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PERSPECTIVE

Can employees waive Berman hearings? Jury is still out

By David Krol

If a California employer fails to pay wages, an employee may not want to file a lawsuit and instead seek administrative relief by filing a wage claim with the California labor commissioner. An employee who files such a claim is entitled to a "Berman" hearing, which is conducted by a deputy labor commissioner.

For employees, a Berman hearing is an attractive alternative to litigation. The hearing is informal, so the rules of evidence don't apply. That can help employees who represent themselves at the hearings — and the presiding deputy labor commissioners. Indeed, those commissioners are required to interpret and apply state and related federal law, but don't need college degrees, let alone a law degree or any legal training. And employers who think the deck is stacked against them may be right: A 2012 analysis determined that commissioners routinely find in employees' favor at Berman hearings.

There are other advantages to the Berman hearing procedure. If the employee prevails, the employer must post a bond in the amount of the award. Any "appeal" will be heard in the superior court, but the employee (and the employer) can introduce entirely new evidence. The labor commissioner also represents indigent employees in court for free. If the employer loses the appeal, the employer must pay the employee's attorney fees, but the employee is only liable for the employer's attorney fees if the court awards the employee zero.

Because Berman hearings favor employees, employers may justifiably want prospective employees to waive Berman hearing rights in employment arbitration agreements. It's not altogether clear if those waivers are enforceable, however.

In 2011, the state Supreme Court held that the right to a Berman hearing can never be waived in *Sonic Calabasas-A, Inc. v. Moreno (Sonic I)*. Several months later, however, the U.S. Supreme Court vacated and remanded *Sonic I* in light of *AT&T Mobility LLC v. Concepcion*], which held that California law barring enforcement of class action waivers in employment agreements was unenforceable under the Federal Arbitration Act (FAA), because California law conflicted with the FAA's goal of facilitating an informal, streamlined arbitration proceeding.

In revisiting *Sonic I*, the state Supreme Court overruled it, now holding that the FAA preempts California state law which *categorically* prohibits Berman hearing waivers in *Sonic Calabasas-A v. Moreno (Sonic II)*. Thus, under *Sonic II*, a California employee can waive the right to a Berman hearing. Unfortunately, that isn't the end of the matter, because *Sonic II* seemingly created an exception: The waiver will be unenforceable if the arbitration agreement is found to be "unconscionable" as a whole, which will occur if "the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable." In other words, a Berman hearing waiver must be taken into account in deciding unconscionability.

It is difficult to reconcile *Sonic II*'s central holding with its unconscionability analysis. On the one hand, it seems a Berman hearing waiver would always be unconscionable, because the hearing would necessarily be "inaccessible" in a standard employment arbitration. However, categorical unenforceability would violate both *Concepcion* and *Sonic II* — and in Concepcion, the U.S. Supreme Court reinstated a class-action waiver which the state Supreme Court had invalidated on unconscionability grounds. If, on the other hand, a Berman hearing can be waived under Concepcion and Sonic II, then that waiver shouldn't be relevant in deciding whether the arbitration agreement is unconscionable as a whole.

For now, however, the state Supreme Court isn't backing down. It recently characterized *Sonic II* as "establish[ing] an unconscionability rule that considers whether arbitration is an effective dispute mechanism for wage claimants without regard to any advantage inherent to a procedural device (a Berman hearing) that interferes with fundamental attributes of arbitration." It is therefore uncertain whether or not a Berman hearing waiver will be enforceable.

In a recent published decision, the 4th District Court of Appeal was able to duck that issue, because the employment agreement excluded arbitration of "any matter within the jurisdiction of the California labor commissioner." But the Court of Appeal did note that, under *Sonic II*, "[a]n employee's right to seek a Berman hearing can be waived as a condition of employment," without mentioning unconscionability. *Rebolledo v. Tilly's Inc.*, 2014 DJDAR 10486 (Aug. 6, 2014).

In July, in an unpublished opinion issued after a Berman hearing occurred and the employee had received a substantial award, the 1st District Court of Appeal granted an employer's petition to compel arbitration, thus necessarily determining that a Berman hearing could be waived: *Fremont Automobile Dealership v. Kim*, A137266 (July 23, 2014). That decision didn't mention unconscionability, either.

Although unpublished, that decision may provide some guidance as to whether courts will favor validity over unconscionability in analyzing Berman hearing waivers. The state Supreme Court — and the U.S. Supreme Court — may ultimately have to re-visit the issue, however.

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