No. S167169

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEARSON DENTAL SUPPLIES, INC., *et al.*,
Defendants/Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,

LUIS TURCIOS,
Plaintiff/Real Party in Interest.

After a Decision by the California Court of Appeal,
Second Appellate District, Division 4, Case No. B206740
Los Angeles County Superior Court Case No. BC359605
Hon. Alan S. Rosenfield, Judge

REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. What standard of judicial review applies to an arbitrator's decision on an employee's anti-discrimination claim under the Fair Employment and Housing Act (Gov. Code, section 12900 et seq.) that is arbitrated pursuant to a mandatory employment arbitration agreement?

2. Can such a mandatory arbitration agreement restrict an employee from seeking administrative remedies for violations of the Act?

PRINCIPAL STATUTORY PROVISIONS AT ISSUE

In addition to the statutory limitations periods governing plaintiff's underlying claims for age discrimination in violation of the California Fair Housing and Employment Act (Gov. Code §12965(b), for wrongful termination in violation of public policy (C.C.P. §335.1), and for breach of implied contract (C.C.P. §339(1)), this case requires the Court to consider the proper construction of the California Arbitration Act; and in particular Code of Civil Procedure §1281.12, set forth below, which requires arbitrators to toll all applicable limitations periods from the date a claim is filed in court until 30 days after a final judicial order compelling arbitration:

> **Tolling arbitration time period**
>
> If an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration

agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first.

C.C.P. §1281.12.

REAL PARTY'S OPENING BRIEF ON THE MERITS

INTRODUCTION

This Court has repeatedly held, in cases such as *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, and *Gentry v. Superior Court* (2007) 42 Cal.4th 443, that an employer cannot obtain judicial enforcement of provisions in a mandatory, pre-dispute arbitration agreement whose practical effect is to deprive workers of the minimum substantive and procedural protections needed to effectively vindicate their fundamental, unwaivable employment law rights. *Armendariz*, 24 Cal.4th at 101; *Little*, 29 Cal.4th at 1077; *Gentry*, 42 Cal.4th at 457-58. Among these guaranteed minimum protections are "a written arbitration decision and judicial review sufficient to ensure that arbitrators have complied with the law respecting such claims." *Little*, 29 Cal.4th at 1081; *Armendariz*, 24 Cal.4th at 106.

Judicial review of arbitration awards is usually highly deferential, as arbitrators have broad powers to rest their awards on considerations of equity and justice. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10-11. However, when an award violates established public policy or deprives a claimant of fundamental, unwaivable statutory or common law rights, heightened judicial review is required. In those circumstances, the claimant is entitled to the full protection of the applicable law, and the courts must

exercise sufficiently searching review to ensure that the law has been correctly construed and applied.[1]

The present case requires the Court to apply these principles to an arbitration award that wrongfully rejected as time-barred a 67-year old janitor's claims of age discrimination and wrongful termination. Although plaintiff Luis Turcios timely filed an administrative claim with the Department of Fair Employment and Housing ("DFEH") less than 10 weeks after his discharge, and timely filed his civil lawsuit in Superior Court less than six months after obtaining a DFEH right-to-sue letter, the arbitrator refused to consider plaintiff's claims on their merits. Instead, the arbitrator dismissed plaintiff's age discrimination claims as time-barred under the arbitration agreement's one-year deadline, even though FEHA and the Code of Civil Procedure both provide longer limitations periods, Pet. App. 211-12 n.1, and despite the tolling requirements of the California Arbitration

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[1] *See Moncharsh*, 3 Cal.4th at 32 (greater scrutiny is required where "granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights"); *Armendariz*, 24 Cal.4th at 107 (judicial review of arbitrator's rulings must be "'sufficient to ensure that arbitrators comply with the requirements of the statute.'"); *City of Palo Alto v. Service Employees Intl. Union* (1999) 77 Cal.App.4th 327, 334 (quoting *Moncharsh*, 3 Cal.4th at 32-33) (vacatur required "where 'according finality to the arbitrator's decision would be incompatible with the protection of a statutory right' or where the award contravenes 'an explicit legislative expression of public policy.'").

Act, C.C.P. §1281.12, and common law, *see McDonald v. Antelope Valley Comm. College Dist.* (2008) 45 Cal.4th 88.[2]

Had the arbitrator properly applied the governing limitations periods and tolling principles, he would have found plaintiff's claims timely (as the Superior Court and Court of Appeal both recognized, Pet. App. at 865; Ct. App. Slip Op. 19). Instead, the arbitrator exceeded his powers within the meaning of §1286.2(a)(4) of the California Arbitration Act ("CAA") and violated *Armendariz* and *Little* by failing to apply the limitations periods and tolling principles required by law in evaluating the timeliness of plaintiff's age discrimination claims.

The Superior Court correctly vacated the arbitrator's summary judgment award. For the reasons explained below, an employee asserting unwaivable statutory employment law claims pursuant to a mandatory pre-dispute arbitration agreement is entitled to de novo judicial review of: 1) whether the award violated a clearly expressed public policy; and 2) the arbitrator's legal reasoning (including any application of law to findings of fact), where the employee seeks to vacate the award on the ground that it deprived the employee of fundamental, unwaivable statutory rights or rendered the arbitration agreement unconscionable. In these circumstances

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[2] All code references are the Code of Civil Procedure, unless expressly stated otherwise. References to "Pet. App" and "RP App." are to the Appendices to the Petition for Writ of Mandate, filed in the Court of Appeal on March 28 and June 26, 2008.

(*i.e.*, an essentially involuntary workplace arbitration agreement coupled with the alleged denial of fundamental public law rights), de novo review of the arbitrator's legal determinations is essential to preserving the worker's underlying rights.

Applying these standards, this Court should affirm the Superior Court's Order vacating the arbitrator's award and should either remand the matter to a new arbitrator (as the Superior Court did, Pet. App. 868) or remand for trial in Superior Court (after finding the arbitration agreement unenforceable, based on the severability analysis presented below).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff Luis Turcios, a Spanish-speaking immigrant from El Salvador with permanent resident status, worked as a janitor for defendant Pearson Dental Supplies, Inc. ("Pearson") for seven years. He started working on February 8, 1999 at a wage of $5.75/hour, and was terminated on January 31, 2006, when he was 67 years old and earning $7.50/hour. Pet. App. 145, 147, 152-55; RP App. 24. The supervisor who fired plaintiff told him that he was being fired because of his age. Pet. App. 439; RP App. 4. Pearson then replaced plaintiff with someone younger and less experienced. *Id.*

In January 2001, Pearson had required plaintiff as a condition of continued employment to sign a two-paragraph "Dispute Resolution Agreement" ("DRA"), in English, which stated:

> To avoid the inconvenience, cost and risk that accompany formal administrative or judicial proceedings, Pearson Dental Supply Co. ("PEARSON") and the employee whose signature appears below (the "Employee") agree that dispute [sic] arising in any way out of, or in any way related to, Employee's application for employment with PEARSON, employment with PEARSON, and/or termination of employment shall be resolved through arbitration conducted by a mutually agreed upon arbitrator pursuant to the California Arbitration Act, California Code of Civil Procedure § 1280, et seq. If, within ten (10) days of a demand for arbitration of a covered dispute, the parties have not agreed upon an arbitrator, either party may then submit the dispute to JAMS/Endispute in Los Angeles, California, for resolution. The parties agreed to allow JAMS/Endispute to select a single arbitrator to resolve the dispute. The arbitrator is to prepare a written award that, at a minimum, discloses the essential findings and conclusions on which the award is based. No arbitrator, however, shall have any power to alter, amend, modify or change any term of this agreement. The decision of the arbitrator shall be final and binding upon both PEARSON and the Employee and either party may seek judicial confirmation of any arbitration award.
>
> PEARSON and the Employee further agree that any dispute with any party which arises from employee's employment with PEARSON or termination of employment with PEARSON must be submitted to binding arbitration within one year from the date the dispute arose or the Employee or PEARSON first became aware of facts giving rise to the dispute. If any employment-related dispute which may arise is not submitted to binding arbitration within one year from the date the dispute arose or the Employee or PEARSON first became aware of facts giving rise to the dispute, PEARSON and the Employee agree that the claim

> shall be void and considered waived to the fullest extent allowed by law.

Pet. App. 149-50. At about the same time, Pearson also required plaintiff to sign an "acknowledgment that he received the Employee Handbook." RP App. 36-38; Pet. App. 73, 75, 124, 129. The acknowledgment form and Handbook, both in Spanish, included similar mandatory arbitration language. *Id.*

Pearson fired Turcios on January 31, 2006 (while apparently paying him through February 3). Pet. App. 308; RP App. 24. Although plaintiff's supervisor stated that plaintiff's age was the reason for his termination, in discovery Pearson claimed that it had fired plaintiff because his "services were no longer needed." Pet. App. 439; RP App. 4.

In compliance with FEHA's mandatory exhaustion requirements, plaintiff on April 5, 2006 filed a timely administrative claim with DFEH. Pet. App. 175, 313. On April 14, 2006, DFEH issued a right-to-sue letter. Pet. App. 315-20. On October 2, 2006, less than six months after plaintiff received that letter, plaintiff filed a three-count complaint in L.A. Superior Court, alleging: 1) age discrimination in violation of FEHA, Gov. Code §12941; 2) wrongful termination in violation of public policy; and 3) breach by Pearson of its implied-in-fact contract obligation not to terminate him without good cause. Pet. App. 338, 436-72.

Plaintiff's Superior Court complaint was filed well within the statutes of limitations set by FEHA (one year after receiving the right-to-sue letter) and the Code of Civil Procedure (two years from termination, on both the wrongful discharge claim and the breach of implied contract claim). *See infra* at 17-19. Plaintiff's complaint was also filed within the one-year deadline set by the Pearson arbitration agreement, because only eight months had passed between plaintiff's termination (January 31, 2006) and the date he filed his complaint (October 2, 2006).

For five months after being served, Pearson actively defended plaintiff's lawsuit in court without making any reference to the DRA. For example, on November 8, 2006, Pearson filed a demurrer and motion to strike. Pet. App. 343-49, 351-57. Pearson did not refer to the DRA in these motions, but contended that plaintiff's complaint was not sufficiently detailed to state valid claims for age discrimination or punitive damages. On December 11, 2006, the Superior Court overruled Pearson's demurrer and denied its motion to strike. Pet. App. 359.

On December 29, 2006 (still within one year of termination), Pearson filed its Answer, accompanied by 31 affirmative defenses. Pet. App. 361-69. None of those defenses referred to the arbitration agreement. None asserted a contract limitations period defense or challenged the

Superior Court's jurisdiction (except for Pearson's frivolous Ninth Affirmative Defense, alleging workers' compensation preemption). *Id.*

Discovery commenced in November 2006. Several of plaintiff's form interrogatories asked Pearson to identify any written agreement or procedure that might apply to the parties' employment relationship. Pearson responded without making any reference to the parties' agreement to arbitrate. Ct. App. Slip Op. 4. Pearson also did not refer to the arbitration agreement in its portion of the joint CMC Statement submitted to the Superior Court on February 16, 2007. RP App. 7-8. Instead, Pearson wrote that it was requesting a "jury trial"; that the requested trial would last three days; and that the case would be ready for trial within 12 months after the October 2006 filing date. Pearson also failed to check the box on the CMC form asking whether it wished to arbitrate, and did not raise the arbitration agreement in response to the question on the CMC form about whether any issues existed concerning the court's jurisdiction. *Id.*

The first time Pearson made any reference to the DRA was at the CMC on February 20, 2007, almost five months after the case was filed – but just over a year after plaintiff's termination (and thus outside the DRA's one-year contractual deadline, if strictly applied without tolling). Pearson's counsel stated at the CMC that there was an arbitration agreement in plaintiff's personnel file which "would be something that I would have to

explore," but he did not say when he became aware of that agreement or why he had delayed bringing it to the court's attention until after a year had passed since termination. Pet. App. 375-76. The Superior Court responded that it could not consider the impact of the alleged agreement unless Pearson filed a petition to compel arbitration, and set the case for trial. Pet. App. 376-78; Ct. App. Slip. Op. at 5 & n.2.

Three weeks later, on March 13, 2007, Pearson filed its motion to compel arbitration, contending that plaintiff was bound by the DRA to arbitrate his claims. Pet. App. 382-89, 443-47, 647-54. Pearson did not refer to the one-year contract deadline in the DRA or to its intent to seek dismissal of plaintiff's claims if the case were arbitrated. Instead, Pearson's petition simply asked the Superior Court to compel plaintiff to arbitrate.[3]

The Superior Court granted Pearson's petition by Order dated May 2, 2007 (after having issued an oral ruling from the bench on April 12). In its written Order, the court rejected plaintiff's unconscionability and waiver defenses to the petition, concluding that the DRA was valid and enforceable. Pet. App. 180-83, 396-97; RP App.1-15.

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[3] Although Pearson wrote a letter to plaintiff's counsel on March 2, 2007 (two weeks after the CMC and one month after the supposed expiration of the one-year period), asking plaintiff voluntarily to dismiss with prejudice his lawsuit because of the one-year contractual deadline, Pet. App. 177-78, Pearson never asked the Superior Court to dismiss on that basis and never informed the Superior Court that it planned to challenge Pearson's claim in arbitration as time-barred. Ct. App. Slip Op. 5.

Plaintiff filed a writ petition on May 1, 2007, to challenge the Superior Court's otherwise non-appealable order compelling arbitration. Pet. App. 407; RP App. 40-69. The Second District Court of Appeal, Division 4, summarily denied the writ later that month, on May 31, 2007. Pet. App. 187, 409.

On June 13, 2007, just 13 days after the writ denial, plaintiff accepted defendant's proposed appointment of the Hon. Robert Feinerman (Ret.) of Judicate West to arbitrate their dispute. Pet. App. 235, 411-12. (Pearson had proposed Feinerman as one of three possible arbitrators in mid-April. Pet. App. 843).

On July 24, 2007, after the start of arbitration, Pearson filed a motion for summary judgment. Pearson argued (for the first time other than in its March 2, 2007 letter) that plaintiff was not entitled to a hearing on the merits of his age-discrimination claims because he had not submitted those claims to arbitration within one year of his termination, as purportedly required by the DRA. Pet. App. 1-24, 530-44.

Plaintiff responded that dismissing his action as untimely would be unconscionable and would deprive him of protected statutory rights under *Armendariz*, pointing out that the applicable statutes of limitations on his claims were all greater than one year, and that even if a shortened one-year contractual limitations period applied, it must be tolled under §1281.12 for

the nine-month period from October 2, 2006 (when he filed his Superior Court Complaint) until 30 days after May 31, 2007 (when the Court of Appeal denied his writ). Pet. App. 201-14, 546-59, 643-45, 807-20; *see also* Ct. App. Slip Op. 7.

Arbitrator Feinerman granted summary judgment to Pearson on November 17, 2007, based on the one-year contractual limitations period. Pet. App. 499-500. His brief letter of decision stated:

> After due consideration of all of the written materials submitted to me and the oral arguments of counsel, I have concluded that the employer Pearson Dental Supplies, Inc.'s Motion for Summary Judgment must be granted. The employee Turcios's failure to submit his claims and disputes to binding arbitration within the one year period as required by the Dispute Resolution Agreement or within the tolling period prescribed in California Code of Civil Procedure 1281.12 has resulted in a waiver of his right to proceed in this arbitration against his employer Pearson Dental Supplies, Inc.

Pet. App. 502.

In December 2007, Pearson filed a motion to confirm the arbitration award. Plaintiff opposed that motion and filed a cross-motion to vacate. Pet. App. 461-65, 474-95, 613-18, 620-38, 662-84, 754-72, 781-89. Among plaintiff's arguments were that the arbitrator's application of the contractual one-year limitations period violated plaintiff's "unwaivable rights," that the one-year period was substantively unconscionable, that the arbitrator had improperly interpreted and applied the tolling provision in §1281.12, that the award had been procured by fraud or other undue means,

and that Pearson's conduct estopped it from asserting a limitations time-bar. Ct. App. Slip Op. 8 & n.5.

The Superior Court agreed with plaintiff and vacated the award, explaining:

> CCP section 1286.2 . . . authorizes the Court to vacate an arbitration award in exceptional circumstances, including those situations in which the arbitrator exceeded his or her power and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. (CCP section 1286.2, subd. (4)). The primary issue in the instant action is whether there has been an exercise of excessive jurisdiction by the arbitrator to warrant a vacation of the award, based on the nature of plaintiff's claims and the right to submit those claims to arbitration. . . .
>
> Plaintiff's causes of action arise under the FEHA, alleging that he was terminated by defendant Pearson because of his age. In *Armendariz v. Foundation Health Psychcare Services, Inc.*, the California Supreme Court recognized that FEHA rights are "unwaivable statutory rights" that are only arbitrable if the arbitration permits the plaintiff to vindicate those rights. . . .
>
> This court, under its limited determinative powers under CCP sections 1286.2, 1286.4 and 1287, finds that the one year contractual limitations period was tolled *at least* from October 2, 2006 (the filing date of the instant case) to January 31, 2007, which is a period of almost exactly four months from the filing date which commenced the period of tolling to the expiration of the contractual term within which to submit the matter to arbitration. That would extend the submission date to at least June 29, 2007 (30 days after denial of the writ by the Court of Appeal). . . .
>
> Thus, the arbitrator's decision is completely unsupported by the statutory law governing the arbitration procedure or the case law allowing for arbitration of statutory rights only if the matter can fairly be adjudicated on the merits. As such, and

> in light of the above discussion, the arbitrator has ruled in excess of his jurisdiction. (CCP §1286.2, subd. (4).)

Pet. App. 862-68. The Superior Court also concluded that the arbitrator had miscalculated the tolling period under §1281.12, *id.*; *see also* Ct. App. Slip Op. 8-9, and that Pearson's failure to demand arbitration within one year of plaintiff's termination, coupled with its active defense in court before petitioning to compel arbitration, "estopped [defendant] to deny the validity of the arbitration forum for determination of plaintiff's claims on the merits." *Id.*

Pearson challenged the Superior Court's decision by filing a writ, which the Court of Appeal granted – not because it found any justification for the arbitrator's erroneous analysis, but because it mistakenly believed that *Moncharsh* shielded the arbitrator's decision from any meaningful judicial review:

> For good or ill, "[t]he scope of judicial review of arbitration awards is extremely narrow. Courts may not review the merits of the controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator's reasoning. [Citations.] Indeed, with limited exceptions, 'an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties.' [Citation.]" (*Department of Personnel Administration v. California Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 1200.)

Ct. App. Slip Op. 10. The Court of Appeal acknowledged that *Moncharsh* and *Armendariz* require heightened judicial review in cases involving

unwaivable statutory rights and/or expressly stated public policies. *Id.* at 19. Nonetheless, it concluded that the one-year contract deadline "did not unreasonably burden plaintiff's ability to vindicate statutory rights under the FEHA" because plaintiff *could* have filed his claims in arbitration within one year of his termination, rather than filing in court – a ruling that ignored settled tolling principles and the Legislature's explicit decision, in enacting §1281.12, to allow claimants initially to pursue their potentially arbitrable claims in court, without prejudice. *Id.* at 12-17; *see infra* at 40-42. While the Court of Appeal "agree[d] with the trial court that the arbitrator misapplied the tolling period provided by section 1281.12," it concluded that the erroneous arbitration award "is insulated from judicial review and is not a proper basis upon which either to deny confirmation of the arbitration award or to vacate the award." *Id.* at 19.

On September 30, 2008, plaintiff Turcios filed a Petition for Review. All seven Justices of this Court voted to grant that petition on November 19, 2008.

SUMMARY OF ARGUMENT

The arbitrator exceeded his powers by granting summary judgment to defendant Pearson. The Superior Court was therefore correct in vacating the erroneous arbitral award.

The arbitrator's error in calculating the appropriate deadline was plain. Under the applicable statutory limitations periods, plaintiff had until one year from receipt of the DFEH right-to-sue letter to file his FEHA claim, and until two years from termination to file his wrongful termination and implied contract claims. Under §1281.12, moreover, each of those periods should have been tolled during the nine months plaintiff was actively pursuing his claims in court.

The usual principles of deference to arbitral decisions do not apply when an arbitrator issues an award that violates public policy or when, in the context of a mandatory, pre-dispute arbitration agreement, the arbitrator's award deprives a claimant of minimum statutory or common law rights in violation of *Armendariz* and *Little*, or construes the parties' contract in a manner that renders it unconscionable. In those circumstances, the reviewing courts have a responsibility to the public to ensure compliance with public policy and unwaivable statutory and common law rights.

To ensure judicial protection of these fundamental rights, an arbitrator's award must be vacated when the reviewing court concludes that the award violates a clearly stated public policy, based on its de novo evaluation of the effects and result of the award. An arbitrator's award must also be vacated when, in the context of a mandatory, pre-dispute

agreement, the reviewing court concludes, upon de novo review, that the arbitrator's legal analysis, or application of facts to law, deprived the employee claimant of unwaivable statutory rights.

Here, the arbitrator exceeded his authority because his award violates the express terms of §1281.12 as well as the unwaivable public policies embodied in this state's anti-discrimination law, the common law of equitable tolling, and the prohibition against contracts that effect a waiver of unwaivable rights. The arbitrator further exceeded his authority by basing his agreement on an illegal contract, whose terms impermissibly limited FEHA and *Tameny* remedies and were unconscionable.

Because the arbitration agreement as a whole evidences Pearson's intent to deprive plaintiff not only of his full statutory limitations period, but also of critical FEHA administrative remedies, the deficiencies in the DRA cannot be remedied through severance. This case should therefore be remanded to the trial court for determination of plaintiff's claims on the merits.

ARGUMENT

I. THE ARBITRATOR'S SUMMARY JUDGMENT RULING VIOLATED PUBLIC POLICY AND DEPRIVED PLAINTIFF OF FUNDAMENTAL, UNWAIVABLE, STATUTORY AND COMMON LAW RIGHTS

The dispute in this case is not whether the arbitrator erred in dismissing plaintiff's claims as time-barred – he certainly did. Nor should

there be any serious dispute about the public policy consequences of that error, which deprived plaintiff Luis Turcios of important public law rights underlying his FEHA and *Tameny* claims. Nonetheless, we begin by demonstrating the arbitrator's obvious error, and explaining why the consequences of that error require a judicial remedy.

A. Plaintiff's Claims Were Timely Filed Under the Applicable Statutes of Limitation

We start with the threshold proposition that if the arbitrator had applied the limitations periods prescribed by California law (rather than the limitations period purportedly set by contract), the arbitrator would have found plaintiff's claims timely.

The relevant dates in this case are not in dispute. Pearson fired plaintiff Turcios from his janitorial position on January 31, 2006. RP App. 24. Turcios filed his DFEH claim on April 5, was issued a right-to-sue letter on April 14, and filed his Superior Court complaint on October 2, 2006, approximately 5-1/2 months after issuance of his right-to-sue letter and eight months after his termination. Pet. App. 175, 315-16, 436.

Plaintiff's court filing was timely. The deadline for filing a FEHA claim in court can be as long as three years after the challenged act. Under FEHA, an employee has one year from an "alleged unlawful practice" to exhaust administrative remedies by filing a complaint with DFEH. Gov. Code §12960(d). If the DFEH does not pursue the case itself, it must issue

a right-to-sue letter no more than one year after receiving the administrative complaint. *Id.* at §12965(b). The complaining employee then has one year from the issuance of a right-to-sue letter to file his DFEH claim in court. *Id.*

In this case, plaintiff's FEHA claim was timely filed in court within one year after April 14, 2006. Because the statute of limitations is two years for wrongful termination in violation of public policy (§335.1) and breach of implied contract (§339(1)), plaintiff's wrongful termination and implied contract claims were timely filed as well.[4]

While the Superior Court identified several events that could have constituted the parties' "submi[ssion] to arbitration" under the DRA, *see* Pet. App. 865-66, at the very latest plaintiff communicated his willingness to arbitrate his claims on June 13, 2007, the day he confirmed in writing his acceptance of retired Justice Feinerman as arbitrator. Pet. App. 411-12. This date was well within the statutory two-year limitations period for plaintiff's wrongful termination and breach of implied contract claims. Although it was outside the limitations period of FEHA (because April 13, 2007 was the end of the one-year period following DFEH's issuance of a

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[4] Because Pearson was paid through February 3, 2006 and may have worked through that date as well, the triggering date might be February 3, 2006 rather than January 31, 2006, although the record is not clear on that point – which, in event, is immaterial to the outcome here. *See Romano v. Rockwell Int'l, Inc.* (1996) 14 Cal.4th 479, 494.

right-to-sue letter), plaintiff had both a statutory and common law right to equitable tolling on all his claims while they were pending in court. When those tolling periods are factored in, plaintiff's submission to arbitration on June 13, 2007 was well within the limitations period for all of his claims.

The California Arbitration Act includes an express tolling provision, which codifies (and arguably extends for 30 days) the common law doctrine of equitable tolling for plaintiffs who file their claims in court before submitting them to arbitration. In pertinent part, §1281.12 tolls all applicable limitations periods "from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy."

In this case, because the Court of Appeal issued its one-sentence writ denial on May 31, 2007, §1281.12 tolled all applicable statutes of limitation from October 2, 2006 to July 1, 2007 – a period of nine months. (Even without §1281.12, plaintiff should have been entitled to common law equitable tolling from October 2, 2006 until at least May 31, 2007 – a period of eight months – because as long as a defendant has notice of the claims against it, a plaintiff's pursuit of alternate remedies tolls the statute of limitations on those claims. *See generally McDonald,* 45 Cal.4th at 100, 109-10.)

Had the arbitrator taken into account the statutory nine-month tolling period provided by §1281.12, he would have deemed plaintiff's submission of his claim to arbitration as having occurred nine months before June 13, 2007 – *i.e.,* on September 13, 2006. Because September 13, 2006 was less than a year after DFEH's April 14, 2006 right-to-sue letter and less than two years after plaintiff's January 31, 2006 termination, the arbitrator *should* have concluded that, with tolling, plaintiffs' submission of his claim to arbitration was timely. Even if the arbitrator had authority to deprive plaintiff of the full FEHA limitations period (which he did not), plaintiff's submission to arbitration would still have been timely because, with tolling, plaintiff's submission occurred within approximately 7-1/2 months after his termination.

The arbitrator did not explain *why* he found plaintiff's claim to be time-barred. Despite the requirement in *Armendariz* and *Little* that the arbitrator's award must be sufficiently detailed to permit meaningful judicial review, *Little*, 29 Cal.4th at 1081; *Armendariz*, 24 Cal.4th at 107, it is impossible to tell from the arbitrator's award how he analyzed the limitations and tolling issue. The award included only the single, conclusionary statement that plaintiff cannot proceed because he "fail[ed] to submit his claims and disputes to binding arbitration within the one year period as required by the Dispute Resolution Agreement or within the

tolling period prescribed in California Code of Civil Procedure 1281.12." Pet. App. 502.

While it is clear that the arbitrator applied the one-year contract deadline rather than any of the applicable statutory limitations periods, this terse statement does not explain *why* those limitations periods were inapplicable or *why* application of the "tolling period prescribed in California Code of Civil Procedure 1281.12" did not make the claim timely. As will be shown below, the absence of any legal analysis supporting the award provides just one of many reasons why the arbitrator's award was properly vacated.

B. Traditional Principles of Judicial Deference Are Not Appropriate in Reviewing a Mandatory, Pre-Dispute Arbitration Award That is Challenged as Contrary to Fundamental Statutory Rights or Expressly Stated Public Policies

The California Arbitration Act enumerates several bases for a court to vacate (§1286.2) or correct (§1286.6) an arbitrator's award. For the most part, these reasons parallel those in the Federal Arbitration Act, 9 U.S.C. §§10-11 (although as this Court recently concluded in *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1343, the U.S. Supreme Court's constructions of the FAA do not control how this Court will construe the CAA).

The arbitrator's award was subject to vacatur on numerous grounds, some explicitly set forth in the CAA and some suggested by prior case law. We begin by demonstrating several reasons why, in the general category of cases at issue (that is, challenges to awards issued pursuant to mandatory, pre-dispute agreements in which the weaker party contends the award violated unwaivable statutory rights or public policy), a heightened standard of judicial review is appropriate.

1. The general principle that an arbitrator's legal and factual determinations are insulated from judicial review is subject to specific, court-approved exceptions

Federal and state courts have long endorsed arbitration as a favored dispute resolution mechanism and have appropriately deferred to the decisions of the arbitrators whom the parties voluntarily select, through legally valid and enforceable arbitration agreements, to resolve the disagreements they consent to have decided under contractually-based rules and procedures. Such deference rests on the assumption that "[b]ecause the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration." *Moncharsh*, 3 Cal.4th at 10.

Because contracting parties are generally entitled to select for themselves the procedures and mechanisms for resolving their disputes, this

Court, like the U.S. Supreme Court, has made clear that as a general matter, "intervention in the arbitration process [should] be minimized." *Id.*; *see also Hall Street Assocs. L.L.C. v. Mattel, Inc.* (2008) __ U.S. __, 128 S.Ct. 1396, 1405. The governing rule has thus long been that "an arbitrator's legal, as well as factual, determinations" are insulated from review; and unless the parties agree upon a stricter standard of judicial review, *Cable Connection,* 44 Cal.4th at 1361, an arbitral award that is not subject to vacatur under the specific standards of §1286.2 or to correction under the standards of §1286.6 must be confirmed, even if it is erroneous on its face and/or results in substantial injustice. *Moncharsh*, 3 Cal.4th at 31.

The CAA, in §1286.2(a)(4), authorizes vacatur when arbitrators "exceed[] their powers." While arbitrators ordinarily do not exceed their powers by making erroneous factual findings or misstating the law, *Cable Connection*, 44 Cal.4th at 1360, they have no authority to violate public policy or to construe an agreement in a manner that makes it illegal or otherwise revocable. *Moncharsh*, 3 Cal.4th at 28-32. Nor may they deprive claimants of rights protected under *Armendariz*, and *Little*, which is why this Court has recognized that heightened judicial review may be appropriate when "granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights." *Moncharsh,* 3 Cal.4th at 32; *see also City of Palo Alto*, 77 Cal.App.4th at 334, 336-37

(when an arbitral award "contravenes an explicit legislative expression of public policy,'" the courts must also deviate from "[t]he normal rule of limited judicial review"); *Armendariz*, 24 Cal.4th at 100, 106-07; *Little*, 29 Cal.4th at 1076-77; *Cole v. Burns Int'l Sec. Servs.* (D.C. Cir. 1997) 105 F.3d 1465, 1486-87.[5]

Whether couched in the CAA's language of an arbitrator "exceeding his powers" or in terms of the minimum level of judicial review required to protect and preserve unwaivable statutory rights and to invalidate arbitral awards that violate public policy, the result should be the same. It is for the reviewing courts, not the arbitrator, to have the last word in determining whether the arbitrator's award violates public policy or deprives a claimant of unwaivable statutory or common law rights – and that determination can only be made by applying a de novo review standard to the public policy and legal issues presented. Put another way, while contracting parties in other contexts may voluntarily limit an arbitrator's decisionmaking discretion by specifically agreeing that the arbitrators must "act in conformity with rules of law," *Moncharsh*, 3 Cal.4th at 10-11, and may

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[5] This Court and the Courts of Appeal have previously applied the "exceeded their powers" standard in cases such as *Bd. of Educ. v. Round Valley Teachers Ass'n* (1996) 13 Cal.4th 269, 272; *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 367; *see also Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443 (citing cases);and *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1055-56 (citing cases).

"take themselves out of the general rule that the merits of the award are not subject to judicial review" by "clearly agree[ing] that legal errors are an excess of arbitral authority that is reviewable by the courts," *Cable Connection,* 44 Cal.4th at 1361; *but see Hall St. Assocs.*, 128 S.Ct. at 1403, claimants asserting unwaivable statutory rights are legally entitled to judicial review sufficient to ensure that the arbitrator actually complied with applicable rules of law. Those claimants have an implied-in-law right to "judicial review sufficient to ensure that arbitrators have complied with the law respecting such claims," *Little*, 29 Cal.4th at 1081, just as they have an implied-in-law right to every other minimum standard guaranteed by *Armendariz* and *Little*.

2. The circumstances of this case warrant the exercise of independent, de novo judicial review of the arbitrator's legal conclusions and his application of law to facts

Before discussing the precise scope of plaintiff's proposed standard of judicial review, we briefly address three key underlying principles.

1. *First*, determinations about what constitutes public policy or unwaivable rights and whether an arbitrator's award impermissibly trenches upon them should be made independently by judges, not arbitrators. Because such rights advance important public goals, they cannot be entrusted to exclusively private adjudication.

The California Legislature has expressly restricted the ability of contracting parties to modify or bargain away certain public policy rights. *See, e.g.,* Civil Code §3513 (prohibiting contracts that "contravene" laws established for public benefit), §1667 (prohibiting contracts contrary to public policy). In the context of private contractual arbitration, reviewing courts have appropriately recognized that independent judicial review serves a vital function in ensuring that public rights are not violated. *See City of Palo Alto*, 77 Cal.App.4th at 334, 336-37; *Round Valley Teachers*, 13 Cal.4th at 272, 277; *W.R. Grace & Co. v. Rubber Workers* (1983) 461 U.S. 767; *Black v. Cutter Laboratories* (1955) 43 Cal.2d 788, 798-99; *see also infra* at 34-44.

Arbitrators are not charged with the responsibility – and do not have the power – to determine public policy or to modify rights that the Legislature has concluded are fundamental and unwaivable. Unlike judges, who are charged with serving the public interest, arbitrators are creatures of contract whose only role is to understand and resolve private disputes. They have no obligation to protect public rather than private rights.[6]

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[6] *See Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1081; *United Paperworkers Int'l Union v. Misco* (1987) 484 U.S. 29, 42; *see also Iowa Elec. Light and Power Co. v. Local Union 204* (8th Cir. 1987) 834 F.2d 1424, 1427 (public policy determination is for courts, not arbitrators); *C.R. Klewin Northeast, LLC v. City of Bridgeport* (2000) 919 A.2d 1002, 1027 (requiring de novo review of public policy impacts because "'courts have greater expertise and knowledge than

(continued...)

Indeed, arbitrators are not even required to follow the law absent an explicit contract requirement (or, as we show, in the context of mandatory, pre-dispute agreements affecting unwaivable statutory rights).[7]

This Court held in *Armendariz* that for a mandatory, pre-dispute arbitration agreement to be enforceable, it must incorporate all minimum standards necessary to ensure the claimant's vindication of unwaivable statutory rights. *Armendariz*, 24 Cal.4th at 106, 107, 113. These minimum standards must include a mechanism for ensuring sufficient judicial review to guarantee their enforcement; for it would make little sense to incorporate such standards into arbitration agreements as a matter of law without also incorporating procedures to ensure their enforcement. While contracting parties *may* agree to incorporate heightened arbitral review provisions under *Cable Connection*, they *must* be deemed to have done so in cases to which the minimum procedural protections of *Armendariz* and *Little* apply.

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[6] (...continued)
arbitrators' in 'the identification and application of the public policy of this state'"); *Bureau of Special Investigations v. Coalition of Public Safety* (2000) 430 Mass. 601, 603 (requiring de novo review because "courts may not enforce contracts or agreements that violate strong public policy").

[7] *See Moncharsh*, 3 Cal.4th at 10-11 ("arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. . . . [A]n arbitrator is not ordinarily constrained to decide according to the rule of law").

2. *Second*, although arbitrators generally have considerable leeway in applying rules of evidence and procedure (subject to the proviso that minimum procedural protections may be required to protect substantive statutory rights, *see, e.g., Gentry*, 42 Cal.4th at 456-63; *Sanchez v. Western Pizza Enterprises, Inc.* (March 17, 2009) __ Cal.App.4th __, 2009 WL 683701, at *7-*8), no such leeway exists with respect to applying the rules governing arbitration set forth in the CAA. An arbitrator may no more disregard or misapply the tolling requirement of §1281.12 than refuse to comply with the ethics standards mandated by §1281.85 or the disclosure requirements of §1281.9 et seq., or deny a claimant's request to be represented by counsel, §1282.4. These are fixed, minimum requirements, adopted by the Legislature to ensure the basic fairness of the arbitral process. *See generally Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 831; Calif. Law Revision Comm. Committee, *Recommendation and Study Pertaining to Arbitration*, at G-40 - G-41 (Dec. 1960) (discussing needed for minimal restrictions on arbitration process to ensure fairness), *available at* http://clrc.ca.gov/pub/Printed-Reports/Pub034.pdf.

Where the reviewing court finds that the arbitrator failed to comply with the CAA and thereby caused prejudice to the complaining party, it must vacate the arbitrator's award – without any deference to the arbitrator's construction of those CAA provisions. Such de novo review is

required in part because the CAA's structural protections, like FEHA and *Tameny* rights, are rooted in well-established public policies that are not waivable by private contract. *See Azteca Construction, Inc. v. ADR Consulting, Inc.* (2004) 121 Cal.App.4th 1156, 1167; *cf. Round Valley Teachers*, 13 Cal.4th 269 (vacating arbitrator's award based on independent determination that award conflicted with statute). Without such independent judicial review, the CAA's structural protections would be essentially unenforceable (because only by a motion to vacate can a party challenge an arbitrator's failure to comply with the CAA). *See Azteca,* 121 Cal.App.4th at 1167; *Trabuco Highlands Cmty Ass'n v. Head* (2002) 96 Cal.App.4th 1183, 1190.

None of the reasons courts generally defer to arbitral awards apply to awards that violate the CAA. Arbitrators are generally empowered to determine the scope of "their contractual authority" and the appropriate "choice of remedy," because these decisions call on the "flexibility, creativity, and sense of fairness" that the parties contracted for in agreeing to arbitrate. *Advanced Micro Devices,* 9 Cal.4th at 373-74. But nothing in CAA or its legislative history suggests that the Legislature intended to rely on arbitrators' "flexibility, creativity, and sense of fairness" in interpreting the CAA itself. To the contrary, when the Legislature has chosen to introduce flexibility into the CAA's rules, it has done so explicitly. *See,*

e.g., §1282 (permitting parties to agree to their own rules on arbitral neutrality); §1283.1 (allowing parties to incorporate by agreement certain discovery rules).[8]

For these reasons, anything less than de novo review of the arbitrator's construction of §1281.12's tolling provision would undercut the Legislature's deliberate effort to codify and extend the protections of common law equitable tolling to the arbitration context. Section 1281.12 eliminates any uncertainty about the proper scope of tolling for plaintiffs who first pursue their claims in court and only later submit those claims to arbitration. If the Legislature had intended to allow arbitrators the flexibility to decide tolling questions based solely on their own notions of fairness and equity, enactment of §1281.12 would have been unnecessary.

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[8] Even with regard to contractual limits on authority, this Court has recognized that an arbitrator's discretion to decide disputes is limited where the scope of discretion is "expressly restricted by the agreement or the submission to arbitration," *Advanced Micro Devices*, 9 Cal.4th at 376, or where the arbitrator by contract or statute is "'specifically required to act in conformity with rules of law." *Moncharsh*, 3 Cal.4th at 10; *cf. DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, 1815 (concluding that arbitrator exceeded his authority when he denied attorneys' fees to a prevailing party under an agreement stating that such a party "'shall'" be entitled to fees). The CAA's requirements, including §1281.12, constitute explicit and unambiguous limits on arbitrators' authority that are not only incorporated as a matter of law into every arbitration agreement to which the statute applies, *see Vandenberg,* 21 Cal.4th at 831, but that constitute binding legislative commands the arbitrators must obey – subject to the reviewing court's power to determine whether that compliance was adequate.

3. *Third*, the need for sufficiently rigorous judicial review to ensure protection of fundamental statutory, common law, and public policy rights is especially pronounced where the award results from implementation of a mandatory, individual pre-dispute agreement, rather than a voluntarily-negotiated post-dispute agreement or a collective bargaining agreement among parties with equal bargaining power and comparable "repeat player" status. *See Cole*, 105 F.3d at 1475-77; *Armendariz,* 28 Cal.4th at 115.

This Court has previously recognized that heightened judicial scrutiny is required to protect employees (and consumers) subject to non-negotiable "take it or leave it" pre-dispute agreements. *Armendariz*, 24 Cal.4th at 103 n.8; *see also Muhammad v. County Bank of Rehoboth Beach* (N.J. 2006) 912 A.2d 88, 96-97; *Strand v. U.S. Bank Nat. Ass'n* (N.D. 2005) 693 N.W.2d 918, 924; *Malice v. Coloplast Corp.* (Ga. App. 2006) 629 S.E.2d 95, 99. While the Court has thus far accepted the fiction that such one-sided agreements are to some degree "voluntary," *Armendariz*, 24 Cal.4th at 115, it has also recognized that the degree of voluntariness in such arrangements is extremely limited, and that in the modern non-unionized workplace, most employees have no meaningful ability to negotiate over any of their terms or conditions of employment. *Id.* at 103 n.8, 115; *Gentry*, 42 Cal.4th at 471-72; *Sanchez*, 2009 WL 683701, at *11.[9]

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[9] *See also* Sara Lingafelter, *Lack of Meaningful Choice Defined:* (continued...)

The need for judicial oversight of arbitration agreements imposed on workers as a condition of their employment is particularly critical given employers' ability, under *Cable Connection*, to grant themselves the benefits of heightened judicial review of arbitral decisions whenever they so choose. In this case, for example, nothing would have prevented defendant Pearson from including a clause in the DRA that required heightened judicial review of any arbitration award reached under its provisions.[10]

Heightened review in these circumstances will also not unduly undermine the efficiency and finality goals of arbitration. As the D.C. Circuit explained in *Cole*:

> The value and finality of an employer's arbitration system will not be undermined by focused review of arbitral legal determinations. Most employment discrimination claims are entirely factual in nature and involve well-settled legal principles. . . . As a result, in the vast majority of cases,

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[9] (...continued)
Your Job vs. Your Right to Sue in a Judicial Forum (Spring 2005) 28 Seattle U.L. Rev. 803, 803-04; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration* (1997)1997 Wis. L. Rev. 33, 56-57.

[10] Applied to mandatory, pre-dispute arbitration agreements, the *Cable Connection* rule solely advantages employers, who, as the drafters of such agreements, have unilateral authority to decide which issues they wish to subject to greater judicial review. For that reason, although the de novo review standard we propose only applies *as a matter of law* to arbitral awards that allegedly violate public policy or that are challenged by employee claimants as depriving them of unwaivable rights, the proposed standard is not unfair because an employer can always add to its mandatory, pre-dispute agreements a provision requiring de novo review of *all* legal determinations, regardless of who prevailed.

> judicial review of legal determinations to ensure compliance with public law should have no adverse impact on the arbitration process.

Cole, 105 F.3d at 1487 (footnote and citations omitted).

The limited exceptions to deferential judicial review in the circumstances we propose would serve the best of both worlds. In the vast majority of arbitration cases, those exceptions will not apply and will not have any effect upon arbitral efficiency or finality. But, in the narrow category of cases involving mandatory pre-dispute agreements, where an arbitrator's award appears to violate the CAA, to deprive a claimant of unwaivable statutory rights, or to violate established public policy, heightened judicial review of the arbitrator's legal rulings is necessary to avoid "substantial injustice," and to prevent the private system of arbitral justice from unduly encroaching upon fundamental public rights.

II. THE ARBITRATOR'S AWARD WAS PROPERLY VACATED

The arbitrator's erroneous determination that plaintiff's FEHA and other claims were time-barred deprived plaintiff of rights protected by FEHA, the CAA, and several established public policies (regarding state anti-discrimination laws, non-waivability of FEHA rights, and the doctrine of equitable tolling). As a result, the arbitrator's award was properly vacated by the Superior Court.

A. The Arbitrator's Award Must be Vacated As Contrary to Public Policy

1. Court should review de novo and cannot confirm an award that violates public policy

When an arbitral award "contravenes an explicit legislative expression of public policy,'" courts must deviate from "[t]he normal rule of limited judicial review." *City of Palo Alto*, 77 Cal.App.4th at 334, 336-38 (arbitral award cannot violate public policy). On a petition to confirm or vacate, a court should independently determine whether the award violates public policy, without deference to the arbitrator's legal analysis.

The principle is well established that courts cannot enforce arbitration awards that are contrary to public policy. *See, e.g., W.R. Grace*, 461 U.S. 767; *Gentry*, 42 Cal.4th at 467; *Black*, 43 Cal.2d at 798-99; *Armendariz*, 24 Cal.4th at 99; *Sanchez*, 2009 WL 683701, at *9; *State v. Henderson* (2009) 277 Neb. 240, 249 n.40 (citing authorities from 14 states). This principle is rooted in basic contract law, for as the U.S. Supreme Court has explained:

> A court's refusal to enforce an arbitrator's award . . . because it is contrary to policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act . . . .

Misco, 484 U.S. at 42.[11] In California, this principle is codified by Civil Code §1667, which declares that a contract "[c]ontrary to an express provision of law [or] the policy of express law" is unlawful.

It is for the courts, not private arbitrators, to determine what constitutes a public policy and whether an arbitration award conflicts with that policy. That determination is necessarily de novo, not only because it rests on application of a legal standard to an issue that an arbitrator has no public authority or expertise to resolve, but also because public policies are often developed through an interrelated series of legislative enactments and judicial decisions that extend beyond the particular legal principles involved in deciding a particular arbitration claim. *See, e.g., Henderson*, 277 Neb. at 259 (discussing varied sources of state's policy against racial discrimination).

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[11] *See also W.R. Grace*, 461 U.S. at 766; *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17* (2000) 531 U.S. 57, 63 (inquiry is whether award "run[s] contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests"); *N.Y. State Corr. Officers & Pol. Benev. Ass'n v. State* (1999) 94 N.Y.2d 321, 327 ("a court may vacate an arbitral award where strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit a particular matter from being decided or certain relief from being granted by an arbitrator"); *AFSCME v. State of Illinois* (1988) 124 Ill.2d 246, 260 ("While there is no precise definition of public policy, it is to be found in the Constitution, in statutes and, when these are silent, in judicial decisions.").

De novo "public policy" review will not in most cases require review of an arbitrator's factual determinations, and often will not even require review of the arbitrator's legal analysis. To determine whether an award is contrary to public policy, a court compares the *effect* or *result* of an arbitrator's award – not the findings underlying the arbitrator's analysis or "the behavior or conduct of the party in question." *See generally S. Calif. Gas Co. v. Utility Workers Union, Local 132* (9th Cir. 2001) 265 F.3d 787, 795; *City of Palo Alto*, 77 Cal.App.4th at 339.[12]

2. The arbitrator's award violated clearly defined public policy

There should be little dispute over the proposition that the

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[12] Because public policy review of an arbitrator's award focuses principally upon the effect of an award on public policy, such review would rarely require heightened scrutiny of the arbitrator's underlying findings. *See Misco*, 484 U.S. at 44-45 (award cannot be vacated as contrary to public policy based on factual inference about an employee's drug use that arbitrator did not draw); *but cf. Bose Corp. v. Consumers Union* (1984) 466 U.S. 485, 499 ("in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"). This limitation on reviewing an arbitrator's factual findings is appropriate, given the need to balance arbitral finality against the goal of protecting public policies. Thus, for example, it was appropriate for the court in *City of Palo Alto* to recognize "an explicit public policy requiring employers to take reasonable steps to provide a safe and secure workplace," while concluding that reinstatement of an employee who made a threat of violence did not violate such policy, in part because: the arbitrator did not find that threats were genuine; there was not "uncontroverted evidence" to the contrary; and the arbitrator had not "failed to reach that substantive ground." 77 Cal.App.4th at 336-38.

arbitrator's award deprived plaintiff Turcios of fundamental, unwaivable rights in violation of California public policy – most significantly, the right to initiate a claim for unlawful age discrimination within the time periods created and protected by the California Legislature. Because plaintiff took reasonable steps to prosecute his age discrimination claims before DFEH and in court well within the statutory limitations period, and because plaintiff promptly submitted those claims to arbitration after the Court of Appeal denied his writ petition, the Superior Court correctly concluded that the arbitrator exceeded his powers by issuing an award that violated California public policy.

a. This Court has repeatedly held that the State of California has a strong public policy against age discrimination, codified in FEHA and actionable under FEHA and the *Tameny* line of cases. As stated in *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, for example:

> [T]here can be little doubt that the FEHA's express policy condemning employment discrimination against older workers is one that benefits the public at large. Because average life expectancy has risen to more than 80 years, most California residents either are now or will become over-40 employees, thus creating an extraordinarily broad class of potential victims of age discrimination in employment. Moreover, the pernicious effects of age discrimination in employment are not confined to the employees who are its immediate targets. As the Legislature has recognized in Unemployment Insurance Code section 2070, discrimination against older workers violates the public policy that "manpower should be used to its fullest extent," thereby

depriving society at large of the benefit of valuable human resources. *Id.* at 895 (footnote omitted).

State anti-discrimination policy strongly supports applying applicable tolling doctrines in a manner that preserves, rather than curtails, a plaintiff's right to pursue FEHA claims. That policy reflects the "legislative intent that [FEHA] and its statute of limitations be liberally interpreted in favor of . . . ultimately resolving claims on the merits," *McDonald*, 45 Cal.4th at 107-08, and is "more consistent with the remedial purpose of [FEHA] than one likely to bar potentially meritorious claims." *Romano*, 14 Cal.4th at 494. The policies underlying FEHA thus demand application of equitable tolling while "an aggrieved party's claims are being addressed in an alternate forum," in order to ensure that otherwise time-barred claims can be determined on their merits. *McDonald*, 45 Cal.4th at 108, 110; *see also Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798.[13]

b. A related public policy violated by the award in this case is the policy underlying equitable and statutory tolling. Every contract in this

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[13] Although the direct linkage between equitable tolling and anti-discrimination policy may not have been made explicit prior to *McDonald*, that connection was certainly strongly implied by the Legislature. After all, FEHA expressly tolls any judicial limitations periods during the pursuit of federal administrative remedies (Gov. Code §12965(d)) as well as for other reasons. *See* Gov. Code §12960(d) (tolling deadline for filing a complaint based on lack of knowledge of employer's identity, delayed knowledge of unlawful practice, or complainant's youth); *see also McDonald*, 45 Cal.4th at 108-10 (recounting Legislature's addition of additional grounds for tolling in reaction to court decisions).

state is deemed to incorporate external sources of law and equitable principles. *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263. In addition, mandatory pre-dispute arbitration agreements are deemed to incorporate minimum standards sufficient to ensure protection of unwaivable rights. *Armendariz*, 24 Cal.4th at 106, 107, 113; *Sanchez,* 2009 WL 683701, at *12. Thus, even if the DRA did not expressly incorporate the "California Arbitration Act, California Code of Civil Procedure, §1280 et seq.," Pet. App. 149, the parties' agreement would still have to be read as incorporating the tolling principles of §1281.12 and common law. *See McDonald,* 45 Cal.4th at 101-02. Such tolling promotes "persuasive policy considerations," *Elkins v. Derby* (1974)12 Cal.3d 410, 417, avoids inequity, *id.* at 418, protects the "unwary" from "procedural traps." *McDonald*, 45 Cal.4th at 102, and furthers the public policy of discouraging "duplicative filings, with attendant burdens on plaintiffs, defendants, and the court system." *Id.* at 102; *see also Downs v. Dept. of Water & Power* (1997) 58 Cal.App.4th 1093, 1100; *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 926; *Campbell v. Graham-Armstrong* (1973) 9 Cal.3d 482, 490.

The CAA expresses the arbitration-related public policies of this State through a "detailed" and "comprehensive statutory scheme" designed to ensure that extra-judicial arbitration proceedings are just and fair.

Moncharsh, 3 Cal.4th at 9; *see Vandenberg*, 21 Cal.4th at 830. The CAA furthers these policies by requiring that all applicable limitations periods be tolled during the pendency of preliminary court proceedings. §1281.12. The CAA also helps to ensure the fairness of arbitrable proceedings by setting forth the basic prerequisites for arbitration agreements to be enforceable (§1281); regulating the arbitrators' neutrality (§1281.9); allowing attorney representation to arbitrating parties (§1282.4); and imposing limitations on the parties' allocation of arbitral costs (§1284.3). *See generally Azteca*, 121 Cal.App.4th at 1165 ("Precisely because arbitrators wield . . . mighty and largely unchecked power, the Legislature has taken an increasingly more active role in protecting the fairness of the [arbitration] process."); Assem. Comm. on Judiciary, Analysis of AB 1553 (2005-06 Leg. Sess.) ("Bill Analysis") at 3 (§1281.12 protects claimants from being unfairly deprived of a forum in which to resolve their disputes).

The public policies underlying §1281.12 directly support plaintiff's position in this case. When the Legislature enacted §1281.12, it identified several reasons why arbitral limitations period must be tolled for the entire period (plus 30 days) during which a claimant pursues pre-arbitration judicial remedies. The Legislature recognized that plaintiffs may have many legitimate reasons for filing in court initially, instead of submitting to

arbitration, and concluded that plaintiffs should not be penalized for having made that choice. As the Assembly Bill Analysis explained:

> Supporters [of C.C.P. §128.12] observe that there are many legitimate reasons why a party might file a lawsuit in court, rather than demanding or pursuing arbitration. Among these are the following: (1) the plaintiff may believe the claims are not subject to arbitration because the arbitration agreement is unenforceable on grounds of unconscionability or similar concepts; (2) there may be a dispute about whether the particular claims at issue do or do not fall within the scope of an arbitration agreement; (3) the plaintiff may contend that one or more of the statutory grounds for denying a petition to compel arbitration set forth in Code of Civil Procedure section 1281.2 exist, assuming the defendant does file a petition to compel arbitration in response to the plaintiff's filing of the lawsuit; (4) the plaintiff may prefer a court trial or jury trial and simply be hopeful that the defendant will not assert any right to arbitrate the claims, for whatever reason [indeed, the defendant may decide that it prefers a court proceeding as well]; and (5) the plaintiff might not even be aware that there is an arbitration agreement governing the controversy.

Bill Analysis at 3; *see also id.* at 2-5 (describing policy goals of §1281.12; *Elkins*, 12 Cal.3d at 419-20 (equitable tolling furthers same policies).

This Court has recently explained that the tolling doctrine is designed to "avoid[] . . . chaos in the administration of justice" by "alleviating the fear of claim forfeiture." *McDonald*, 45 Cal.4th at 100. That "fear of claim forfeiture" is heightened for employees such as plaintiff, for if they reasonably but incorrectly choose the *wrong* forum, the limitations period for the *correct* forum may run out while the first action is pursued – which is precisely what Pearson is claiming should be the result here.

All of these policies in favor of tolling apply with particular force in the context of mandatory, pre-dispute arbitration agreements, where the agreement may not even be enforceable and where the employee may not have understood the consequences of what he was forced to sign. *See Armendariz*, 24 Cal.4th at 103 n.8, 115; *Gentry*, 42 Cal.4th at 471-72; *see generally* Katherine Van Wezel Stone, *Labor and Employment Law: Mandatory Arbitration of Individual Rights: The Yellow Dog Contract of the 1990s* (1996) 73 Den. U.L. Rev. 1017, 1036-37; Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: the Return of Unconscionability Analysis As a Counterweight to Arbitration Formalism* (2004) 19 Ohio St. J. on Disp. Resol. 757, 760, 767.

c. The arbitrator's dismissal of plaintiff's claims also violates the well-defined public policy that FEHA and *Tameny* claims cannot be restricted by contract – and certainly not by an adhesive form contract. *See Armendariz*, 24 Cal.4th at 100-01, 103 n.8 (discussing FEHA claims and Civil Code §§3513, 1668); *Little*, 29 Cal.4th at 1076-77 (extending *Armendariz* to *Tameny* claims); *Stevenson*, 16 Cal.4th at 904.

The public policy against such restrictions is rooted not only in FEHA itself, but also in two provisions of the Civil Code: §1668, which prohibits exculpatory contracts whose object is "to exempt anyone from . . . violation of law," and §3513, which states that "a law established for a

public reason cannot be contravened by a private agreement." *Armendariz*, 24 Cal.4th at 100; *see also Little*, 29 Cal.4th at 1077. Under these policies, "an employment contract that required employees to waive their rights under the FEHA . . . . would be unlawful," because "an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA." *Armendariz*, 24 Cal.4th at 100.[14]

Certainly, contracting parties may knowingly and voluntarily agree to shorten the available limitation periods on many common law claims. However, "most reported decisions upholding shortened periods involve straightforward commercial contracts plus the unambiguous breaches or accrual of rights under those contracts." *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1430. This Court's analysis in *Armendariz* and later

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[14] *Armendariz* describes the restriction prohibited by §1668 and §3513 as "waiver," and accordingly, we refer to FEHA and *Tameny* rights as "unwaivable." However, the limitations that §3513 places on contracting parties is not limited to "waiver," as formally defined to mean voluntary relinquishment of a known right. *See* Black's Law. Dict. (8th ed. 2004). Rather, §3513 more broadly states that a contract cannot "contravene[]" FEHA or *Tameny* law. *Id.* (defining "contravene"as "[t]o violate or infringe"; "to come into conflict with; to be contrary to"). Accordingly, "[c]ourts have applied [§3513's] principle, either expressly or by implication, to annul or restrict contractual arbitration provisions that run afoul of statutory rights that benefit the public." *Azteca,* 121 Cal.App.4th at 1166. *Armendariz*, for example, concluded that a contractual limitation on available remedies effectively waived FEHA rights without inquiring whether the provision constituted a voluntary relinquishment of a known right. *See generally Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1048 (applying §3513 to hold that "a law established for a public reason cannot be waived *or circumvented* by a private act or agreement'") (emphasis added).

cases makes clear that the public policies preserving unwaivable statutory rights demands a different result for contracts applied to unwaivable FEHA and *Tameny* claims, as here.

B. The Arbitrator's Award Must Be Vacated Because it Violated the CAA

We demonstrated above that arbitrators have no authority to violate the CAA, in part because of the public policies served by the statute. *See supra*, at 28-30. The arbitrator committed clear error in failing to toll the statute of limitations as required by §1281.12, as both lower courts agreed. *See supra* at 3. By refusing to toll the limitations period in the face of a direct statutory requirement that he do so, the arbitrator necessarily "exceeded [his] powers" within the meaning of §1286.2(a)(4). No arbitrator has the power to ignore the mandatory language of the CAA – particularly not under an agreement that explicitly incorporates the CAA, as the DRA does. *See* Pet. App. 149. For this reason as well, the arbitrator's award was properly vacated.

C. The Arbitrator's Award Must Be Vacated Because It Deprived Plaintiff of Several Minimum Protections Required Under *Armendariz* and *Little* For Vindicating Unwaivable Statutory and Common Law Claims

In *Armendariz* and *Little*, this Court held that mandatory, pre-dispute arbitration agreements must ensure sufficient substantive and procedural protections for claimants seeking to vindicate unwaivable statutory or

common law rights. *Armendariz*, 24 Cal.4th at 100; *Little*, 29 Cal.4th at 1076-77. Even if the arbitration agreement does not expressly mandate a forfeiture of such rights (which they rarely do), an agreement that prevents a plaintiff from "fully vindicat[ing] his or her [unwaivable] cause of action in the arbitral forum" violates the public policies against waiver of FEHA, *Tameny* and other public rights. *Id.*; Civil Code §§1668, 3513. That is because '"[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."' *Cole*, 105 F.3d at 1487 (quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26).

In many instances, whether an arbitration agreement is inadequate to protect statutory rights will be clear on its face (such as if it expressly limits statutory remedies, vests sole discretion in the arbitrator to allocate costs, or imposes procedural limitations that would likely chill the exercise of protected rights). *Armendariz*, 24 Cal.4th at 103, 107-11. In other instances, the practical impact of the contract language will need to be evaluated before its impact on protected rights can become known. *See, e.g., Gentry*, 42 Cal.4th at 457, 463 (because a contractual prohibition against class actions could "lead to a de facto waiver of statutory rights," the trial court should consider the "real world obstacles to the vindication of

class members' right to overtime pay through individual arbitration" in evaluating the enforceability of a contractual class action prohibition); *Sanchez,* 2009 WL 683701, at *8-*9. In still other instances, as here, not until the arbitrator actually construes or applies a particular clause will its impact on protected rights be knowable.[15]

The first section of *Armendariz* holds that a mandatory pre-dispute arbitration agreement, to be enforceable, must guarantee a sufficiently high level of substantive and procedural protections to ensure that the plaintiff can "vindicate his or her . . . cause[s] of action in the arbitral forum." *Armendariz*, 24 Cal.4th at 101; *Little*, 29 Cal.4th at 1076-77. To accomplish this purpose, and to preserve the public policies that make FEHA and *Tameny* claims unwaivable, "parties agreeing to arbitrate [such claims] must be deemed to consent to abide by the substantive and remedial provisions of the [relevant statute or doctrine]. . . . Otherwise, a party

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[15] While plaintiff in this case perhaps *could* have challenged the DRA at the outset under *Armendariz* (given its shortening of the statute of limitations), there was no reason to believe at the time that the shortened limitations period would make any difference, given §1281.12 and the agreement's express incorporation of the CAA. But whether or not plaintiff could have raised a successful *Armendariz* challenge earlier based on how the DRA *might* be construed, there is no compelling reason why, after issuance of the award, he could not seek vacatur on the theory that the agreement stripped him of minimum statutory rights, as applied. *Cf. Paramount Unified School Dist. v. Teachers Ass'n* (1994) 26 Cal.App.4th 1371, 1381 ("Arbitrators . . . exceed their powers in enforcing a contract provision illegal on its face or as applied.").

would not be able to fully vindicate his or her . . . cause of action in the arbitral forum." *Id.* at 100 (internal quotation marks and brackets omitted).

Armendariz adapted from the D.C. Circuit's decision in *Cole* a non-exhaustive list of "five minimum requirements for the lawful arbitration of [unwaivable rights] pursuant to a mandatory employment arbitration agreement." 24 Cal.4th at 102 (quoting *Cole*, 105 F.3d at 1482). Among these was assurance that the arbitration would provide for all relief that would otherwise be available in court and a written arbitration decision and judicial review sufficient to ensure that the arbitrator complied with the law. *Armendariz*, 24 Cal.4th at 103-04, 106-07; *Little*, 29 Cal.4th at 1081.

The arbitration agreement here failed to provide these mandatory minimum requirements.

When unwaivable statutory rights are being asserted, the full limitations period allowed by statute must be among the "substantive and remedial provisions" protected by the arbitration agreements. To deprive a plaintiff of the right to pursue a claim for unlawful age discrimination based on a contractually shortened limitations period is no different than depriving plaintiff of the right to seek statutorily-permitted remedies or to pursue on its merits a statutorily-recognized theory of liability. By shortening plaintiff's statute of limitations, the arbitration agreement (as construed by

the arbitrator) imposed a direct "limit[ation on] statutorily imposed remedies" in violation of *Armendariz*, 24 Cal.4th at 103.

The Court of Appeal stated that plaintiff *could have* filed his claims within the one-year contract deadline, based on the fact that he *did* file those claims (albeit, in court) within a year of his termination. Ct. App. Slip Op. 17. But the proper question is not what plaintiff *could have* done. After all, any plaintiff theoretically could meet any contract deadline. Instead, the question should be whether application of a shortened contract deadline had the actual consequence of precluding plaintiff from vindicating unwaivable statutory rights – including the right to tolling and to the full statutory limitations periods that would apply in court.

Where the result of not meeting a contract deadline is dismissal of unwaivable claims, and where the underlying statutes provides a *longer* deadline that the plaintiff *did* satisfy, application of the shortened statutory deadline violates unwaivable rights. Particularly because the California Legislature made clear in enacting §1281.12 that a plaintiff may have many legitimate reasons for filing a claim in court before submitting that claim to arbitration, *see supra* at 41, courts must be diligent in ensuring that the arbitrator provides, at a minimum, the full statutory time periods to which the plaintiff is entitled.[16]

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[16] The Court of Appeal attempted to minimize the importance of the (continued...)

Nor does it matter that award was based on a one-year limitation period, rather than the six-month limitation period found to limit a plaintiff's ability to vindicate his FEHA rights in *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107. *Armendariz* does not distinguish between *degrees* of limitations on a plaintiff's ability to vindicate unwaivable rights. Nor would any such distinction make sense; unwaivable means unwaivable under any circumstances, not unwaivable in *most* circumstances. In any event, the difference between the Agreement's one-year period and FEHA's 2-3 year period is far from *de minimis*.

Plaintiff's unwaivable statutory rights were also not adequately protected here because the arbitrator failed to issue a sufficiently detailed award to enable a court to meaningfully review his reasoning, as required by *Armendariz*, 24 Cal.4th at 106-07. While de novo review should be

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[16] (...continued)
Agreement's shortened limitations period by noting that this case does not involve continuing violations. *See* Ct. App. Slip Op. 15 n.8. But the policy against waiving unwaivable rights is not limited to any particular FEHA theory. A shortened and strictly-applied limitation period will limit plaintiffs' rights to recover under *any* theory. And the Ninth Circuit law that the Court of Appeal cited is not limited to cases in which plaintiffs seek to remedy continuing violations. In *Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1077 the Ninth Circuit noted its "particular[] concern [about] continuing violations" but did not conclude that a continuing violations theory was at issue. And, in *Circuit City Stores, Inc. v. Mantor* (9th Cir. 2003) 335 F.3d 1101, the Ninth Circuit held unconscionable and unenforceable a contractual shortening of a limitations period even though, as here, the claims at issue centered on plaintiff's termination. *Id.* at 1104 n.5, 1107.

required whenever an arbitrator's award is challenged as violating statutory rights or public policy, the case for de novo rather than more deferential review is even stronger where, as here, there are no factual findings or legal analysis stated, and thus no countervailing analysis that might warrant deference. The mere conclusion that plaintiff filed too late under the contract offers no insight into the arbitrator's thinking, or why he disregarded the statutory limitations periods or the statutory or equitable tolling doctrines. While de novo review would be necessary to protect plaintiff's rights even if some explanation had been provided, the absence of analysis make the appropriateness of the Superior Court's vacatur ruling even clearer.

D. The Arbitrator's Award Must Be Vacated Because It Construed the Contract in A Manner That Rendered It Unconscionable and Unenforceable

1. Courts must review de novo an award based on an mandatory, pre-dispute arbitration agreement that is challenged as unconscionable and unenforceable

An arbitrator has no authority to issue an award based on an invalid arbitration agreement. *See generally* §1281 (a written arbitration agreement "is valid, enforceable and irrevocable, *save upon* such grounds as exist for the revocation of any contract.") (emphasis added). For the same reason, an arbitrator should have no authority to construe an arbitration agreement in a manner that renders it unconscionable. While unconscionability challenges

are generally raised as a threshold matter in court, there is no requirement that unconscionability challenges must be raised before arbitration begins. Moreover, there are many circumstances in which unconscionability challenges cannot be raised in court initially, such as when the contract as a whole (and not the arbitration agreement) is being challenged as unconscionable, *see Nagrampa* v. *MailCoups, Inc.* (9th Cir. 2006) (en banc) 469 F.3d 1257, 1263-64, or where, as here, the arbitrator's award construes the arbitration agreement in an unanticipated manner that makes it unconscionable.

Courts have long been empowered to vacate arbitration awards resting on agreements that were unconscionable or otherwise illegal. *See Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 610 (plurality opinion) ("the court should deny confirmation and should vacate any award granting relief under [an] illegal contract upon the ground that the arbitrator exceeded his powers in making such award"). "The mere submission of an illegal matter to arbitrators and reducing it to an award does not purge it of its illegality.'" *Id.* at 611 (citing cases supporting "this well-settled principle").

For a court to determine whether an arbitration agreement as construed by the arbitrator is unconscionable, the court must conduct an independent, de novo review of the arbitrator's analysis. Just as a court cannot defer to an arbitrator's decision about whether an award violates

public policy, neither can it defer to an arbitrator's decision that, as construed, the agreement is not unconscionable. When a plaintiff seeks to vacate an arbitral award on the ground that its construction of the contract is unconscionable – in this case, because of its foreshortened, un-tolled, limitations period – that issue should be decided under the same de novo review standard that would apply to an appellate court's review of a trial court's unconscionability finding. *See* §1281.2(b); *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 171.

2. The DRA, as construed and applied by the arbitrator, is unconscionable

The doctrine of unconscionability in contracts "has both a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Little*, 29 Cal.4th at 1071 (internal quotation marks omitted); *Armendariz*, 24 Cal.4th at 114.

An arbitration agreement drafted by an employer and imposed on its employees as a condition of employment is procedurally unconscionable. *Armendariz,* 24 Cal.4th at 113-15; *Little,* 29 Cal.4th at 1071; *Martinez*, 118 Cal.App.4th at 114. In this case, the DRA was drafted by Pearson and imposed on plaintiff, a low-wage, Spanish-speaking janitor, on a "take it or leave it" basis as a condition of his continued employment. There is no evidence that plaintiff had any opportunity to opt out or negotiate the

DRA's terms, especially because those terms (as paraphrased) were also made part of the employee handbook. *See supra* at 6.[17]

Because procedural unconscionability can also rest on contractual terms that come as a surprise to plaintiff or are beyond plaintiff's reasonable expectations, *Armendariz*, 24 Cal.4th at 133; *Sanchez*, 2009 WL683701, at *9-*10, the unanticipated fact that the DRA could be construed by an arbitrator as eliminating plaintiff's right to the statutory limitations periods and statutory tolling also support a finding of procedural unconscionability in this case. *Compare Gentry*, 42 Cal.4th at 470.

The DRA as applied by the arbitrator is also substantively unconscionable. Confronted with arbitration agreements similar to the DRA, the Ninth Circuit and California courts have repeatedly found arbitration agreements that shorten the limitations period for asserting FEHA claims unconscionable. *See Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1175; *Circuit City Stores, Inc. v. Adams* (9th Cir. 2002) 279 F.3d 889, 894; *Martinez*, 118 Cal.App.4th 107; *see also Davis*, 485 F.3d at 1066 (wage and hour claims).

The DRA's one-year limitations period is particularly harsh because, by restricting plaintiff's ability to assert unwaivable FEHA and *Tameny*

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[17] It is not even clear whether plaintiff in fact agreed to the DRA, because the only Spanish-language document he signed was a mere acknowledgment of receipt, not an agreement to arbitrate. Pet App. 129; *Nelson v. Cyprus Bagdad Copper Corp.* (1997) 119 F.3d 756, 762.

claims, it "operate[s] effectively as [an] exculpatory contract clause[] that [is] contrary to public policy." *Discover Bank,* 36 Cal.4th at 161. The one-year limitations period not only severely restricted plaintiff's ability to bring an age discrimination/wrongful termination claim, but also would have precluded him from asserting a "continuing violations" claim, if the facts had warranted. *See Ingle*, 328 F.3d at 1175.

III. THE ARBITRATOR'S AWARD VIOLATES SEVERAL OTHER PROVISIONS OF THE CALIFORNIA ARBITRATION ACT AS WELL

For the reasons explained above, the arbitrator's erroneous interpretation of the CAA tolling provision and a contractual limitation period so obviously violated plaintiff's rights under FEHA, *Tameny*, and the equitable tolling doctrine, that on multiple and independent grounds, the Superior Court was correct to vacate the award. We have focused on the gravest errors in the arbitrator's award – those that threaten the public policies on which plaintiff's underlying claims are based. However, we note that this Court also has several other options for affirming the Superior Court's vacatur ruling or "correcting" the arbitrator's award.

First, the award may be vacated because it was obtained by " . . . fraud or other undue means." §1286.2(a)(1). Defendant Pearson seems to have deliberately delayed filing its petition to compel arbitration until after the one-year DRA limitation period expired, in order to later file a "gotcha"

summary judgment motion in arbitration. Pearson never referred to the DRA or arbitration in its court filings until after that one-year period, and never informed the Superior Court that, if arbitration were compelled, Pearson's first order of business would be to assert that plaintiff's claims were time-barred and that §1281.12 did not toll them. *See generally A.G. Edwards & Sons, Inc. v. McCollough* (9th Cir. 1992) 967 F.2d 1401, 1403. This constitutes a fraud on plaintiff and on the court, or, at a minimum, the use of "undue means" to obtain the dismissal of plaintiff's age-discrimination claims in arbitration. It is a basic principle of equity that "[o]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383 (internal quotation marks and brackets omitted). That is exactly what Pearson did by not disputing plaintiff's right to litigate until after the one-year limitations period passed.

Second, by misapplying §1281.12, the arbitrator's award is subject to vacatur under §1286.2(a)(5), because "[t]he rights of the party were substantially prejudiced by . . . conduct of the arbitrator[] contrary to the

provisions of this title." In this case, the prejudicial conduct was the arbitrator's failure to toll the limitations period as §1281.12 requires.

Third, at a minimum, the arbitrator's award could be corrected, because it was based on "an evident miscalculation of figures." *See* §1286.6(a). The arbitrator did not explain how he calculated the running of plaintiff's limitations period under the applicable tolling provisions. But under any reasonable computation of the relevant dates, plaintiff's claim was timely, if his time in court were properly deemed tolled.

IV. THIS COURT SHOULD STRIKE DOWN THE ENTIRE ARBITRATION AGREEMENT AS UNENFORCEABLE

The Superior Court vacated the arbitrator's award and remanded for the parties to select a new arbitrator. Pet. App. 868. While that ruling effectively reformed the parties' contract to sever the unenforceable limitations provision, the more appropriate remedy under traditional "severance" analysis would have been to remand for trial before the Superior Court itself, not an arbitrator.

This Court in *Armendariz* stated the basic principles concerning severance. "If the illegality [of a contract] is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, . . . severance and restriction are appropriate." *Armendariz*, 24 Cal.4th at 124. But, arbitration cannot

continue "[i]f the central purpose of the contract is tainted with illegality." *Id.* In that case, "the contract as a whole cannot be enforced." *Id.*

Although the most glaring problem with the DRA is its one-year limitations period, the agreement has "multiple defects [that] indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Armendariz*, 24 Cal.4th at 124.

First, as explained throughout this brief, the DRA deprived plaintiff of the full statute of limitations provided by the California Legislature – both with respect to the statutes governing his underlying claims and (as the agreement was construed by the arbitrator) with respect to plaintiff's statutory right to tolling. Second, as the Court of Appeal correctly noted, the DRA "explicitly eliminated an administrative proceeding . . . as a dispute resolution vehicle," Ct. App. Slip Op. 16, or at the very least imposed a chill on those employees who might otherwise have sought the active assistance of DFEH in pursuing their workplace claims.

The first sentence of the DRA stated that arbitration would "avoid the inconvenience, cost and risk that accompany formal administrative or judicial proceedings," Pet. App. 149. However, Pearson had no right to force its employees to forego access to the DFEH administrative process. Private contracting parties may not restrict an administrative agency's

jurisdiction to pursue public law rights under federal or state anti-discrimination statutes. *See EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279. Just as Title VII "makes the EEOC the master of its own case," *id.* at 291, under FEHA the decision whether to pursue a discrimination case on behalf of the California public is vested exclusively in DFEH; and a claimant cannot be prohibited from filing with DFEH or asking DFEH to investigate a claim of alleged discrimination. *See also Armendariz*, 24 Cal.4th at n.6; *Gilmer,* 500 U.S. at 28 (employee bound by arbitration agreement "will still be free to file a charge with the EEOC").

A plaintiff's access to DFEH cannot be contractually limited, either directly or, as in this case, indirectly through the mechanism of a contractually shortened limitations period, because DFEH remedies are essential to the furtherance of FEHA's statutory purposes. *See, e.g.,* Gov. Code §12964 (directing DFEH to conduct compliance reviews of conciliation agreements); *Rojo v. Kliger* (1990) 52 Cal.3d 65, 83 (FEHA administrative scheme promotes "important policy interests . . . of resolving disputes and eliminating unlawful employment practices by conciliation, . . . as well as the salutory goals of easing the burden on the court system, maximizing the use of administrative agency expertise and capability . . ., and providing a more economical and less formal means of resolving the dispute") (internal citations omitted). Such a contractual "limit [on]

statutorily imposed remedies" is thus contrary to public policy and unlawful under *Armendariz*, 24 Cal.4th at 103-04.[18]

The DRA's unlawful elimination of administrative remedies, coupled with the shortened limitations period, suggests that Pearson's goal was not simply to expedite claims resolution through a speedy arbitral process, but to disadvantage plaintiff by eliminating altogether the channel for relief that was most accessible and favorable to him – particularly as a low-wage, non-English speaking worker. For many plaintiffs, the possibility that DFEH will prosecute their claims is "likely to be a significantly more effective practical means of vindicating the[ir] rights . . . than individual litigation or arbitration" and "the disallowance of [such proceedings] will likely lead to a less comprehensive enforcement of [FEHA] for . . . employees." *Gentry*, 42 Cal.4th at 463.

The combined effects of Pearson's imposition of the one-year deadline on plaintiff's statutory rights and on his ability to effectively vindicate the public law principles underlying them thus require invalidation of the arbitration agreement as a whole, not just its improper

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[18] By shortening the deadline by which plaintiff had to file his claim in arbitration, the agreement effectively eliminated plaintiff's statutory right to file a claim with DFEH within a year of his termination and to provide DFEH another year in which to decide whether to prosecute the case itself. The looming contract deadline meant that plaintiff's only realistic option was to forego the possible availability of a DFEH prosecution and instead to request a right-to-sue letter and then prosecute his public law claim himself.

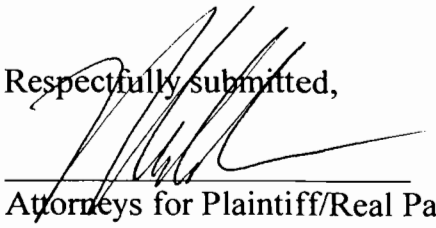
time-deadline. As a result, plaintiff requests that this Court affirm the trial court's vacatur order, but remand to the Superior Court, rather than to a new arbitrator, for all further proceedings.

CONCLUSION

For the reasons stated, the arbitrator's award was properly vacated, and this case should be remanded to the Superior Court for trial.

Dated: April 1, 2009

Respectfully submitted,



Attorneys for Plaintiff/Real Party in Interest, Luis Turcios

CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that the REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS is proportionally spaced, has a typeface of 13 points or more, and contains 14,697 words, excluding the cover, the tables, the signature block and this certificate. Counsel relies on the word count of the word-processing program used to prepare this brief.

Dated: April 1, 2009

Respectfully submitted,

Attorneys for Plaintiff/Real Party in Interest, Luis Turcios

PROOF OF SERVICE

CASE NAME: *Pearson Dental Supplies, Inc., et al., v. Luis Turcios*
CASE NO.: S167169

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On April 1, 2009, I served the following document(s):

1) **REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS**

on the parties by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

A) By U.S. First Class Mail: I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. I placed each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

B) By U.S. Express Mail: I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing Express Mail with the United States Postal Service. I prepared each such envelope, with the proper postage used for U.S. Express Mail thereon fully prepaid, to be deposited in a recognized place of deposit for U.S. Express Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

C) By Messenger Service: I am readily familiar with the practice of Altshuler Berzon LLP for messenger delivery, and I prepared each such envelope, to be delivered to a courier employed by Western Messenger Service, with whom we have a direct billing account, who personally delivered each such envelope to the office of the addressee on the date last written below.

D) By United Parcel Service: I am readily familiar with the practice of Altshuler Berzon LLP for the collection of overnight courier deliveries and I caused each such envelope to be delivered to the United Parcel Service at San Francisco, California, with whom we have a direct billing account, to be delivered to the office of the addressee on the next business day.

E) By Facsimile: I caused such document(s) to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers:

F) By E-mail: I caused such document(s) to be served via electronic mail (e-mail) on the parties in this action by transmitting true and correct copies to the following e-mail address(es):

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A	State of California Court of Appeal Second District, Division 4 Ronald Reagan State Building 300 So. Spring St. 2nd Floor Los Angeles, CA 90013	
A	Superior Court of Los Angeles Central District Stanley Mosk Courthouse 111 N. Hill Street Los Angeles, CA 90012	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this April 1, 2009, at San Francisco, California.

Morgan Levy