

Key Developments in Employment Arbitration: What Employers Need to Know Now



Today's Agenda

- Why Arbitration Matters?
- Federal Attacks on Arbitration
- State Attacks on Arbitration
- The Significance of Jury Trial Waivers
- Tips for an Effective Arbitration Agreement/Program

Case	Court/Date	Type of Claims	Damages
Martinez v. SoCal Edison	LASC/June 2, 2022	Hostile Work Environment & Retaliation	\$464,600,000
Diaz v. Tesla, Inc.	N.D. Cal./Oct. 4, 2021	Hostile Work Environment	\$136,000,000
Forde v. Regents of UC	OCSC/Oct. 6, 2022	Hostile Work Environment & Retaliation	\$17,000,000
Europe v. Equinox	SDNY/May 16, 2023	Hostile Work Environment and Retaliation	\$11,266,000
Vince v. Los Angeles	LASC/Mar. 17, 2023	Retaliation	\$10,100,000

Advantages

- A quicker, cheaper resolution
- May be less costly overall
- Greater choice in selection of fact-finder
- Greater privacy?
- Less burden on the courts
- No jury: Limits “runaway jury verdicts” in favor of plaintiffs
- Automatic appeal from a denial of motion to compel arbitration

Disadvantages

- Arbitrators are more likely to “split the baby”
- Employer may have to pay all arbitrator fees
- Summary judgment less likely to be granted
- Limited judicial review
- Inability to join/depose 3/P’s

Why Arbitration Matters: #MeToo Movement

- The birth of the #MeToo Movement in October 2017 galvanized earlier efforts to trim back arbitration policies



Companies and legislative bodies have been forced to confront arbitration after the rise of the #MeToo movement



Arbitration seen as a means to “hide” sexual harassment claims and resolve them in secret



States and Congress have enacted laws that limit the enforceability of **arbitration agreements**



Trial lawyers have many friends and admirers among legislators

Recent Legislation: **Federal**

- ***The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (“the EFAA”)***
- “[A]t the election of the person alleging conduct constituting a sexual harassment dispute ... **no predispute arbitration agreement ... shall be valid or enforceable**”
- Arbitrability shall be determined by a court rather than an arbitrator even if there’s a “delegation clause”

“I know there’s discussion in Congress about whether forced arbitration clauses should also be banned for other kinds of employment disputes beyond sexual harassment . . . I think it’s all wrong and they should be banned.” - President Biden

Recent Legislation: **Federal**

- **Forced Arbitration Injustice Repeal Act (“FAIR Act”):**
would have prohibited (1) predispute arbitration agreements, and (2) agreements that interfere with right to participate in class or collective actions
- FAIR Act was reintroduced in the Senate in April 2023



“Forced arbitration is unfair, unjust, and un-American” – Sen. Richard Blumenthal

Recent Legislation: **Federal**

- ***Ending Forced Arbitration of Race Discrimination Act***
- Introduced on May 3, 2023
- Contains language similar to the EFAA and extends the prohibition on arbitration to *race* discrimination, harassment and retaliation cases
- Judge (not arbitrator) decides arbitrability

“This bill takes meaningful, common-sense steps to ensure that Americans are treated fairly under the law and an individual can take action if they face racial discrimination on the job.”
- Representative Colin Allred

“Because everyone deserves the right to choose between court and arbitration, I am pleased to join Senator Booker and Congressman Allred on the Ending Forced Arbitration for Race Discrimination Act.”
- Representative Hank Johnson

Recent Legislation: **Federal**

- ***The Protecting Older Americans Act of 2023***
- A bipartisan group of legislators, the same group that introduced the EFAA, introduced the Protecting Older Americans Act in the Senate in June 2023.
- Contains language similar to the EFAA and extends the prohibition on arbitration to *age* discrimination, harassment and retaliation cases
- Judge (not arbitrator) decides arbitrability

Johnson v. Everyrealm: Scope & Applicability of the EFAA

- *Johnson v. Everyrealm* (SDNY 2023): What's shielded from arbitration – a sexual harassment claim, or a case in which sexual harassment is alleged?
- Court focused on the statutory language prescribing that a plaintiff may opt out of a valid arbitration agreement “with respect to a **case** which ... relates to ... the sexual harassment dispute”



***Yost v. Everyrealm*: Scope & Applicability of the EFAA**



- To evade their arbitration agreement, must a plaintiff allege more than the words “sexual harassment”?
- Yes, the court held that a plaintiff’s sexual harassment claim must meet Rule 12’s plausibility standard.

Mera v. SA Hospitality Group – What to Do with Unrelated Claims under the EFAA?

- Plaintiff asserted wage and hour claims individually and on behalf of a proposed class along with an individual sexual harassment claim.
- Court held that the plaintiff's arbitration agreement was unenforceable **only with respect to the sexual harassment claim.**



***Turner v. Tesla, Inc.* – California Takes on the EFAA**



- Regarding the Effective Date: Court allowed, under the continuing violations doctrine, for Turner’s pre-effective date allegations of sexual harassment to circumvent the statute’s effective date.
- Regarding Unrelated Claims: the Court refused to sever the non-sexual harassment claims and compel them to arbitration.
 - Found that sexual harassment and other claims were sufficiently “intertwined” to avoid arbitration.

***Morgan v. Sundance* – Waiver of the Right to Arbitrate**

- Previously, in determining whether the employer had waived its right to arbitrate, many jurisdictions required the plaintiff-employee to establish that they would be prejudiced if the agreement was not deemed waived.
- In *Morgan v. Sundance* (2022), the Supreme Court determined that a showing of prejudice is **not required** to establish waiver by the employer.

Waiver of Class/Collective Actions in Arbitration: Still a good thing?



In 2018, the Supreme Court determined that arbitration agreements requiring individualized arbitrations must be enforced. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).



Be Careful What You Wish For.

1. Thousands of individual claims.
2. \$92 million in administration fees.

Recent Caselaw: California

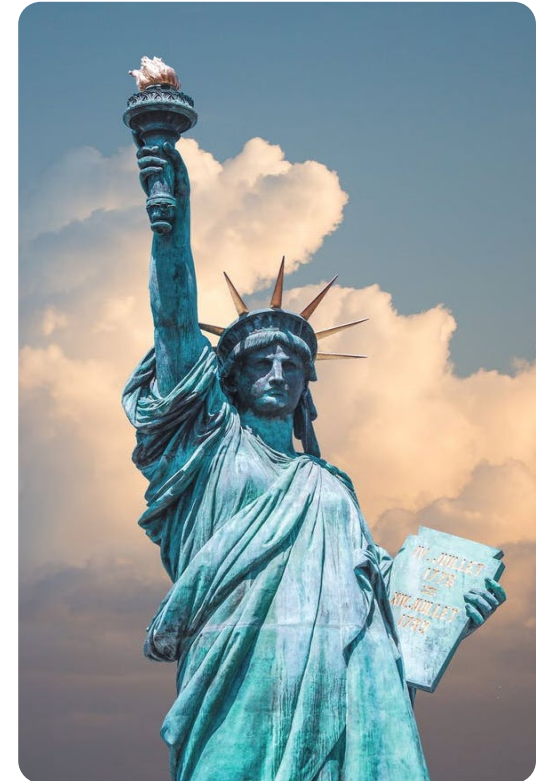
Viking River Cruises: Plaintiff may be compelled to submit an “individual” PAGA claim to arbitration—the portion of a PAGA claim seeking penalties for violations committed against the plaintiff—if the agreement is covered by the Federal Arbitration Act



Adolph v. Uber Technologies: California Supreme Court held that a plaintiff whose individual PAGA claims have been compelled to arbitration may pursue the non-arbitrable class claims in court, which are stayed pending the arbitration

Recent Legislation: New York

- New York law states that arbitration agreements are generally avored as enforceable. C.P.L.R. § 7501
- C.P.L.R. § 7515
 - Arbitration agreement requiring the arbitration of sexual harassment claims is unenforceable “[e]xcept where inconsistent with federal law”
 - Law was later expanded to encompass all discrimination claims



- Arbitration agreements are generally enforceable in CA.
- CA legislature repeatedly has tried to ban employment arbitration agreements, but the Supreme Court and recently the 9th Circuit have struck down the laws
- AB-51 made it a criminal misdemeanor to require an applicant or employee to “waive any right, forum or procedure” for a violation of the CA FEHA or Labor Code
 - “Request Arbitration, Go to Jail Law”
 - AB-51 was ultimately struck down by the Ninth Circuit



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- In 2019, the California legislature passed a law requiring the timely payment (within 30 days) of arbitration fees and costs on pain of “waiving” the right to arbitrate.
 - In *Cvejic v. Skyview Capital, LLC*, another appellate court applied this statute in an employment case and found that by failing to pay the required fees within 30 days of the due date, the employer was in “material breach of the arbitration agreement” even though the arbitration panel actually set a later payment deadline after being notified of Skyview’s failure to pay. The court held that the new deadline did not retroactively “cure” Skyview’s material breach and subsequent triggering of Section 1281.98.

Jury Trial Waivers: An Important Alternative



Contractual, pre-dispute jury trial waivers are enforceable in 47 states.



Unenforceable in California, Georgia, and North Carolina.

Standards for Enforcing Jury Trial Waivers - Generally



- Knowing and voluntary.
- Conspicuous.
- In some states, whether there is a gross disparity in bargaining power.

Arbitration and Confidentiality

- Is a confidentiality provision appended to an arbitration clause enforceable?
- If so, will it work?
- How much privacy will it provide you?



✓	Applicable state laws	✓	Choice of law
✓	Interstate commerce	✓	Mutuality
✓	Standalone	✓	Fee-splitting
✓	Delegation	✓	Statute of limitations
✓	Scope	✓	Class action waiver
✓	Location	✓	Consideration
✓	ADR provider and rules		
✓	Mandatory Mediation?		

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