

First Wednesday — A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management



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Contractual Jury Waiver Ruled Unenforceable

Can parties to an employment contract agree that neither side will request a jury trial in the event a lawsuit is filed? The answer is “probably not,” based on the recent case of *Grafton Partners LP v. Superior Court (PricewaterhouseCoopers LLP)*. This California appellate case, decided February 6, 2004, held that a contractual pre-dispute jury waiver is ineffective under California law.

This case involved Grafton’s dispute with its accounting firm, PricewaterhouseCoopers (“PwC”). The engagement letter between Grafton and PwC had a clause stating that, in the event of a dispute between the parties, to “facilitate judicial resolution, and save time and expense of both parties,” neither will demand a jury trial. Thus, any case would be decided by a judge sitting without a jury. After a dispute arose, Grafton sued PwC for money damages. Grafton requested a jury trial, as was its right under the United States and California Constitutions. PwC objected based on the jury waiver clause in the engagement letter. The court held that, since contractual jury waiver agreements are not listed within the statutory grounds for which the constitutional right to a jury can be waived (CCP section 631), Grafton was entitled to a jury trial despite signing the engagement letter.

The *Grafton* case is important to employers because a jury waiver clause in an employment contract has been (and may still be) considered a good dispute resolution strategy. If an employment dispute, such as sexual harassment or age discrimination, lands in court, the employee will typically demand a jury trial. The employer, fearing a sympathetic jury which might relate better to the employee's side, or the possibility of a high "runaway jury" award, will usually prefer that a judge try the case without a jury. Since a jury trial will be held if either side properly requests it, the possibility of using a contractual jury waiver looks attractive – but for the *Grafton* ruling, which may cause the trial court to disregard the contractual waiver.

A time-honored way to avoid jury trials is in mandatory arbitration. (The *Grafton* decision does not affect the enforceability of arbitration clauses, which effectively operate as jury waivers when parties agree to use the arbitration forum.) Many employers prefer using arbitration clauses in their employment agreements and employee handbook acknowledgements. But arbitration has its downsides, such as fewer procedural and discovery opportunities, finality of decision with no appeal to a higher court, unique costs which must be borne by the employer alone, and "split decisions" that are often based on the equities and not the rule of law. Thus, as an alternative to arbitration, the ability to use the courts for dispute resolution, but without a jury, offers a reasonable middle ground.

But there is the question of the enforceability of a jury waiver clause. Since a prior appellate case has upheld a contractual jury waiver, the California Supreme Court could take up the issue to resolve the conflict with *Grafton*. The prior case is *Trizec Properties, Inc. v. Superior Court*, decided in 1991. The *Trizec* case arose in the context of a commercial lease dispute. Thus, neither case involved a contract between an employer and employee.

In the employment context, a court will look skeptically at a jury waiver based on the unequal bargaining power between the contracting parties and California's public policies which protect the employee's employment and constitutional rights. Though *Trizec* could be relied upon to uphold a jury waiver, I predict that a trial court faced with this issue will be inclined to strike down a jury waiver clause as being unconstitutional

and against public policy. (One federal magistrate judge in New York has upheld a waiver clause in an employment context, but that case involved some unusual facts and not the garden-variety employment dispute.)

In summary, if an employer wants to avoid the possibility of facing a jury trial, then it should use mandatory arbitration clauses in its employment contracts and handbooks. The “middle ground” of choosing the courts as the forum for dispute resolution, but agreeing in advance that any trial will be held without a jury, is not a reliable option for the time being.

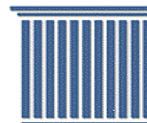
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