

Discovery in Employment Arbitration in California: What You Need to Know

By **Barbara A. Reeves**

There are four pillars of discovery (currently) in employment arbitration in California:

(1) The ruling in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, which states that employment claims brought under California’s Fair Employment and Housing Act (FEHA) must provide the employee with “adequate discovery”

(2) The state and federal court rulings in *Aixtron, Inc. v. Veeco Instruments, Inc.* (2020) 52 Cal.App.5th 360 and *CVS Health Corp. v. Vividus, LLC* (9th Cir. 2017) 878 F3d 703, which define and limit an arbitrator’s authority to issue third-party discovery subpoenas

(3) The applicable arbitration clause

(4) The applicable arbitration rules

Employment cases need discovery. The employee has a claim, and the employer and former employees usually have the information relevant to support or rebut the employee’s claim. Given that so many of these cases wind up in arbitration, counsel need to know how to navigate discovery in arbitration.

1. *Armendariz* and Adequate Discovery

In *Armendariz*, the Supreme Court of California ruled that employment claims brought under FEHA are arbitrable if “the arbitration permits an employee to vindicate his or her statutory rights.” The court declared that the arbitration must meet certain minimum requirements, including the provision of “adequate discovery,” a phrase that now controls

discovery in employment arbitration, and requires that arbitrators strike an appropriate balance between the desired efficiency of limited discovery in arbitration and an employee’s statutory rights. This requires the arbitrator and counsel to assess the amount of default discovery permitted under the arbitration agreement, the standard for obtaining additional discovery, and whether any requested discovery limitations will prevent the claimants from adequately arbitrating their statutory claims.

One recent case, *Davis v. Kozak* (2020) 53 Cal.App.5th 897, provides a useful analysis of the balancing that is required by the “adequate discovery” standard, including citations to authority. The 5th District Court of Appeal begins by confirming that a limitation on discovery is an important way in which arbitration can provide a simplified and streamlined procedure for the resolution of disputes, and then emphasizes that “adequate discovery” is indispensable for the vindication of statutory claims, while recognizing that “adequate” does not mean “unfettered.”

***Armendariz*: Practical Tips**

Present the factual support for your position regarding discovery—specifically, what additional discovery is needed—and provide facts justifying the need for the discovery. If you want more depositions, of whom, who are the deponents, what is the relevance of their expected testimony?

Identify relevant documents, such as those relating to the company’s relevant leave practices, evaluation policies, reorganization, prior complaints similar to the employee’s, communications concerning her discipline and termination, and the company’s internal investigation.

Avoid being overaggressive: Drop “any and all” from your document request forms. Over-

aggressive requests may lead to fee shifting if a massive production contains but a small percentage of relevant documents.

Alternatively, why should discovery be limited? Is it too burdensome? Define the burden in terms of quantity of discovery and expense of production, as well as the reason why the additional discovery is unlikely to justify the expense.

- Davis offers a good example: Davis had a 15-year work history with his employer, and he offered facts tending to show that there had been age discrimination and sexual harassment for at least the past eight years.

- Therefore, relevant documents would include, at minimum, those relating to Davis’ work performance, discipline and termination; the reports of age discrimination and sexual harassment by Davis and others; and the company’s internal investigations.

- The court found that Davis had demonstrated that he has a factually complex case involving numerous percipient witnesses, executives and investigators, and that the arbitration clause’s discovery limitations (two depositions only) would lead to frustration of his statutory rights.

2. Third-Party Discovery: *Aixtron* and *CVS Health Corp.*

The court in *Aixtron* held that while an arbitration agreement may empower an arbitrator to issue subpoenas for nonparty depositions by incorporating California Code of Civil Procedure (CCP) § 1283.05 into the agreement (CCP § 1283.1(b)), an arbitration agreement that neither referenced CCP § 1283.05 nor provided for full discovery under California’s

Civil Discovery Act did not authorize the issuance of subpoenas for discovery purposes.

In employment arbitration alleging violations of FEHA, CCP § 1283.05 may be deemed incorporated into an arbitration agreement pursuant to CCP § 1283.1(a) on the ground that the FEHA claims assert wrongful personal injury, although there is not yet appellate authority following *Aixtron* on this point.

The parties may stipulate, in writing, after a dispute has arisen that CCP § 1283.05 applies to their arbitration agreement, if they desire third-party discovery.

The Federal Arbitration Act (FAA) authorizes arbitrators to issue a subpoena to nonparties “to attend before them” and to produce “any book, record, document or paper which may be deemed material as evidence in the case” (9 USC § 7). The Ninth Circuit in *CVS Health Corp.* held that that would restrict the subpoena power to hearings in the physical presence of the arbitrator.

If a nonparty challenges the authority of an arbitrator to issue a discovery subpoena under the FAA or the California Arbitration Act, and it would prejudice the parties to delay production of the evidence until the evidentiary hearing, the arbitrator can schedule a hearing for the sole purpose of compelling nonparties to testify and produce documents.

This raises some questions: How do you hold the hearing? Must the arbitrator attend in person? Even during a pandemic? Are the documents that are produced now part of the record?

3. The Applicable Arbitration Clause

Assuming an arbitration clause is valid under applicable law, it can set limitations on discovery and provide for the use of more formal or less formal discovery procedures.

- Does the arbitration clause say anything about discovery, such as identifying the appli-

cable discovery rules; mention the California CCP; impose discovery limitations; or permit third-party discovery?

- Does it identify the applicable arbitration rules and provider (e.g., JAMS or the American Arbitration Association (AAA))?

4. The Applicable Arbitration Rules

JAMS Employment Arbitration Rule 17

Rule 17 of the JAMS Employment Arbitration Rules & Procedures requires the “exchange of all relevant, non-privileged documents” and electronically stored information (ESI), including names of witnesses and experts who may be called to testify at the arbitration hearing. In theory, this is all the discovery the parties need: all relevant, non-privileged documents and ESI, including the names of witnesses and experts. Further, this obligation to provide the information is continuing. One deposition per party is a matter of right, and the arbitrator may grant requests for additional depositions. The parties also may stipulate to additional discovery.

The JAMS rules do not expressly provide for interrogatories, requests for proposals or requests for authorizations, but arbitrators in California are open to allowing such discovery for good cause.

To put teeth into Rule 17, Rule 29, “Sanctions,” authorizes the arbitrator to “order appropriate sanctions for failure of a Party to comply with its obligations,” including the assessment of fees, costs and “reasonable attorneys’ fees; exclusion of certain evidence; drawing adverse inferences; or . . . determining an issue . . . adversely to the Party that has failed to comply.”

Rule 9 of AAA’s Employment Arbitration Rules and Mediation Procedures takes a different approach, leaving discovery to the discretion of the arbitrator, simply stating that the arbitrator “[has] the authority to order

such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.”

In conclusion, read the arbitration clause, apply the rules of the arbitration venue and be factually specific in your discovery needs and objections.

This is one arbitrator’s view. Other arbitrators may have different views of the scope of discovery in employment arbitration in California, just as trial court judges may have different views.

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