



SB 707 (Wieckowski and Hertzberg) Forced Arbitration Accountability Act



Summary

This bill would provide individuals who have been forced to submit to arbitration to resolve an employment or consumer dispute with procedural options and remedies when a company stalls or obstructs the arbitration proceeding by refusing to pay the required fees.

This bill would also require arbitration companies to report the same kind of demographic information about their arbitrators that our judiciary is required to report about judges (including gender, race and ethnicity).

Background

Mandatory arbitration provisions have become an ever-growing aspect of consumer transactions and employment relationships. Over half of America's workforce has been forced to sign mandatory arbitration agreements as a condition of employment. Under these terms, consumers and workers whose rights have been violated cannot pursue their claims in court, and instead must submit their claims in an arbitration proceeding that overwhelmingly favors businesses and employers. With workers and consumers barred from court, businesses are able to strategically withhold payment to the arbitration service provider to obstruct the arbitration proceeding and the ability to pursue a claim.

This can happen at all stages of arbitration, from nonpayment of the initial filing fee to nonpayment of fees at the very end of the proceeding (often, to prevent the release of a judgment or award favorable to the consumer or worker). By withholding payment, a business can obstruct the arbitration proceeding in the hope that the claim is abandoned. This completely undermines the business' promise of arbitration as an efficient and low-cost forum for dispute resolution.

SB 707 also addresses the alarming lack of diversity in the arbitration industry. In a 2015 survey of practicing employment arbitrators, 74 percent of those surveyed were male and 92 were white. Compared to the state bench in California (64% men and 66 % white), it is not difficult to see why such a homogenous group of arbitrators may fail to understand the experiences of an increasingly diverse workforce. It is especially troubling when considering that this nearly all-white panel of arbitrators is increasingly tasked (without any

meaningful choice by the worker or consumer) with resolving cases involving important civil rights like sex harassment and race discrimination.

Existing Law

In *Brown v. Dillard's Inc*, 430 F. 3d 1004 (9th Cir. 2005), the Ninth Circuit held that an employer's refusal to participate in arbitration pursuant to a mandatory arbitration provision constituted a breach of that contract. A few year later, in *Sink v. Aden Enterprises Inc.*, 352 F.3d 1197 (9th Cir. 2010), the Ninth Circuit held that an employer's failure to pay arbitration fees was a material breach of that contract and grounds for a default of arbitration.

Under the Federal Arbitration Act ("FAA"), courts may declare a party to be in "default of arbitration," but the Act does not grant non-defaulting parties the remedies typically available in a judicial proceeding. Moreover, the Act does not directly address the scenario in which a party breaches the arbitration agreement. The California Arbitration Act is even less instructive, providing no guidance at all to parties or arbitration providers.

Regarding diversity in our justice system, the Judicial Council of California has stated that "[i]ncreasing the diversity of California's judicial officers to reflect the rich diversity of California's populace continues to be an important goal." To track this commitment, Government Code section 12011.5(n) requires the Judicial Council of California to collect and release aggregate demographic data relative to the gender, race/ethnicity, sexual orientation, gender identity, and veteran and disability status of California state court justices and judges, by specific jurisdiction each calendar year. No similar reporting requirement exists for arbitration companies.

Solution

This bill would provide workers and consumers with procedural options to remedy the breach of contract and deter companies and employers from strategically withholding the payment of arbitration fees.

When a company or employer fails to pay the initiation fee (to commence the arbitration proceeding) within 30 days of its due date, this bill would declare that party to be in material breach of the arbitration contract. In the event of such a breach, consumers and employees may

SB 707 (Wieckowski and Hertzberg) Forced Arbitration Accountability Act

choose to withdraw from arbitration and proceed in court, or to compel arbitration under the contract.

When a company or employer fails to pay fees to continue the arbitration proceedings within 30 days of their due date, this bill would declare that party to be in material breach of the arbitration provision and would provide consumers and employees with several options:

- First, they may elect to withdraw the claim from arbitration and proceed in court.
- Second, they may choose to continue in arbitration, provided that the arbitration company agrees to continue administering. The bill would allow the arbitration company to collect the unpaid fees at the end of the proceeding.
- Third, they may petition the court for an order compelling the employer to pay the arbitration fees under the parties' contract.
- Finally, they may pay the unpaid fees in order to continue the arbitration, and recover the amount paid to cover the employer's share of the fees at the end of the proceeding whether the worker wins or loses.

This bill also allows arbitrators and courts to impose appropriate sanctions on the defaulting party, up to and including terminating sanctions.

To address the issue of diversity in the arbitration industry, SB 707 will require arbitration companies to report the same kind of demographic information about their arbitrators as the Judicial Council is required to report about state court justices and judges. This information is aggregated and based on self-reporting.

Sponsors

California Employment Lawyers Association

Mariko Yoshihara – mariko@cela.org

Ken Wang – ken@cela.org

Consumer Attorneys of California

Jacquie Serna – jserna@caoc.org

Nancy Peverini – nancyp@caoc.org