Breakout Sessions – Series 3

THE GOOD, THE BAD, AND THE UGLY

REAL-WORLD EXPERIENCES WITH EMPLOYMENT ARBITRATION AND CLASS ACTION WAIVERS

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I. The Shifting Landscape for Arbitration and Class Action Waivers

Employment arbitration first received the Supreme Court's approval in 2001 in *Circuit City Stores, Inc. v. Adams*.1 After *Circuit City*, employers' interest in arbitration increased. By 2008, it was estimated that 25% or more of non-unionized workers were covered by arbitration agreements.

In the past decade, employers began including class and collective action waivers in their arbitration agreements, and many courts regularly upheld them. However, some courts and the National Labor Relations Board (NLRB) refused to enforce these class action waivers, leading to uncertainty about their viability.

Despite this uncertainty, as use of these waivers became more common, employer's interest in arbitration further increased. According to an April 2018 study conducted by the Economic Policy Institute, a nonprofit employee advocacy group, “more than half—53.9 percent—of nonunion private-sector employers have mandatory arbitration procedures. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures.” The study further estimates that “among private-sector nonunion employees, 56.2 percent are subject to mandatory employment arbitration procedures.”

On May 18, 2018, the Supreme Court decided *Epic Sys. Corp. v. Lewis*, confirming that class and collective action waivers in employment arbitration agreements are enforceable.3 Since May of 2018, employers' interest in arbitration has surged, with many employers adopting new arbitration programs or updating existing ones.

The ever increasing use of employment arbitration and class action waivers has led to some backlash. Over the past two years, a number of states have adopted legislation that attempts to limit the use of employment arbitration, at least with respect to certain claims.

<table>
<thead>
<tr>
<th>State</th>
<th>Date Law In Effect</th>
<th>Passed State Laws</th>
<th>Description of Law</th>
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<tbody>
<tr>
<td>Maryland</td>
<td>10/1/2018</td>
<td>Md. Code Labor and Employment § 3-715</td>
<td>The act, &quot;except as prohibited by federal law,&quot; bars employers from requiring employees to arbitrate claims of sexual harassment.</td>
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<tr>
<td>New Jersey</td>
<td>3/18/2019</td>
<td>N.J. S.B. 121</td>
<td>The bill prohibits waivers of rights and remedies related to claims of discrimination, retaliation, or harassment contained in employment contracts. This purportedly includes prohibiting employers from requiring employees to sign mandatory arbitration agreements to</td>
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<tr>
<td>State</td>
<td>Date</td>
<td>Statute Reference</td>
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<td>New York</td>
<td>7/11/2018</td>
<td>N.Y. C.P.L.R. 7515(b)(1)</td>
<td>Prohibits employers from including mandatory arbitration clauses for allegations of unlawful sexual harassment. The statute also provides it does not apply &quot;where inconsistent with federal law....&quot;</td>
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<tr>
<td>Vermont</td>
<td>7/1/2018</td>
<td>Vt. Stat. tit. 21 § 495h(g)</td>
<td>Bars employers from requiring employees to sign an agreement waiving rights to remedies with respect to sexual harassment claims. N.B. Prior to passing this new statute, Vermont had another law which arguably prohibited arbitration agreements. See Vt. Stat. Tit. 12 § 5653(b) (&quot;No arbitration agreement shall have the effect of preventing a person from seeking or obtaining the assistance of the courts in enforcing his or her constitutional or civil rights.&quot;)</td>
</tr>
<tr>
<td>Washington</td>
<td>6/7/2018</td>
<td>Wash. Rev. Code § 49.44.085</td>
<td>Renders void and unenforceable any provision of an employment agreement that requires an employee to waive the employee’s right to publicly pursue a state or federal cause of action for discrimination or to publicly file a claim.</td>
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</table>
Other states have considered or are considering such legislation.

<table>
<thead>
<tr>
<th>State</th>
<th>Date Still Pending</th>
<th>Proposed Laws</th>
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<tbody>
<tr>
<td>California</td>
<td>3/27/2019</td>
<td>CA Legislature A.B. 51</td>
<td>Prohibits employers from requiring any employee to waive any right, forum, or procedure for a violation of any provision of FEHA as a condition of employment, continued employment, the receipt of any employment-related benefit, or of entering into a contractual agreement. This provision is aimed at outlawing arbitration agreements in employment contracts. N.B. CA's former governor vetoed a similar bill in fall 2018.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>3/22/2019</td>
<td>HI S.B. 1048</td>
<td>Makes confidentiality clauses in employment contracts unenforceable as to sexual harassment claims. Bans mandatory arbitration agreements as to sexual harassment claims. Makes mandatory confidentiality clauses in an arbitration agreement unenforceable as to sexual harassment claims.</td>
</tr>
<tr>
<td>Kentucky</td>
<td>7/6/2018 (died in committee)</td>
<td>KY H.B. 500</td>
<td>Would make arbitration agreements unconscionable if employee alleges claims of sexual harassment, retaliation based on allegations of sexual harassment, or claims related to sexual harassment</td>
</tr>
<tr>
<td>Louisiana</td>
<td>3/26/18 (died in chamber)</td>
<td>LA H.B. 578</td>
<td>Would have banned employers from requiring employees to sign contracts prohibiting them from filing sexual harassment suits in court.</td>
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<tr>
<td>Massachusetts</td>
<td>7/6/2018</td>
<td>MA H.B. 4058</td>
<td>Would prohibit enforcement of mandatory arbitration agreements relating to a claim of discrimination, non-payment of wages or benefits, retaliation, harassment or violation of public policy in employment.</td>
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</table>
Missouri  7/9/2018 (died in committee)  MO H.B. 2552  Would allow sexual harassment claims to be subject to mandatory arbitration but prohibits mandatory confidentiality of such arbitrations.

New York  3/28/2019  NY S.B. 54109  Would amend C.P.L.R. 7515 to prohibit arbitration not just for sexual harassment claims, but for all claims of discrimination including but not limited to claims arising under N.Y. Executive Law Article 15 (the State Human Rights Law).

South Carolina  1/9/2018 (died in committee)  SC H. 4433  Would have provided that no pre-dispute arbitration agreement is valid or enforceable if it requires arbitration of a sex discrimination dispute.

Tennessee  4/3/2018 (died in committee)  H.B. 2573  Arbitration agreement provisions that have purpose or effect of concealing details relating to claim of sexual harassment or sexual assault would be void and unenforceable.

Virginia  2/15/2018 (died in committee)  VA H.B. 704  Arbitration agreement that has purpose or effect of concealing details regarding claim for sexual harassment or sexual assault would be unconscionable and unenforceable.

Against this anti-arbitration trend, one state has recently enacted a statute protecting employers’ ability to use employment arbitration.

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<td>Kentucky</td>
<td>3/25/2019</td>
<td>Amendment to Ky. Rev. Stat. § 336.700</td>
<td>Provides that &quot;any employer may require an employee or person seeking employment to execute an agreement for arbitration, mediation, or other form of alternative dispute resolution as a condition or precondition of employment.&quot;</td>
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In addition, federal legislation has been proposed to prohibit employment and other forms of arbitration and class action waivers. The Senate bill has 33 co-sponsors, all Democrats. It has been referred to the Senate Judiciary Committee, where it is unlikely to receive consideration. The House bill has 160 co-sponsors and has been referred to the House Judiciary Committee where it is likely to receive active consideration. These bills are unlikely to become law at this time.
The Forced Arbitration Injustice Repeal ("FAIR") Act seeks to (1) prohibit pre-dispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes, and (2) prohibit agreements and practices that interfere with the rights of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.

Most observers expect that the newly enacted state statutes purporting to limit or ban employment arbitration will be preempted by the Federal Arbitration Act. Courts will inevitably be addressing this question over the coming months. For example, the issue is currently pending before the Southern District of New York in Doe v. Morgan Stanley & Co. LLC et al., Case No. 18-cv-11528 (S.D.N.Y.), where the employer has moved to compel arbitration and argued that the New York statute banning arbitration of sexual harassment claims is inconsistent with federal law and preempted.

II. Experiences with Arbitration and Class Action Waivers

After adopting an arbitration program, employers and their counsel face an almost endless variety of issues in enforcing arbitration agreements and conducting arbitration proceedings – just as they do in defending litigation in court. As in litigation, employers (and their counsel) must learn from experience. Here are a few issues employers now regularly encounter.

A. Plaintiffs’ counsels’ responding to class action waivers

- Engaging in solicitation of claims outside the legal process, e.g., using LinkedIn and other forms of social media
- Filing numerous coordinated individual actions, all alleging the same claims

B. Plaintiffs’ challenging the existence of an agreement to arbitrate

- Plaintiffs’ denying that they entered an arbitration agreement
- Employers’ losing arbitration agreements

C. Plaintiffs’ challenging the use of confidentiality in arbitration

- State unconscionability law
- New state statutes
- National Labor Relations Act
D. Dealing with arbitrators

- Engaging in arbitrator selection
- Being aware of the “repeat player” issue
- Handling the nightmare arbitrator

E. Dealing with bad arbitration awards

- Petitioning a court to vacate

F. Plaintiffs’ counsels’ capitulating and/or disappearing

- Some plaintiffs’ attorneys are giving up the fight against arbitration
- The best case is the one never filed

G. Being prepared for pushback

- Media coverage of some employers’ dropping arbitration, e.g., Microsoft, Uber, Lyft and Google

H. Dealing with interstate transportation workers

- The Supreme Court’s decision in New Prime v. Oliveira
- Plaintiffs’ attorneys attempting to stretch decision to all employees working in interstate commerce

I. Handling third-party discovery

- 9 U.S.C. § 7

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

- The Second, Third, Fourth, and Ninth Circuits hold that the plain language of the statute does not give a party or an arbitrator the authority to issue third party discovery subpoenas. See, e.g., CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 705 (9th Cir. 2017); Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London, 549 F.3d 210, 216 (2d Cir. 2008) (“The language of section 7 [of the FAA] is straightforward and unambiguous. Documents are only discoverable in arbitration when brought before arbitrators by a testifying witness. The FAA was enacted at a time when pre-hearing discovery in civil litigation was generally not permitted. The fact that the Federal Rules of Civil Procedure were since enacted and subsequently broadened demonstrates that if Congress wants to expand arbitral subpoena authority, it is fully capable of doing so.”); In Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004) (“The power to require a non-party “to bring” items “with him” clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in
which the items are simply sent or brought by a courier...Section 7's language unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.

*COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999) (“Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery.

- The Sixth and Eighth hold arbitrators have an implicit power to issue third party discovery subpoenas. See *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870 - 871 (8th Cir. 2000); *Am. Fed’n of Tel. & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999) (“...the FAA’s provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing.”).

- A work-around in jurisdictions that do not allow third-party discovery subpoenas:

  Arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence.

*Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413 (3d Cir. 2004).

**J. Determining whether arbitration is really cheaper and/or quicker**

- Employers are responsible for paying the additional costs unique to arbitration, such as the arbitrator’s hourly fees and fees charged by a third-party arbitration administrator such as the American Arbitration Association or JAMS. These fees can make some arbitrations more costly than litigation.

- Fee splitting or shifting?
ENDNOTES

2 https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/
3 138 S. Ct. 1612 (2018)
The Good, the Bad, and the Ugly: Real-World Experiences With Employment Arbitration and Class Action Waivers

Presenters
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Please join in the discussion
The Shifting Landscape for Arbitration and Class Action Waivers

- 53.9 percent of nonunion private-sector employers use arbitration
- 65.1 percent of companies with 1,000 or more employees use arbitration
- 56.2 percent of private-sector non-union employees are subject to arbitration
- Note: as of April 2018

- Epic Systems decided May 18, 2018
- Settled 6 years of turmoil after NLRB’s D.R. Horton
- Individual employment arbitration agreements are enforceable under the FAA.
- Spawned epic wordplay
State Backlash

**Maryland, 10/1/2018**
Bars employers from requiring employees to arbitrate claims of sexual harassment, “except as prohibited by federal law.”

**New Jersey, 3/18/2019**
Bans waivers of rights and remedies related to claims of discrimination, retaliation, or harassment contained in employment contracts.

State Backlash

**New York, 7/11/2018**
Ban mandatory arbitration clauses for allegations of unlawful sexual harassment. The statute also provides it does not apply “where inconsistent with federal law....”

**Vermont, 7/1/2018**
Bars employers from requiring employees to sign an agreement waiving rights to remedies with respect to sexual harassment claims.
State Backlash

*Washington, 6/7/2018*

Renders void and unenforceable any provision of an employment agreement that requires an employee to waive the employee’s right to publicly pursue a state or federal cause of action for discrimination or to publicly file a complaint with the appropriate state or federal agencies, or if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential.

More on the Horizon?

- California
- Hawaii
- Massachusetts
- New York (would expand 2018 statute)
Forced Arbitration Injustice Repeal ("FAIR") Act

- Proposed federal legislation
- Would prohibit employment and other forms of arbitration and class action waivers

Senate bill – 33 co-sponsors, all Democrats.
Unlikely to receive consideration.

House bill – 160 co-sponsors
Referred to the House Judiciary Committee
Likely to receive consideration.
Experiences with Arbitration and Class Action Waivers

Plaintiffs’ Counsels’ Response to Class Action Waivers

- Engaging in solicitation of claims outside the legal process, e.g., using LinkedIn and other forms of social media
- Filing numerous coordinated individual actions, all alleging the same claims
LinkedIn

Plaintiffs Challenging the Existence of an Agreement to Arbitrate

- Plaintiffs denying that they entered an arbitration agreement
  - Proving electronic signatures
- Employers losing arbitration agreements
Plaintiffs Challenging the Use of Confidentiality in Arbitration

- State unconscionability law
  - *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007) (arbitration agreement “preclude[d] even mention to anyone ‘not directly involved in the mediation or arbitration’ of ‘the content of the pleadings, papers, orders, hearings, trials, or awards in the arbitration’”).

- New state statutes

- National Labor Relations Act
  - *Pfizer, Inc. & Rebecca Lynn Olvey Martin, an Individual & Jeffrey J. Rebenstorf, an Individual*, No. BIRMINGHAM, AL, 2019 WL 1314927 (Mar. 21, 2019)

Dealing With Arbitrators

- Engaging in arbitrator selection
  - Arbitrator databases

- Being aware of the “repeat player” issue
  - Plaintiffs’ attorneys

- Handling the nightmare arbitrator
  - Like a judge, but even more so
Dealing With Bad Arbitration Awards

- Petitioning a court to vacate
  - 9 U.S.C. § 10

Plaintiffs’ Counsels Capitulating and/or Disappearing

- Some plaintiffs’ attorneys are giving up the fight against arbitration
- The best case is the one never filed
Being Prepared for Pushback

- Media coverage of some employers dropping arbitration

Dealing With Interstate Transportation Workers

- The Supreme Court’s decision in *New Prime v. Oliveira*

  - Plaintiffs’ attorneys attempting to stretch decision to all employees working in interstate commerce
Handling Third-Party Discovery

- 9 U.S.C. § 7

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

Circuit Split

- No third-party discovery subpoenas: 2nd, 3rd, 4th, and 9th Circuits
- Third-party discovery subpoenas OK: 6th and 8th Circuits
- A work-around: Preliminary hearing
  - “In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence.”
Determining Whether Arbitration Is Really Cheaper and/or Quicker

- Overall cost
  - Individually?
  - Long term?
  - Lower settlements?
  - Fewer cases?
  - Lower awards?
  - Fewer awards?

- Fee splitting or shifting?
  - Is it worth it?
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