

The New Arbitration Rule: Pre-dispute arbitration agreements from before March 19, 2018

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Last month, we discussed some of the basic requirements of the Consumer Financial Protection Bureau's new Arbitration Rule ("Rule") that goes into effect on March 19, 2018. This month we discuss what the Rule means for arbitration agreements ("arbitration agreements" or "Agreements") already in effect on March 19.

As you already know, the Rule requires you to send out a Notice or to amend your arbitration agreement if you "enter into" it on or after March 19. So, using your common sense, you might think that you don't have to worry about Agreements that you "enter into" before March 19. However, the CFPB's idea of when an Agreement is "entered into" involves some uncommon sense.

Even if you entered into an Agreement before March 19, you still need to send a Notice or amend your Agreement after March 19 in two instances:

- If you sell a new product or service to an existing customer and make that new product or service subject to an existing arbitration agreement; and
- If you add a provision to an arbitration agreement that requires an arbitrator, rather than a court, to decide whether the arbitration agreement is enforceable.

"Enter into" on or after March 19

In general, all arbitration agreements that you "enter into" with a customer after March 19 need to have the Rule's required language in them. The required language explains to the customer that you won't enforce a class action waiver against them.

Acquisition or assignment. You "enter into" an arbitration agreement with a customer when you buy a contract that is subject to an arbitration agreement and you become a party to the arbitration agreement. This is true even if the person you bought the contract from was not subject to the Rule. So, if you are a bank and you purchase a retail installment contract that contains an arbitration agreement from a sales finance company or a dealer, you are subject to the Rule; even if you purchase the contract from a franchise auto dealer who is not subject to the Rule.

So, if you purchase the contract on or after March 19, 2018 and you become a party to the already-existing arbitration agreement, you will have 60 days to amend the arbitration agreement or notify the customer that you won't enforce the class action waiver.

"Enter into" before March 19

You can enforce a class action waiver in an arbitration agreement that you entered into before March 19, unless you add a new product or service to the arbitration agreement or change the forum that decides whether the arbitration agreement is enforceable.

Adding a product or service. You "enter into" an arbitration agreement with an existing customer if you add a new product or service to an existing customer relationship that is subject to an arbitration agreement. But you haven't entered into an Agreement when you "modify, amend, or implement" a product or service that is subject to an arbitration agreement without providing a new product or service. The definition is circular and the line between "modifies, amends, or implements" and "provides a new product or service" is not entirely clear.

What is entirely clear though is that if a sales finance company sells a new service contract or credit insurance product to an existing customer on or after March 19, the Rule applies even if the sales finance company entered into the original Agreement before March 19.

So, if you add a new product or service on or after March 19, 2018, within 60 days of adding it, you must amend the arbitration agreement to clarify that the class action waiver does not apply to disputes that arise in connection with the new product or service, or notify the customer that the class action waiver does not apply to disputes that arise in connection with the new product or service. You will not be able to enforce the class action waiver in the arbitration agreement if the customer sues you in connection with the new product or service.

Modifying the Arbitration Agreement. You "enter into" an arbitration agreement with an existing customer if, after March 19, you change the Agreement to require the customer to submit to an arbitrator the question of whether the arbitration agreement applies to a dispute (a "delegation provision"). This is true even if you originally bought the contract with the Agreement before March 19.

So, if you add that kind of requirement to an Agreement after March 19, you've "entered into" the Agreement and within 60 days you need to send the required Notice or amend your Agreement.

Notice or Amendment

If you "enter into" an Agreement after March 19 that doesn't have the Rule's required language, you need to either amend the Agreement or send a Notice to the customer within 60 days of entering into it. The Notice explains:

We agree not to rely on any pre-dispute arbitration agreement to stop you from being a part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else.

The Rule offers variable examples of language that you can use for Agreements that apply to multiple products or services, if not all are covered by the Rule.

If you decide to amend the Agreement instead of sending the Notice, you need to amend it by adding:

We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action

filed by someone else.

Again, the Rule offers variable examples of language that you can use for Agreements that apply to multiple products or services, if not all are covered by the Rule.

You can also add one or more of the following sentences to the end of the amendment, if it applies:

This provision does not apply to parties that entered into this agreement before March 19, 2018.

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This provision does not apply to products or service first provided to you before March 19, 2018 that are subject to an arbitration agreement entered into before that date.

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This provision does not apply to persons that are excluded from the Consumer Financial Protection Bureau's Arbitration Agreements Rule.

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This provision also applies to the delegation provision.

We will continue to discuss the Rule over the coming months.

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