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PERSPECTIVE

Failure to pay arbitration invoice can lead to trial, penalties

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Employers go to great lengths to draft arbitration agreements that will withstand scrutiny under California law and require employees to litigate their disputes privately, outside of court. But what if an employee initiates arbitration and the employer neglects to timely pay the arbitration invoice? The employer will be in material breach of the arbitration agreement and the employee – at her election – may withdraw her claims from arbitration and file them in court. Further, the employer will have to pay the employee’s attorneys’ fees and costs incurred in connection with the abandoned arbitration and may even be subjected to other, non-monetary sanctions. The 2nd District Court of Appeal in *Espinoza v. Superior Ct. of Los Angeles Cnty.*, 83 Cal. App. 5th 761 (2022), has held that this is the case, even if the failure to timely pay is inadvertent, due to clerical error, or results in no prejudice to the employee. Employers beware!

Effective Jan. 1, 2020, Code of Civil Procedure Sections 1281.97 and 1281.98 provide that in employment (and consumer arbitrations) the “drafting party” – “the company or business that included a predispute arbitration provision in a contract with a consumer or employee” (C.C.P. § 1280(e)) – must pay the arbitration fees and costs at the outset and during the arbitration within 30 days of the invoice date. If the drafting party fails to do so, it is in material breach and default of the arbitration agreement and waives its right to compel arbitration of

the employee’s or consumer’s claims. (C.C.P. §§ 1281.97(a)(1), 1281.98(a)(1).) As a result of the material breach, the employee or consumer, at her election, may withdraw her claims from arbitration and proceed with them in court. (C.C.P. §§ 1281.97, 1281.98, and 1281.99.) In addition, the drafting party must pay the em-

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ployee or consumer’s attorneys’ fees and costs incurred in connection with the “abandoned arbitration” and is also at risk for non-monetary sanctions, e.g., evidence, terminating, and contempt sanctions. (C.C.P. § 1281.99(b)).

Prior to *Espinoza*, drafting parties who were late in paying an arbitration invoice tried to avoid the harsh consequences of Sections 1281.97 and 1281.98 by quickly curing the default and arguing that they had substantially complied with the statute and/or that the employee or consumer had not suffered any prejudice by the late payment. *Espinoza* makes clear that those arguments are not available to drafting parties because the statute “must be applied strictly when payment is not made within 30 days, with no exceptions for substantial compliance or lack of prejudice”—even if the payment is only a few days late as was the case in *Espinoza*. *Espinoza*, 83 Cal.

App. 5th at 1 (emphasis added).

In *Espinoza*, the trial court granted the employer/drafting party’s motion to compel arbitration and stay litigation of a former employee’s claims. *Id.* The arbitration provider issued an initial invoice to the parties with a due date of May 31, 2021. *Id.* at 2. On July 1, 2021, following the expira-

tion of the statutory 30-day grace period (C.C.P. § 1281.97(a)), the arbitration provider confirmed for the employee that the employer had not paid the invoice. *Espinoza*, 83 Cal. App. 5th at 2. The employee withdrew her claims from arbitration and moved the trial court for an order lifting the litigation stay so she could proceed with her claims in court. *Id.* She also asked the court to impose monetary and evidentiary sanctions against the employer. *Id.* The employer opposed the motion, arguing that it had “substantially complied” with the statute as it had since paid the invoice, the delay in payment was inadvertent and due to a clerical error, and the employee had not been prejudiced by the late payment. *Id.* at 1.

The trial court denied the employee’s motion to lift the stay, finding that the employer “was not in material breach because it had substantially complied with its payment obligations and the delay did not prejudice plaintiff.” *Id.* The Court of Appeal granted the employee’s petition for writ of mandate, holding that the plain language of Section 1281.97 is unambiguous, and “must be applied

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strictly when payment is not made within 30 days, with no exceptions for substantial compliance or lack of prejudice.” *Id.* at 5 (emphasis added). “Under the plain language of the statute, then, the triggering event is nothing more than non-payment of fees within the 30-day period – the statute specifies no other required findings, such as whether the nonpayment was deliberate or inadvertent, or whether the delay prejudiced the nondrafting party.” *Id.* The Court of Appeal was persuaded that the Legisla-

ture’s clear intent was not to give trial courts the discretion to find the drafting party not in material breach “if the delay in payment was inadvertent or otherwise excusable.” *Id.* at 6.

The *Espinoza* Court also found that the plain language of the statute permits trial courts no discretion in determining whether to impose monetary sanctions, i.e., attorneys’ fees and costs, against the defaulting drafting party. *Id.* at 6. Considering the Legislature’s express grant of discretion to a

trial court to impose nonmonetary sanctions under Section 1281.99(b) (“the court may order any of the following sanctions...”) (emphasis added), the Court concluded that the Legislature did not intend to do the same with regard to monetary sanctions under Section 1281.99(a) (“[t]he court shall impose a monetary sanction...”) (emphasis added). *Id.*

Until the Legislature amends the statute, employers must be vigilant and timely pay all arbitration invoices. Some tips to consider:

- Ensure that the invoice is correct and addressed to the appropriate individual/entity, if possible, before it is issued, to avoid possible delays in having the invoice re-issued.
- Set calendar reminders of the due date.
- Request an estimate of future fees in case reserves need to be set or other financing arrangements made to pay future invoices.
- Pre-pay fees/maintain a (refundable) balance with the arbitration service.

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