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### **Ninth Circuit Curtails Enforceability of Mandatory Employment Arbitration Agreements**

On May 13, 2003 the Ninth Circuit Court of Appeals in *Ingle v. Circuit City Stores, Inc.* issued an important decision regarding the enforceability of employment arbitration agreements. Most notably, the Ninth Circuit held that mandatory employment arbitration agreements are presumptively unconscionable.

The circumstances giving rise to the case were commonplace. Prior to beginning her employment at Circuit City, Ingle was required to sign an agreement to resolve all employment-related disputes through arbitration. About two years into her employment, Ingle filed an action in federal court against Circuit City alleging sexual harassment, sex discrimination, and disability discrimination under the California Fair Employment and Housing Act (FEHA). She also alleged claims of sex discrimination and retaliation under Title VII of the Federal Civil Rights Act. Circuit City moved to compel arbitration of the disputes pursuant to its arbitration agreement with Ingle, but the District Court and later the Ninth Circuit denied the motion, concluding the arbitration agreement was unenforceable.

More specifically, the Ninth Circuit concluded the arbitration agreement was procedurally unconscionable because:

1. Circuit City had greater bargaining power.
2. Circuit City would not even consider applicants who did not sign the arbitration agreement.
3. Ingle had no meaningful opportunity to negotiate or opt out of the arbitration agreement.

The court further concluded that the arbitration agreement was substantively unconscionable because:

1. The possibility of an employer asserting an employment claim against an employee is so remote that mandatory employment arbitration agreements are, for practical purposes, unfairly one-sided. Unless the employer can prove that the arbitration

agreement has a bilateral effect on both the employer and employee, the Ninth Circuit held the agreements are presumptively substantively unconscionable.

2. The agreement required employees to file for arbitration within one year from the date the employee should have known of facts giving rise to a claim, which deprived employees of more liberal rights under California law to bring otherwise time-barred claims under a continuing violation theory.

3. The provision directing the arbitrator not to consolidate claims of different employees into one proceeding and generally prohibiting an arbitration class action deprived employees of a procedural benefit and was "manifestly and shockingly one-sided." (However, the *Ingle* decision appears to conflict with the recent California appellate court decision, *Discover Bank v. Superior Court of L.A. County* (2003) 105 Cal.App.4th 326 on this issue.)

4. The agreement required employees to pay a \$75 filing fee to Circuit City, not the arbitration service, and there was no exception for indigent persons as permitted under federal law.

5. The agreement stated an employee could pay half of the arbitration costs, even if victorious, but Circuit City could recoup all of its costs if it prevailed.

6. The agreement improperly narrowed federal statutory remedies, including limiting the amount of total recoverable damages, curtailing an employee's front pay award to only two years' salary, and limiting punitive damages to the greater of \$5,000 or the total of front and back pay awarded.

7. Lastly, Circuit City had unilateral power to amend or terminate the arbitration agreement and the employees had no meaningful opportunity to change or negotiate the terms of the agreement.

Because the Ninth Circuit continues to scrutinize mandatory employment arbitration agreements, employers should review their agreements to ensure their enforceability under applicable state and federal law.

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