputes must comply with general principles of conscionability, that is the agreement cannot be so unfair or one-sided that it shocks the conscience. Although, the court did not provide clear test for unconscionability, it did provide some useful guidance for employers. The first step is to determine whether the agreement is an Adhesion Agreement, that is an agreement imposed by the party with superior bargaining power on a take it or leave it basis. A fully negotiated agreement with an executive employee would likely not be regarded as an adhesion contract whereas a standardized agreement with rank and file employees would likely be viewed as an adhesion contract. With regard to adhesion type contracts, the court did not offer much in the way of guidelines other than to state that such contracts must contain a modicum of bilaterality. The only thing clear from the Armendariz decision is that an agreement which requires the employee to arbitrate any dispute with the employer, but allows the employer to pursue a dispute with the employee in court lacks the necessary bilaterality.

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The conscionability test will no doubt be fleshed out by future court decisions which will be followed by our office.

Before deciding to implement binding arbitration agreements with its employees, the employer should carefully consider the advantages and disadvantages of doing so. The advantages of arbitration to the employer are that resolution is obtained much more quickly, at relatively less cost, in a less public forum and the employer avoids the risk of the runaway jury verdicts one has read about in the newspapers. The potential disadvantages are the lack of a summary disposition process which leads to a full arbitration of a claim which may be legally merit less on its face and the lack of a meaningful right of appeal. The bases on which an arbitration award may be reviewed are very limited.

If you are interested in designing an arbitration program for your company, please contact our office to discuss whether such a program is right for your company and to allow us to assist you in drafting a written agreement and implementing a program which will be fair, effective and enforceable.

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periods, there was sufficient universal support for a longer notice period. Further, the concern that the bill would indirectly define what constitutes an acceptable rent increase was overcome by the free market and its role in preserving affordable housing.

2. Dumpster Diving Law: A new consumer law also has an affect on landlords and tenants. The new law protects consumers from identity theft by requiring that business owners, including landlords, dispose of customer or tenant records by shredding, erasing or otherwise modifying the personal information in those records to make them unreadable or indecipherable.

It has been estimated that victims of identity theft spend an average of 175 hours and \$808 (not including attorneys fees) to correct their problems. Therefore, we recommend that tenants always ask landlords how their personal data is kept and request careful control of such data. For the landlords, we recommend that you institute careful business practices to prevent a tenant's personal information from ending up in the garbage can or other location that can be accessed by a willing thief.

For more information on either of these laws, please contact our offices.

Joanne Reming is an associate with the firm and she handles construction, real estate and domestic and international business litigation and estate planning/probate matters. She can be reached via email at jreming@stimmel-law.com

SPOTLIGHT

In the spotlight this quarter are several new laws that will affect all of us in the rental housing market B whether you are landlord or tenant. As of January 1, 2001, the following two laws went into effect:

1. 60-day Notice of Rent Increase: Under this law, a landlord must provide 60 days written notice prior to raising rent over ten (10%) percent. The 60 days notice period will also be triggered if the rent is raised multiple times within a twelve-month period and cumulatively those increases exceed 10% of the rent. If the rent increase is less than 10% and will be cumulatively less than 10% for the year, the landlord is still entitled to provide only 30 days notice.

If you are a landlord, please remember that a notice can be delivered by personal service (i.e., delivered personally by a process server or other qualified person to the hands of the tenant or someone able to accept service on their behalf) or by mail service. If mail served, you must add 5 days to the notice period.

While this bill was briefly contested by landlords due to the concern that it might be confusing to have two separate notice

“I was never ruined but twice -- once when I lost a lawsuit, and once when I gained one.”

-- Voltaire



“A countryman between two lawyers is like a fish between two cats.”

-- Benjamin Franklin.

WATCHOUT FOR

END OF YEAR CORPORATE LEGALITIES

For most of our clients, the end of the year for their corporation may have significant tax implications. We all know that corporations are supposed to have annual shareholder and board of director meetings (though they can have as many as they need) and we all know that corporate tax is payable based on annual earnings with quarterly payments, be it fiscal or calendar year. Tax planning requires in most cases appropriate resolutions of the board of directors or shareholders and absent those appropriate resolutions, the corporation is legally not taking the action that accountants (or good sense) normally require. Yet, too often the corporate officers wait until it is too late to have the required meetings to pass the required resolutions, often to their detriment.

For example, bonuses to employees, which can reduce the corporate income tax (since they are deductible), are a typical step that should be taken prior to year-end. If the employee is a key employee or owner, board resolutions are recommended.

But let us assume that a cash flow issue requires the corporation to spend its available cash on things other than that bonus, but the CPA recommends a bonus to avoid significant taxes on earnings of the company from past months. The solution is to have the employee either loan money to the company to fund his/her own bonus and to pass a resolution of the board committing the company to the bonus this year. The loan may be repaid as soon as the cash flow eases up and the tax benefit is achieved.

Purchases or leases of equipment available for deduction, contributions to various types of pension or health plans, declaration of bonuses all these are things usually best done before the end of the tax year and many of which require board resolutions.

THE KEY: Schedule your meeting of the Board and Shareholders at least six weeks before the end of the year, have a meeting with the corporate CPA at least two weeks before that meeting, and mark in your calendar the deadline for making all such decisions well before the end of the year so that the resolutions can be passed and placed in the minute book as required.

If you are a LLC, your operating agreement will normally provide for essentially the same procedure and just because there is a tax pass through (as with a Sub S corporation) does not mean that such planning is not necessary since the only difference is whether the owners, individually, or the corporate entity itself will enjoy the possible tax benefits.

Also remember to check those employment, lease, and equipment lease contracts that often have year-end expiration or payment Cost of Living clauses to determine if your business needs to cancel, budget, or elect some action predicated on those provisions.

Again, if you are an entity based on calendar year, plan for an October or November meeting of the Board and Shareholders and if you are on a fiscal year, give yourself two or more months to plan accordingly.

Check our website for form minutes, resolutions and notices of meetings.

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F.Y.I.

The H-1B United States Business Visa

An H-1B visa permits a foreign national to live and work in the United States for a maximum of two, three-year terms. Additionally, H-1B visa holders can bring immediate family members to the U.S. However, family members who want to work in the U.S. must separately qualify for a work visa.

A. What's Behind U.S. Immigration Policy?

While the personal stakes to a foreign national can be great (i.e., higher wages and more freedom), the actual H-1B petitioner is the U.S. employer. Why? Immigration policy is almost entirely economy driven, and so, as the economy goes so does our immigration policy. For example, the U.S. normally permits 65,000 H-1B visas to be issued. However, a booming economy has caused Congress to repeatedly increase the number of visas. Recently, the number of H-1B visas was essentially increased from 65,000, to 195,000 for 2001-2003. This increase will lapse after 2003, but if the economy is strong, Congress may again increase the number of visas. If the economy is in recession, Congress is less likely to intervene. In addition, H-1B visas are limited to jobs which have insufficient American's to meet demand. In terms of today's economy, qualifying jobs are predominantly high tech, including electrical engineers and software developers.

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B. The H-1B Visa Petition Process.

The application process is supposed to take eight to twelve weeks, however, processing may be delayed by several months due to current backlogs. Below is a brief, and not exhaustive, list of the mutual responsibilities of the employer and foreign national in pursuing an H-1B visa.

The employer must: (1) attest that it has offered the foreign national a job and that the pay will be at least the prevailing wage for that type of job; (2) file appropriate forms; and (3) confirm that the job offered meets certain criteria, including that a bachelors degree or higher is a minimum requirement for the position.

Additionally, the foreign national must qualify for H-1B status by confirming that: (1) he/she is going to perform a specialty occupation with a college degree; and (2) he/she has the correct background to qualify for the job offered. In addition, to these general requirements, a foreign national must provide supporting documentation, including translated college diplomas and college transcripts.

C. Conclusion.

An H-1B visa may be a very useful way to secure a talented and motivated employee, while at the same time assisting him/her to improve their quality of life. The combination of the foreign national's qualifications and their private motivations may be a tremendous addition. However, be aware that the process can be delayed because of bureaucratic snafus and that as the employer, you bear some financial responsibility. Finally, please note that this is merely a snapshot of the H-1B visa petition process, and that this procedure is significantly more complex than can be discussed in the space available.

Please seek legal advice prior to any application.

Eric Sternberger joined the firm as an associate in August of 2000. He specializes in Corporate, International Business, and Immigration. He can be reached via email at esternberger@stimmel-law.com

“Your Honor, in the first place, as they say, I am going to say it. I was going to say what you said and the reason I am going to say it, is not because you just said it. If you had not said it, I was going to say it first.”

-- A lawyer speaking to a judge

DISCLAIMER: *These Articles are to give the reader a general description of certain areas of the law. Legal advice is necessary to apply these legal concepts to your particular situation. **The Reader should obtain competent legal advice before relying on the Articles.***

If you have questions please feel free to contact our office at

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