Legal Update Article

What California's Time Limits for Payment of Arbitration Fees Mean for Restaurant Employers

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Arbitration agreement enforcement continues to take up California court space. Recently, a wave of cases highlights for restaurant and food service industry and other employers the importance of timely payment of arbitrator and arbitration fees, particularly in California, to avoid an ejection from arbitration and return to court. Often, and certainly in California, employer arbitration agreements require employers to pay most, if not all, employment arbitration fees. A failure to pay such fees timely in California may result in a waiver of the right to proceed in arbitration and a court may order that the case proceed in court — perhaps even on a class basis — rather than in arbitration on an individual basis.

California Code of Civil Procedure section 1281.98 requires that arbitration fees be paid within 30 days of the due date. The arbitration provider must issue an invoice identifying the fees owed and stating the date fees are due. Often, professional arbitration services' invoices state that the fees are due on the date of the invoice. Importantly, under section 1281.98, a late payment of fees constitutes a material breach of the arbitration agreement, which results in a waiver of the employer's right to proceed in arbitration. Indeed, in recent decisions, state Courts of Appeal have ruled that employers waived their right to arbitrate when fees were paid even one day late and even when such nonpayment was not intentional. These opinions have held that there is no "grace period."

(A Court of Appeal decision, *Hernandez v. Sohnen Enters.,* Inc., No. B323303 (May 22, 2024), offers a glimmer of hope on this issue. In *Hernandez,* the court held that, at least where the Federal Arbitration Act rather than California law applies, there is no basis for an automatic and mandatory finding that any tardiness in payment is a breach of the agreement requiring that the matter be removed from arbitration and returned to the court. Whether this holding applies to a particular agreement requires careful review of its language.)

The failure to pay on time allows the employee to return the matter to court and terminate the arbitration and proceed in court. If the case is a class or collective action, then it proceeds as one in court rather than arbitration on an individual basis. That is not the only penalty that impacts the tardy employer. As a *mandatory* sanction, the employer whose matter is sent back to court must pay the costs and attorneys' fees incurred by the employee in getting the matter back to court. The employee need not prove that the employer intentionally paid late or was motivated by a desire to delay the proceedings.

Further, under the law, the court can impose other harsh sanctions against the late-paying employer. These sanctions can include an evidentiary sanction that prohibits the drafting party from conducting any discovery in the civil action or terminating sanctions (such as an order striking the employer's answer in the civil action or an order granting the employee a default judgment). The court can also find the employer in contempt of court. To avoid these sanctions the employer must persuade the court that it acted with substantial justification or that there are other circumstances that make imposing the sanction unjust.

It is an issue frequently litigated, as it has substantial consequences. If a court finds a failure to timely pay, a case previously ordered to individual arbitration may wind up in court as a

class action.

These harsh penalties — and the active litigation over the issue — drive home the point that, once an employer decides on proceeding with arbitration in California, it must do so with the expectation that the fees for arbitration, which can be considerable, will be paid swiftly.

Please contact a Jackson Lewis attorney with any questions.