

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

SB 762 (Wieckowski)  
Version: March 9, 2021  
Hearing Date: April 6, 2021  
Fiscal: No  
Urgency: No  
AWM

**SUBJECT**

Arbitration: fees and costs: invoicing

**DIGEST**

This bill requires arbitration providers in consumer or employee arbitrations to send invoices, at specified times and setting forth amounts due and due dates, for costs and fees required to be paid by the business or employer who drafted the contract.

**EXECUTIVE SUMMARY**

Under current law, consumers and employees whose disputes are subject to mandatory arbitration acquire certain rights when the business or employer delays the commencement or continuation of an arbitration by failing to pay fees within 30 days after the fees are due. Current law is not clear, however, when and how invoices for an arbitration must be issued, giving rise to ambiguity as to when a consumer or employee may exercise their rights against an untimely business or employer. This bill would clarify current law by requiring arbitration providers to send to the parties invoices setting forth the full amount of costs and fees owed, and the due date for the fees, at the outset of the arbitration and as needed to continue the arbitration. The bill would further require all parties to agree to any extensions of payment due dates.

This bill is sponsored by the California Employment Lawyers Association and is supported by the California Labor Federation, the California Rural Legal Assistance Foundation, the California Work & Family Coalition, the Consumer Attorneys of California, and Equal Rights Advocates. There is no known opposition.

**PROPOSED CHANGES TO THE LAW**

Existing federal law:

- 1) Provides, pursuant to the Federal Arbitration Act (FAA), that a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy arising from the contract or transaction, or the refusal to perform the whole or any part thereof, or a written agreement to submit to arbitration an existing controversy arising from such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (9 U.S.C. § 2.)

Existing state law:

- 1) Establishes the California Arbitration Act (CAA), which governs arbitrations with provisions including the enforcement of arbitration agreements, rules for neutral arbitrators, the conduct of arbitration proceedings, and the enforcement of arbitration awards. (Code Civ. Proc., §§ 1280 et seq.)
- 2) Defines the following for purposes of the CAA:
  - a) "Consumer" is an individual who seeks, uses, or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.
  - b) "Drafting party" is the company or business that includes a predispute arbitration provision in a contract with a consumer or employee, and any third party relying upon, or otherwise subject to, the arbitration provision other than the employee or consumer.
  - c) "Employee" is any current employee, former employee, or applicant for employment, and any person who was, or claims to have been misclassified as an independent contractor or otherwise places into a category other than employee or applicant for employment. (Code Civ. Proc., § 1280.)
- 3) Provides that, if an employment or consumer arbitration requires the drafting party to pay fees and costs before arbitration can begin and the drafting party fails to pay those fees or costs within 30 days after the due date, then the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration. In response, the employee or consumer may withdraw the claim from arbitration and proceed in court or continue the arbitration notwithstanding the drafting party's failure to pay costs. If the employee consumer elects to proceed with an action in court, the court shall impose sanctions on the drafting party as set forth in Part 7) below. (Code Civ. Proc., § 1281.97.)
- 4) Provides that, if an employment or consumer arbitration requires the drafting party to pay fees or costs during the pendency of an arbitration proceeding and those fees or costs are not paid within 30 days of their due date, then the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and

waives its right to compel arbitration. In response, the employee or consumer may unilaterally opt to do any of the following:

- a) Withdraw the claim from arbitration and proceed in court.
  - b) Continue the arbitration proceeding, if the arbitration company agrees to continue administering the proceeding notwithstanding the drafting party's failure to pay fees and costs.
  - c) Petition the court for an order compelling the drafting party to pay all arbitration fees that the drafting party is obligated to pay.
  - d) Pay the drafting party's fees with the arbitration proceeding, and recover the fees paid on behalf of the drafting party without regard to any findings on the merits in the underlying arbitration. (Code Civ. Proc., § 1281.98(a)-(b).)
- 5) Provides that, if the employee or consumer elects to withdraw the claim from arbitration and proceeds in a court of appropriate jurisdiction in response to the drafting party's failure to pay costs and fees due during the pendency of the arbitration, both of the following apply:
- a) The employee or consumer may bring a motion, or a separate action, to recover all attorney fees and costs associated with the abandoned arbitration proceeding. The award shall be without regard to any findings on the merits of the underlying action.
  - b) The court shall impose sanctions on the drafting party for the material breach, as set forth in Item 7) below. (Code Civ. Proc., § 1281.98(c).)
- 6) Provides that, if the employee or consumer elects to continue arbitration despite the drafting party's failure to pay costs and fees during the pendency of the arbitration, the arbitrator shall impose appropriate sanctions on the drafting party, which may include monetary sanctions, issue sanctions, evidence sanctions, or terminating sanctions. (Code Civ. Proc., § 1281.98(d).)
- 7) Requires, where a consumer or employee elects to proceed with an action in the court of appropriate jurisdiction following a drafting party's material breach by failing to pay arbitration costs and fees, the court to impose sanctions on the drafting party. The court-awarded sanctions must include the employee or consumer's reasonable expenses incurred as a result of the drafting party's breach, including attorney fees and costs. The court may also, in its discretion based on what is just under the circumstances, impose:
- a) An evidentiary sanction prohibiting the drafting party from conducting discovery in the civil action.
  - b) A terminating sanction, by striking the pleadings or ordering a default judgment.
  - c) A contempt sanction, by treating the drafting party as in contempt of court. (Code Civ. Proc., § 1281.99.)

This bill:

- 1) Requires an arbitration provider, in an employment or consumer arbitration that requires the drafting party to pay fees and costs before the arbitration can proceed and where the employee or consumer has met the filing requirements necessary to initiate the arbitration, to immediately provide to all parties an invoice for any fees and costs required before the arbitration can proceed. The invoice must be provided in its entirety, state the full amount owed and the payment due date, and be sent to all parties by the same means on the same day.
- 2) Requires an arbitration provider, in an employment or consumer arbitration that requires the drafting party to pay fees and costs during the pendency of an arbitration and where the employee or consumer has met the filing requirements necessary to initiate the arbitration, to provide to all parties an invoice for any fees and costs required for the arbitration to continue. The invoice must be provided in its entirety, state the full amount owed and the payment due date, and be sent to all parties by the same means on the same day. Any extension of the payment due date must be agreed to by all parties.

### COMMENTS

1. Author's comment

According to the author:

This bill clarifies my Forced Arbitration Protection Act (SB 707 of 2019) to encourage transparency around the due date of arbitration fees in order to prevent unnecessary delays in the resolution of disputes for workers and consumers bound by forced arbitration provisions.

2. This bill imposes arbitration invoicing requirements in consumer and business arbitrations to clarify existing law

The FAA and the CAA permit businesses and employers to include clauses in consumer and employment contracts mandating arbitration, rather than adjudication in court, of certain disputes.<sup>1</sup> To ensure that consumers and employees are not unfairly prejudiced when businesses and employers delay arbitrations by failing to timely pay arbitration fees, current law grants consumers and employees certain rights when the drafting business or employee is more than 30 days overdue on a payment. When a business or employer is more than 30 days past due on an arbitration payment, the business or employer is considered in material breach of the arbitration agreement and the consumer or employee may elect to proceed with the arbitration or bring the case in

---

<sup>1</sup> 9 U.S.C. § 2; Code Civ. Proc., §§ 1280 et seq.

court.<sup>2</sup> The consumer or employee is also entitled to a range of sanctions against the breaching business or employee, the severity of which depends on whether the arbitration had already commenced at the time of the breach.<sup>3</sup>

Current law does not, however, impose any requirements on when an arbitrator must send invoices or whether and how the payment due date must be disclosed. This gives rise to a question as to when a business or employer is actually past due on a payment, which in turn causes ambiguity as to when a business or employer is 30 days past due and therefore in material breach of the arbitration agreement. According to the sponsor, the California Employment Lawyers Association, some employers have used this lacuna to their advantage by, for example, receiving undisclosed payment extensions, with the purpose of delaying arbitration proceedings despite the protections provided to consumers and businesses under the law.

This bill closes the gap in current law by establishing clear guidelines for when an arbitrator must send an invoice, as well as requiring the invoice to contain the total amount due and the due date. Additionally, to avoid the reported problem of one-sided payment extensions and extension-related delays, the bill requires all parties to an arbitration to agree before agreeing to a payment extension. Given that businesses already have a 30-day grace period after a due date in which to pay an arbitration fee without being in material breach of an arbitration clause, requiring the consumer or employee to agree to any further delay appears to be a fair balance between the parties' interests.

### 3. Arguments in support

According to bill sponsor California Employment Lawyers Association:

With workers and consumers barred from court [by mandatory arbitration provisions], businesses are able to strategically withhold or delay payment to the arbitration service provider in order to obstruct the arbitration proceeding and the ability for workers and consumers to pursue their claim. Under SB 707 of 2019, which amended the [CAA], consumers and workers were given procedural options in the event that a corporation delays arbitration proceeding[s] by refusing to pay their share of the arbitration fees and costs within 30 days after the due date.

However, SB 707 left ambiguous when the due date should actually be set. Since providers are not currently required to disclose when they set a due date, or when they move it, workers and consumers are often left in the dark...

---

<sup>2</sup> Code Civ. Proc., §§ 1281.97, 1281.98(a)-(b).

<sup>3</sup> See Code Civ. Proc., §§ 1298.(c)-(d), 1281.99.

To increase transparency for workers and consumers, SB 762 would require arbitration providers to disclose the amount due and the due date of arbitration fees and costs to all parties to the arbitration. This information is essential to promote the speedy resolution of disputes, as it sets clear timelines for the proceedings and further deters parties from dragging out disputes for their failure to pay fees. Moreover, this bill would require the provider to obtain the consent of all parties to extend deadlines for fees incurred during the pendency of the arbitration. Delay in this scenario is particularly harmful, as evidence and witnesses may be lost to the passage of time. Nevertheless, workers and consumers are incentivized to agree to reasonable extensions in order to resolve their disputes quickly, rather than relitigate the case from scratch in the event of a material breach.

According to bill supporter Consumer Attorneys of California:

Mandatory arbitration provisions have become an ever-growing aspect of consumer transactions and employment relationships. Over half of America's workforce has been forced into mandatory arbitration as a condition of employment. Under these terms, consumers and workers whose rights have been violated cannot pursue their claims in court and instead must submit their claims in an arbitration proceeding that overwhelmingly favors businesses and employers....

SB 762 would introduce much-needed transparency around the due date of arbitration fees and costs by requiring arbitration providers to disclose the amount due and the due date to all parties to the arbitration. This helps all parties set clear timelines for the proceedings and further deters parties from dragging out disputes through their failure to pay fees.

### **SUPPORT**

California Employment Lawyers Association (sponsor)  
California Labor Federation  
California Rural Legal Assistance Foundation  
California Work & Family Coalition  
Consumer Attorneys of California  
Equal Rights Advocates

### **OPPOSITION**

None known

**RELATED LEGISLATION**

Pending Legislation: SB 76 (Nielsen, 2021) permits organizations representing state employees to request arbitration at the fifth step of the employee grievance procedure. SB 76 is pending before the Senate Committee on Labor, Public Employment and Retirement.

Prior Legislation:

SB 707 (Wieckowski, Ch. 870, Stats. 2019) provided that, for consumer and employment contracts with mandatory arbitration clauses, the drafting party is in material breach of the arbitration agreement and waives its right to compel arbitration if it fails to pay specified costs and fees for the arbitration within 30 days of the due date.

SB 33 (Dodd, Ch. 480, Stats. 2017) exempted from mandatory arbitration cases where the party seeking to enforce an arbitration agreement is a state or federally chartered depository institution that, on or after January 1, 2018, is seeking to apply a written agreement to arbitrate, contained in a contract consented to by a respondent consumer, to a purported contractual relationship with that respondent consumer that was created by the petitioner fraudulently without the respondent consumer's consent and by unlawfully using the respondent consumer's personal identifying information.

\*\*\*\*\*