The Licensing Journal, California Supreme Court Warns That Confidentiality Agreements May Undermine Arbitration Agreements, (Apr. 1, 2026)

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Contract Corner

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When Confidentiality Clauses Undermine Arbitration Agreements

In *Fuentes v. Empire Nissan, Inc.*, --- P.3d --- (Cal. Feb. 2, 2026), the California Supreme Court issued an important decision for employers who seek to protect their confidential information *and* arbitrate employment claims. Specifically, the state's high Court held that when an arbitration agreement is paired with a "secondary" employment document (like a confidentiality agreement) that is silent or ambiguous on the forum for disputes, the agreement may contain an implied permission to litigate the dispute in court—potentially creating a one-sided litigation carveout that undermines arbitration. The Court remanded the case for further fact-finding on whether the parties' confidentiality and arbitration agreements, read together, required arbitration of confidentiality-related disputes, thus putting the arbitration agreement at risk.

Overview of *Fuentes v. Empire Nissan*

In *Fuentes*, Plaintiff Evangelina Yanez Fuentes signed an arbitration agreement as part of her employment application. Later, Ms. Fuentes signed two substantially identical confidentiality agreements. The confidentiality agreements prohibited Ms. Fuentes from using or disclosing the company's trade secrets or confidential information, and authorized the company to take "legal action" to enforce a breach of the agreement. The agreements were silent on whether the company could take such "legal action" in court or arbitration. The separate arbitration agreement Ms. Fuentes signed at the outset of her employment broadly required that the company arbitrate "all disputes which may arise out of the employment context," which would include a breach of the confidentiality agreements.

After the company discharged Ms. Fuentes, she sued for wrongful termination, and the company moved to compel arbitration.

Procedural vs. Substantive Unconscionability in California

To avoid enforcement of an arbitration agreement, the party resisting arbitration must establish *both* procedural unconscionability (surprise or unfairness in the formation of the agreement) and substantive unconscionability (that the actual terms of the agreement are unfair or one-sided).

Why Silence About Forum Selection Creates Risk

The Court found the arbitration agreement procedurally unconscionable because its tiny font and blurry presentation made the document "almost illegible." However, the Court did not identify any substantively unconscionable terms in the arbitration agreement. Instead, the Court focused on whether the confidentiality agreements, read alongside the arbitration agreement, effectively created a lopsided arrangement; by allowing the company to pursue claims arising under the confidentiality agreements—such as for trade secret misappropriation and unfair competition—in court, while requiring Ms. Fuentes to arbitrate all her claims. That outcome, the Court reasoned, could render the arbitration agreement substantively unconscionable.

The employer argued that the arbitration agreement, which expressly covered any disputes arising under the confidentiality agreements, controlled, particularly because the confidentiality agreements were silent as to the forum for any dispute. The California Supreme Court disagreed, holding that the confidentiality agreements' silence—paired with the ordinary understanding of "legal action" to mean a lawsuit in court—created ambiguity. The Court remanded for further fact-finding on whether the confidentiality or arbitration agreement controlled.

Drafting Recommendations for California Employers

Companies with employment arbitration agreements should not leave other agreements signed by the employee —such as confidentiality agreements—silent as to the forum for dispute resolution. Under *Fuentes*, a court may interpret such silence to mean that filing a court action is permissible, which would create a potentially one-sided litigation carveout to an arbitration agreement that renders it unenforceable.

To avoid this interpretation, especially where the priority is enforcing the arbitration agreement, companies should review their agreements and consider:

1. **Cross-Referencing the Arbitration Agreement**. State expressly that disputes arising under the confidentiality agreement (and any other employment-related agreement) are subject to the arbitration/ dispute resolution agreement.
2. **Including an "Agreement Not Superseded" Clause.** Clarify that the confidentiality and other agreements complement—and do not override—the arbitration agreement, unless the parties expressly state otherwise.
3. **Addressing Provisional Relief Carveouts.** Where the parties may seek relief in court (e.g., for provisional, temporary or preliminary injunctive relief), say so explicitly and confirm that otherwise, disputes remain subject to arbitration.

Provisional Relief and Arbitration in Trade Secret Disputes

Trade secret and confidentiality disputes often require immediate relief (TROs/preliminary injunctions) before an employment arbitration can be constituted. As a result, state and federal courts may provide provisional relief necessary to preserve the status quo and the meaningfulness of the arbitration process, such as to restrain the parties from engaging in further conduct related to the alleged trade secrets. To avoid the loss of such provisional relief and arguments that court access is an employer-only option, companies should carefully consider and include terms in their agreements allowing both parties to seek provisional relief in court without waiving the obligation to arbitrate the underlying dispute.

What Employers Should Do Now

In recent years, California courts assessing arbitration enforceability have increasingly examined other agreements signed by employees during the employment relationship—including confidentiality and restrictive covenant agreements—to determine whether those provisions create substantive unfairness that hampers an employer's ability to compel arbitration. Under *Fuentes*, courts will continue to examine these other secondary agreements.

While the ultimate outcome in *Fuentes* is uncertain, companies should not wait-and-see. Instead, employers should revisit their confidentiality agreements, arbitration agreements, and other agreements to ensure they can both protect their confidential information and preserve the right to arbitrate.