

## Senate Bill No. 707

### CHAPTER 870

An act to amend Sections 1280 and 1281.96 of, and to add Sections 1281.97, 1281.98, and 1281.99 to, the Code of Civil Procedure, relating to arbitration.

[Approved by Governor October 13, 2019. Filed with Secretary of State October 13, 2019.]

#### LEGISLATIVE COUNSEL'S DIGEST

SB 707, Wieckowski. Arbitration agreements: enforcement.

Existing law regulates arbitrations conducted pursuant to an agreement, as specified.

(1) In an employment or consumer arbitration in which the drafting party, as defined, is required to pay certain fees and costs before the arbitration can proceed, this bill would provide that if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration. If the drafting party materially breaches the arbitration agreement and is in default of the arbitration, the bill would authorize the employee or consumer to either withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction, or to compel arbitration in which the drafting party is required to pay reasonable attorney's fees and costs related to the arbitration. If the employee or consumer proceeds with an action in a court of appropriate jurisdiction, the bill would provide that the statute of limitations with regard to all claims brought or that relate back to any claim brought in arbitration are tolled, as specified. The bill would further require the court to impose a monetary sanction on the drafting party who materially breaches an arbitration agreement, and would authorize the court to impose other sanctions, as specified.

(2) In an employment or consumer arbitration in which the drafting party, as defined, is required to pay certain fees and costs during the pendency of an arbitration proceeding, this bill would provide that if those fees or costs are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration. If the drafting party materially breaches the arbitration agreement and is in default of the arbitration, the bill would authorize the employee or consumer to unilaterally withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction, or to compel arbitration, as specified. If the employee or consumer proceeds with an action in a court of appropriate jurisdiction, the bill would provide that the statute of limitations with regard to all claims brought or that relate back to

any claim brought in arbitration are tolled, as specified. The bill would require the court to impose a monetary sanction on the drafting party who materially breaches an arbitration agreement, and would authorize the court to impose other sanctions, as specified. If the employee or consumer compels arbitration, the bill would require the arbitrator to impose appropriate sanctions on the drafting party, including monetary sanctions, issue sanctions, evidence sanctions, or terminating sanctions.

(3) Existing law requires a private arbitration company involved in consumer arbitration cases to collect and make certain information regarding those cases available to the public, as specified.

This bill would additionally require a private arbitration company to collect and report demographic data in the aggregate relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators, as specified.

(4) The bill would make related legislative findings and declarations, and would provide that if any provision or its application to any person or circumstance is held invalid, that invalidity does not affect other provisions or applications that can be given effect without the invalid provision or application.

*The people of the State of California do enact as follows:*

SECTION 1. The Legislature finds and declares all of the following:

(a) In California, private contracts that violate public policy are unenforceable. Under Section 3513 of the Civil Code, contract terms that require a party to forgo unwaivable statutory rights are unenforceable. Similarly, Section 1668 of the Civil Code provides that contracts exempting parties from responsibility of their own violation of law are also unenforceable. Thus, under these and other contract defenses of general applicability, a mandatory arbitration agreement, like any other agreement, cannot undercut unwaivable state statutory rights by, for example, reducing the limitations period to commence an action or arbitration, eliminating certain statutory remedies, or erecting excessive cost barriers to obtaining them.

(b) In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, the California Supreme Court concluded that “when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.”

(c) A company’s failure to pay the fees of an arbitration service provider in accordance with its obligations contained within an arbitration agreement or through application of state or federal law or the rules of the arbitration provider hinders the efficient resolution of disputes and contravenes public policy.

(d) A company's strategic non-payment of fees and costs severely prejudices the ability of employees or consumers to vindicate their rights. This practice is particularly problematic and unfair when the party failing or refusing to pay those fees and costs is the party that imposed the obligation to arbitrate disputes.

(e) In *Brown v. Dillard's, Inc.* (2005) 430 F.3d 1004, the United States Court of Appeals for the Ninth Circuit held that, under federal law, an employer's refusal to participate in arbitration pursuant to a mandatory arbitration provision constituted a breach of the arbitration agreement. In *Sink v. Aden Enterprises, Inc.* (2003) 352 F.3d 1197, the Ninth Circuit held that, under federal law, an employer's failure to pay arbitration fees as required by an arbitration agreement constitutes a material breach of that agreement and results in a default in the arbitration.

(f) It is the intent of the Legislature in enacting this measure to affirm the decisions in *Armendariz v. Foundation Health Psychcare Services, Inc.*, *Brown v. Dillard's, Inc.*, and *Sink v. Aden Enterprises, Inc.* that a company's failure to pay arbitration fees pursuant to a mandatory arbitration provision constitutes a breach of the arbitration agreement and allows the non-breaching party to bring a claim in court.

SEC. 2. Section 1280 of the Code of Civil Procedure is amended to read: 1280. As used in this title:

(a) "Agreement" includes, but is not limited to, agreements providing for valuations, appraisals, and similar proceedings and agreements between employers and employees or between their respective representatives.

(b) "Award" includes, but is not limited to, an award made pursuant to an agreement not in writing.

(c) "Consumer" means an individual who seeks, uses, or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.

(d) "Controversy" means any question arising between parties to an agreement whether the question is one of law or of fact or both.

(e) "Drafting party" means the company or business that included a predispute arbitration provision in a contract with a consumer or employee. The term includes any third party relying upon, or otherwise subject to the arbitration provision, other than the employee or consumer.

(f) "Employee" means any current employee, former employee, or applicant for employment. The term includes any person who is, was, or who claims to have been misclassified as an independent contractor or otherwise improperly placed into a category other than employee or applicant for employment.

(g) "Neutral arbitrator" means an arbitrator who is (1) selected jointly by the parties or by the arbitrators selected by the parties, or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by the parties.

(h) "Party to the arbitration" means a party to the arbitration agreement, including any of the following:

(1) A party who seeks to arbitrate a controversy pursuant to the agreement.

(2) A party against whom such arbitration is sought pursuant to the agreement.

(3) A party who is made a party to the arbitration by order of the neutral arbitrator upon that party's application, upon the application of any other party to the arbitration, or upon the neutral arbitrator's own determination.

(i) "Written agreement" includes a written agreement that has been extended or renewed by an oral or implied agreement.

SEC. 3. Section 1281.96 of the Code of Civil Procedure is amended to read:

1281.96. (a) Except as provided in paragraph (2) of subdivision (c), a private arbitration company that administers or is otherwise involved in a consumer arbitration, shall collect, publish at least quarterly, and make available to the public on the internet website of the private arbitration company, if any, and on paper upon request, a single cumulative report that contains all of the following information regarding each consumer arbitration within the preceding five years:

(1) Whether arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering private arbitration company.

(2) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known.

(3) The nature of the dispute involved as one of the following: goods; credit; other banking or finance; insurance; health care; construction; real estate; telecommunications, including software and Internet usage; debt collection; personal injury; employment; or other. If the dispute involved employment, the amount of the employee's annual wage divided into the following ranges: less than one hundred thousand dollars (\$100,000), one hundred thousand dollars (\$100,000) to two hundred fifty thousand dollars (\$250,000), inclusive, and over two hundred fifty thousand dollars (\$250,000). If the employee chooses not to provide wage information, it may be noted.

(4) Whether the consumer or nonconsumer party was the prevailing party. As used in this section, "prevailing party" includes the party with a net monetary recovery or an award of injunctive relief.

(5) The total number of occasions, if any, the nonconsumer party has previously been a party in an arbitration administered by the private arbitration company.

(6) The total number of occasions, if any, the nonconsumer party has previously been a party in a mediation administered by the private arbitration company.

(7) Whether the consumer party was represented by an attorney and, if so, the name of the attorney and the full name of the law firm that employs the attorney, if any.

(8) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

(9) The type of disposition of the dispute, if known, identified as one of the following: withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing. If a case was administered in a hearing, indicate whether the hearing was conducted in person, by telephone or video conference, or by documents only.

(10) The amount of the claim, whether equitable relief was requested or awarded, the amount of any monetary award, the amount of any attorney's fees awarded, and any other relief granted, if any.

(11) The name of the arbitrator, the arbitrator's total fee for the case, the percentage of the arbitrator's fee allocated to each party, whether a waiver of any fees was granted, and, if so, the amount of the waiver.

(12) Demographic data, reported in the aggregate, relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators as self-reported by the arbitrators. Demographic data disclosed or released pursuant to this paragraph shall also indicate the percentage of respondents who declined to respond.

(b) The information required by this section shall be made available in a format that allows the public to search and sort the information using readily available software, and shall be directly accessible from a conspicuously displayed link on the internet website of the private arbitration company with the identifying description: "consumer case information."

(c) (1) If the information required by subdivision (a) is provided by the private arbitration company in compliance with subdivision (b) and may be downloaded without a fee, the company may charge the actual cost of copying to any person who requests the information on paper. If the information required by subdivision (a) is not accessible by the internet in compliance with subdivision (b), the company shall provide that information without charge to any person who requests the information on paper.

(2) Notwithstanding paragraph (1), a private arbitration company that receives funding pursuant to Chapter 8 (commencing with Section 465) of Division 1 of the Business and Professions Code and that administers or conducts fewer than 50 consumer arbitrations per year may collect and publish the information required by subdivision (a) semiannually, provide the information only on paper, and charge the actual cost of copying.

(d) This section shall apply to any consumer arbitration commenced on or after January 1, 2003.

(e) A private arbitration company shall not have any liability for collecting, publishing, or distributing the information required by this section.

(f) It is the intent of the Legislature that private arbitration companies comply with all legal obligations of this section.

(g) The amendments to subdivision (a) made by the act adding this subdivision shall not apply to any consumer arbitration administered by a private arbitration company before January 1, 2015.

SEC. 4. Section 1281.97 is added to the Code of Civil Procedure, to read:

1281.97. (a) In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration administrator, the drafting party to pay certain fees and costs before the arbitration can proceed, if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration under Section 1281.2.

(b) If the drafting party materially breaches the arbitration agreement and is in default under subdivision (a), the employee or consumer may do either of the following:

(1) Withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction.

(2) Compel arbitration in which the drafting party shall pay reasonable attorney's fees and costs related to the arbitration.

(c) If the employee or consumer withdraws the claim from arbitration and proceeds with an action in a court of appropriate jurisdiction under paragraph (1) of subdivision (b), the statute of limitations with regard to all claims brought or that relate back to any claim brought in arbitration shall be tolled as of the date of the first filing of a claim in any court, arbitration forum, or other dispute resolution forum.

(d) If the employee or consumer proceeds with an action in a court of appropriate jurisdiction, the court shall impose sanctions on the drafting party in accordance with Section 1281.99.

SEC. 5. Section 1281.98 is added to the Code of Civil Procedure, to read:

1281.98. (a) In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration provider, that the drafting party pay certain fees and costs during the pendency of an arbitration proceeding, if the fees or costs required to continue the arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel the employee or consumer to proceed with that arbitration as a result of the material breach.

(b) If the drafting party materially breaches the arbitration agreement and is in default under subdivision (a), the employee or consumer may unilaterally elect to do any of the following:

(1) Withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction. If the employee or consumer withdraws the claim from arbitration and proceeds with an action in a court of appropriate jurisdiction, the statute of limitations with regard to all claims brought or that relate back to any claim brought in arbitration shall be tolled as of the date of the first filing of a claim in any court, arbitration forum, or other dispute resolution forum.

(2) Continue the arbitration proceeding, if the arbitration company agrees to continue administering the proceeding, notwithstanding the drafting party's failure to pay fees or costs. The neutral arbitrator or arbitration company may institute a collection action at the conclusion of the arbitration proceeding against the drafting party that is in default of the arbitration for payment of all fees associated with the employment or consumer arbitration proceeding, including the cost of administering any proceedings after the default.

(3) Petition the court for an order compelling the drafting party to pay all arbitration fees that the drafting party is obligated to pay under the arbitration agreement or the rules of the arbitration company.

(4) Pay the drafting party's fees and proceed with the arbitration proceeding. As part of the award, the employee or consumer shall recover all arbitration fees paid on behalf of the drafting party without regard to any findings on the merits in the underlying arbitration.

(c) If the employee or consumer withdraws the claim from arbitration and proceeds in a court of appropriate jurisdiction pursuant to paragraph (1) of subdivision (b), both of the following apply:

(1) The employee or consumer may bring a motion, or a separate action, to recover all attorney's fees and all costs associated with the abandoned arbitration proceeding. The recovery of arbitration fees, interest, and related attorney's fees shall be without regard to any findings on the merits in the underlying action or arbitration.

(2) The court shall impose sanctions on the drafting party in accordance with Section 1281.99.

(d) If the employee or consumer continues in arbitration pursuant to paragraphs (2) through (4) of subdivision (b), inclusive, the arbitrator shall impose appropriate sanctions on the drafting party, including monetary sanctions, issue sanctions, evidence sanctions, or terminating sanctions.

SEC. 6. Section 1281.99 is added to the Code of Civil Procedure, to read:

1281.99. (a) The court shall impose a monetary sanction against a drafting party that materially breaches an arbitration agreement pursuant to subdivision (a) of Section 1281.97 or subdivision (a) of Section 1281.98, by ordering the drafting party to pay the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer as a result of the material breach.

(b) In addition to the monetary sanction described in subdivision (a), the court may order any of the following sanctions against a drafting party that materially breaches an arbitration agreement pursuant to subdivision (a) of Section 1281.97 or subdivision (a) of Section 1281.98, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(1) An evidence sanction by an order prohibiting the drafting party from conducting discovery in the civil action.

(2) A terminating sanction by one of the following orders:

(A) An order striking out the pleadings or parts of the pleadings of the drafting party.

(B) An order rendering a judgment by default against the drafting party.

(3) A contempt sanction by an order treating the drafting party as in contempt of court.

SEC. 7. If any provision of these sections or its application to any person or circumstance is held invalid, that invalidity does not affect other provisions or applications that can be given effect without the invalid provision or application.