

Arbitration will look very different in the New Year

By Tricia Bigelow

On Jan. 1, we will change our calendars, make our resolutions, and practice writing “2025” over and over again. We will also see big differences in the way arbitration is conducted in California.

Two new laws taking effect on that date will alter the landscape for parties whose cases may be resolved through arbitration. Both of these laws have pretty much been flying under the radar, but they could significantly impact the way ADR cases are managed going forward.

SB 365

Senate Bill 365, signed into law by Gov. Gavin Newsom on Oct. 10, is short and sweet. It amends Code of Civil Procedure Section 1294 to give judges the discretion to keep cases moving through the trial process even if a party has appealed an order dismissing or denying a petition to compel arbitration. “Notwithstanding Section 916, the perfecting of such an appeal shall not automatically stay any proceedings in the trial court during the pendency of the appeal.”

According to Sen. Scott Wiener, D-San Francisco and the bill’s author, “SB 365 gives courts the discretion to prevent corporations from using a common delay tactic against workers and consumers - in both private and public enforcement actions - when a court has determined that a particular case cannot not [sic] be sent to arbitration.” Corporate defendants have historically been able to put the brakes on plaintiffs’ cases by filing appeals of denials of motions to compel arbitration. Such



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delay has resulted in cases being paused for as long as three years.

The new law is a big deal for plaintiffs. It empowers trial courts to let cases proceed while the defendants appeal the denial of the grant of a motion to compel arbitration. If a court can be convinced to deny a stay, it would allow litigants to resolve their issues in the trial courts without the lengthy delays and consequent loss of witnesses and evidence that can occur while an appeal of a grant of arbitration is resolved – something that has challenged plaintiffs in the past.

Says Wiener, “SB 365 will level the playing field for consumers, governments, and workers who deserve to move their case forward when a company or employer violates their rights.”

SB 940

Senate Bill 940, authored by Sen. Tom Umberg D-Santa Ana, and signed by the Governor on Sept. 29, has received much attention, but most of that attention has been directed at the ADR certification program that is to be established by the California State Bar.

What has generally been overlooked in the new law is an entire rewriting of the way arbitration is conducted in the state. It will be important for attorneys to understand what has changed in the arbitration process and how this will impact their ADR practice.

With little fanfare, SB 940 has fixed one of the biggest problems that has plagued parties in arbitration. It repeals Section 1283.1 of the Code of Civil Procedure, the law

that has prevented most parties in arbitration proceedings from obtaining third-party subpoenas and conducting other forms of pre-litigation discovery. Unless they remembered to include certain magic words in their arbitration agreements, litigants could not get their hands on critical third-party documents or testimony until they were in front of the arbitrator. This meant that they were often forced to fly blind.

The new law puts a big X through the following language: “Only if the parties by their agreement so provide, may the provisions of Section 1283.05 be incorporated into, made a part of, or made applicable to, any other arbitration agreement.” This extends the same discovery rights to all arbitration claims, not just those involving acts that result in injury or death, as the current law provides.

Code of Civil Procedure Section 1282.6 will be amended to allow

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for the issuance of subpoenas to require the attendance of witnesses - including non-party witnesses - as well as the production of books, records, documents and other evidence - including from non-parties - at arbitration proceedings or depositions.

Code of Civil Procedure Section 1283.05 will be amended to give parties in arbitration “the right to take depositions and to obtain dis-

covery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof, as provided in Chapter 2 (commencing with Section 1985) of Title 3 of Part 4, and in Title 4 (commencing with Section 2016.010) of Part 4,

as if the subject matter of the arbitration were pending before a superior court of this state in a civil action other than a limited civil case, subject to the limitations as to depositions set forth in subdivision (e) of this section.”

Conclusion

What an enormous difference these two new laws will make to the arbitration process starting in the new

year. SB 365 will allow plaintiffs to have their day in court while defendants pursue the hope of arbitration. SB 940 will open the discovery process for litigants as they prepare to arbitrate all types of claims. It will allow all parties in an arbitration to access and review third-party documents, depose non-party witnesses, and seek out other evidence that may be critical to their cases.