Don't Delay! File Your Motion to Compel Arbitration Today!

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In the recent case of *Fleming Distribution Co. v. Younan* (May 15, 2020) Appellate No. A157038, Sonoma County Super. Ct. No. SCV-263702, the appellate court held that an employer waived its right to compel arbitration of a dispute over unpaid wages by delaying filing a motion to compel arbitration and participating in an administrative proceeding before the Labor Commissioner.

In June 2017, Alfons Younan filed a complaint with the Labor Commissioner's Office, seeking his unpaid commissions, plus penalties and interest. In August 2017, Fleming Distribution, Co. ("Fleming") sent a letter to the Labor Commissioner asserting that the complaint should be dismissed because Younan agreed to arbitrate his claims. If the Labor Commissioner did not dismiss the complaint, Fleming stated it would file a motion to compel arbitration in the superior court. When the Labor Commissioner did not dismiss the complaint, Fleming instead filed an answer, a motion to dismiss, and participated in the Labor Commissioner's proceedings.

In December 2018, the Labor Commissioner awarded Younan $22,000 in commissions and $5,412.60 in in penalties and interest. Fleming filed a notice of appeal in the superior court and a new trial was scheduled for March 2019. In February 2019, Fleming filed a motion to compel arbitration. The motion, however, was denied because the trial court found Fleming had waived its right to arbitrate Younan's claims.

On appeal, the Court determined the facts supported the ruling that Fleming waived its right to arbitrate. The Court looked to a number of factors to determine if a party has waived its right to arbitrate. For example, among the factors considered are the substantial use of "litigation machinery," length of delay, taking advantage of judicial discovery procedures not available in arbitration, amount of preparation for trial/hearing, and whether the delay misleads the opposing party. *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1204. Simply participating in some phase of litigation is unlikely to waive the right to arbitrate, but courts look at the party's actions as a whole in determining whether conduct is inconsistent with an intent to arbitrate. *Id*.

Upholding the trial court's ruling, the Court of Appeal identified that Fleming waited 20 months from the filing of the complaint to file its motion to compel arbitration. While Fleming stated its position that Younan's claims ought to be arbitrated on several occasions, Fleming participated in the hearing with the Labor Commissioner. The Court of Appeal noted the Labor Commissioner hearing was conducted at taxpayer expense, and Fleming only tried to compel arbitration after an adverse result.

Fleming argued that it was nonetheless entitled to compel arbitration because the lower court did not establish that Younan had been prejudiced. The Court found delay itself could support a finding of prejudice. Additionally, while Younan was unrepresented in the hearing with the Labor Commissioner, he thereafter retained counsel after Fleming's appeal, incurring attorney's fees and costs. The Court also noted that Younan was forced to wait several years to collect his wages and any benefits arbitration provides of a speedier resolution had been lost.

This case has several takeaways for employers: When utilizing arbitration agreements, do not delay in asserting that right, even when an employee asserts a claim in a forum other than the courts. The lower court and appellate court both noted that Fleming participated in the hearing before the Labor Commissioner and did not file a motion to compel arbitration for 20 months. Courts are more likely to find waiver where an employer has delayed bringing a motion to compel to "see how it goes" in one forum, before moving the dispute to arbitration. Further, arbitration rights must be asserted even where an employee is pursuing their rights in front of the Labor Commissioner. Employers who receive a notice of a complaint with the Labor Commissioner should immediately consult with their counsel to determine if the claims can be compelled to arbitration.

Yet, perhaps the most important lesson for employers is that arbitration agreements should be reviewed for clarity and to make sure they are compliant with the current state of the law. One issue raised in the trial court that was not addressed on appeal was that Fleming's arbitration agreement "explicitly carve[d] out [] petitions for judicial review of a decision issued after an administrative hearing." *Fleming*, at p. 5. The lower court determined in this procedural context there was no agreement to arbitrate the dispute. Hypothetically, if Fleming had not waived its right to arbitrate, it made compelling arbitration more difficult with an ambiguous agreement.

In sum, employers who wish to use arbitration as the forum to resolve employment disputes must be careful to craft clear arbitration agreements and timely enforce them. Current arbitration agreements should be reviewed and updated by counsel to make sure they are clear and enforceable.

A copy of the opinion can be found here.

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