

Changes to the Arbitration Landscape in 2018 and Possible Changes on the Horizon in 2019

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Do you have an arbitration clause in any of your contracts (employment, consumer, subcontractors)?

Yes

No, we don't have arbitration clauses in our contracts

No, we removed arbitration clauses in our contracts

CURRENT LANDSCAPE

Where Are We Now?

- Arbitration agreements are getting pushback from the public
 - Commercial contracts
 - Consumer contracts
 - Employment contracts
- Companies are responding by removing arbitration clauses
- Some bipartisan support to limit arbitration agreements

Forced Arbitration in the News

#googlewalkout #TimesUp #DumpForcedArbitration

- Google Walkout Organizers Demand an End to Forced Arbitration Industry-Wide
 - *Gizmodo*, December 10, 2018
- NLRB Judge: Requiring Confidential Arbitration is an Unfair Labor Practice
 - *National Law Review*, April 1, 2019
- Arbitration Gets the Spotlight at Senate Judiciary Hearing
 - *The National Law Journal*, April 2, 2019
- Harvard Law Students Are Taking on Forced Arbitration
 - *The Nation*, April 15, 2019

State Laws Limiting Arbitration Clauses

- California
 - Private Attorney General Act of 2004
 - Allows aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees and the State of California for labor code violations
 - Arbitration clauses and collective-action waivers that waive the right to pursue under PAGA are unenforceable
- Maryland, New York, New Jersey, Washington and Vermont
 - Limits forced arbitration of sexual harassment claims
 - Likely preempted by FAA, particularly given *Epic Systems*

RECENT SUPREME COURT CASES

Courts' Navigation of Enforceability of Arbitration Agreements

- Courts are not as quick to change the landscape
 - Change likely needs to occur legislatively
 - Has occurred on state level
 - Pending federal legislation, some with bipartisan support
- Courts are generally compelling arbitration
 - Under FAA, “arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms”
 - Application is broad
 - Pro-individual arbitration climate

Has your company recently started requiring arbitration clauses in contracts?

Yes

No, we don't have arbitration clauses at all

We've always included them in contracts

Epic Systems Corp v. Lewis, Ernst & Young LLP v. Morris, and NLRB v. Murphy Oil

- Employees at each company signed arbitration agreements
 - Certain claims must be resolved via arbitration
 - Claims by individual employees could not be consolidated
- Subsequently, the employees filed different class actions (FLSA and NLRA violations)
- Employees: NLRA gave them the right to join class actions (relying on *D.R. Horton, Inc.*)
 - Arbitration agreements cannot overcome that

Epic Systems Corp v. Lewis, Ernst & Young LLP v. Morris, and NLRB v. Murphy Oil

- Court: Employers can force employees to sign mandatory arbitration agreements that forbid class or collective action
- Resolved potential contradiction between FAA and NLRA
 - FAA instructs federal courts to enforce arbitration agreements according to their terms
 - NLRA was silent about workers' rights to collective litigation
- NLRA must be interpreted so as not to interfere with enforceability of arbitration agreements under FAA

Do your arbitration clauses require the arbitrator to decide arbitrability?

Yes

No

Henry Schein, Inc., et al. v. Archer & White Sales, Inc.

- Archer & White (company distributing dental equipment) contracted with Henry Schein (dental equipment manufacturer) to buy dental equipment
- Archer & White sued Henry Schein for antitrust violations
- Defendant moved to compel arbitration under contract and Plaintiff opposed arguing motion was “wholly groundless”
 - Pointed to clause’s exception for “actions seeking injunctive relief”
 - Argued plaintiff sought injunctive relief and damages

Henry Schein, Inc., et al. v. Archer & White Sales, Inc.

- Question: who should determine whether a dispute is subject to arbitration where parties have an arbitration agreement?
- Answer: Arbitrators must resolve merits of dispute
 - Arbitrators must decide whether a dispute is subject to arbitration when contract says arbitrators are to decide that issue
- Courts cannot override the contract terms even if arguments for arbitration are completely baseless or “wholly groundless”
 - “Wholly groundless” exception is inconsistent with FAA

Do you include arbitration clauses with transportation workers (employees or independent contractors) engaged in interstate commerce?

Yes

No

New Prime Inc. v. Oliveira

- New Prime hired Oliveira as truck driver pursuant to Independent Contractor Operating Agreement
- Oliveira filed putative class action for failure to pay minimum wage
- New Prime moved to compel arbitration
- Truck driver argued “contracts of employment” exception within FAA removed his agreement from the FAA’s coverage
 - Excludes “contracts of employment of...seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” (transportation workers exclusion)

New Prime Inc. v. Oliveira

- Court: Courts should decide whether the statutory exception applies before ordering arbitration even with delegation clause
 - Exclusion is not a question of arbitrability that parties can delegate to arbitrator
 - Requires initial determination of whether the contract falls within the Act’s “contracts of employment” exception
- Court: Transportation worker exclusion applies to independent contractors and employees
- *Schein* difference: *Schein* interpreted contract, not statute

Do your arbitration clauses explicitly prohibit class arbitration?

Yes

No

Lamps Plus Inc v. Varela

- Employee filed class action after his personal information was shared by a fellow employee who fell for a phishing attack
- Defendant moved to compel arbitration due to employment contract
- Contract: “arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.”
 - Silent on whether arbitration could be conducted as a class or whether each employee was required to arbitrate individually

Lamps Plus Inc v. Varela

- Defendant: FAA and *Stolt-Nielsen* compel individual arbitration absent express consent
- Plaintiff: ambiguity in contract cuts against drafter
- Lower courts: they could arbitrate as a class
 - Since contract was not explicit one way or the other, state law required ambiguous provision to be interpreted against the drafter
- Supreme Court: overturned 9th Circuit
 - Under FAA, ambiguous agreement cannot provide necessary contractual basis for concluding that the parties agreed to submit to class arbitration
 - Arbitration must be conducted on an individual basis
 - Unless agreement clearly authorizes class arbitration

ON THE HORIZON

Bradley

Pending Federal Legislation

- The Forced Arbitration Injustice Repeal Act
 - Renders predispute arbitration agreements unenforceable for employment, consumer, civil rights and antitrust disputes
 - Requires arbitrations to be entered into after a dispute arises
- Restoring Justice for Workers Act
 - Amends the FAA and NLRA to prohibit arbitration agreements that forbid class or collective actions
- Ending Forced Arbitration of Sexual Harassment Act
 - Prohibits the use of arbitration in instances that involve sexual harassment

Pending State Legislation

- EmPIRE Worker Protection Act
 - Allows employees, whistleblowers or organizations to initiate a public enforcement action to collect penalties on behalf of Labor Commissioner for violations of New York labor laws
 - Modeled off of California Private Attorney General Act
- Similar legislation pending in Massachusetts, Maine, Oregon, Washington and Vermont
 - Expected New York, Maine and Oregon will pass this legislative session
- Likely not preempted by the FAA
 - Government is real party in interest to FCA or PAGA lawsuit
 - Not a party to the arbitration agreement

Has your company experienced an increase in individual arbitration filings?

Yes

No

Business Considerations

- Examine arbitration agreements in various contexts
 - Explicitly prohibit class and collective arbitrations
- Mass individual arbitrations?
 - Employees filed hundreds of arbitration demands against the same employer after *Epic Systems*
 - May change cost-benefit analysis of class action waivers
- Organizers against companies?
 - Google employees
 - Tech companies removed class action waivers
 - Law students boycott firms who require mandatory arbitration agreements
- Companies against companies?
 - Pressure to not contract with companies who require arbitration

Questions?



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