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Revisiting Arbitration Agreements

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Introduction

Sarah Evans, Esq.

- Litigation attorney representing individuals and corporations in threatened and pending litigation involving business torts, contracts, employment, and securities. Ms. Evans also provides trainings, advice, counseling, and investigations for employers and employees.

Introduction

Kyle W. Nageotte, Esq.

- Represent employers in a broad range of employment law matters, including claims involving class actions, discrimination, wage and hour disputes, wrongful termination, trade secrets, and the California Private Attorneys General Act (PAGA).

Introduction

Higgs Fletcher & Mack LLP

- San Diego's oldest law firm
- Full service
- 14 attorneys in the employment law group—broad experience in defending arbitration agreements in State and Federal Courts

Questions?

- If you have questions during today's presentation, please ask!
- Use the chat / Q&A feature.

Here's why this matters...

- Impacts on large wage-and-hour and disparate impact claims
- Arbitration agreements allow litigation to be narrowed to just one year of potential violations (PAGA)
- Allows employers to adjust the scope of employment claims
- Predictability in employment budgets

The Rise of Arbitration

- Contractual arbitration
 - Defined
 - California law and the Federal Arbitration Act (FAA)
 - Pre-employment / during employment

Benefits of Arbitration

- Faster results
- Greater privacy
- No “runaway jury”
- No court trial / jury
- Streamlined discovery (with certain exceptions in employment cases)
- Class action waivers
- Settlement demands are often more reasonable as a result of the above factors

Pitfalls of Arbitration

- Limited discovery
- Difficulty securing summary judgment / adjudication
- Employer must pay for the arbitrator
- Difficult to join other parties
- Limited grounds for appealing an arbitrator's decision

Recent Legal Developments

California vs. the FAA

- California courts and the state Legislature generally disfavor arbitration
- The FAA strongly favors arbitration
- Except for those prohibited under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act = sexual assault and sexual harassment.
 - *Discover Bank*
 - *Concepcion*
 - *Iskanian*
 - *Viking River (PAGA)*

California vs. the FAA

AB 51

- AB 51 was intended to prohibit employers from requiring individuals to sign, as a condition of employment or employment-related benefits, arbitration agreements concerning disputes arising under FEHA or the Labor Code on/after 1/1/2020.
- AB 51 challenged in court due to conflicts with the FAA
- Arbitration agreements in California enforceable
 - Supremacy Clause
 - Supreme Court precedent
 - Statutes that exact some “hostility to arbitration” are pre-empted by the FAA (*Kindred Nursing*)

Arbitrability of PAGA Claims

Viking River Cruises and Uber

- Until June 2022, no PAGA claim could be compelled to arbitration.
- U.S. Supreme Court rules that individual PAGA claims must be arbitrated (Viking)
- California Supreme Court rules non-individual PAGA claims must be prosecuted / defended in Court (risk of jury trials)

What's Next?

Need to Update Arbitration Agreements in CA

- *Hasty v. American Automobile Association* (December 2023)
 - Substantively:
 - Avoid overly-broad confidentiality clause
 - Remember to not waive all PAGA claims (still violative of *Iskanian*)
 - Avoid limitations on employees' filing with government agencies
 - Avoid including non-working link to arbitration rules
 - Procedurally:
 - Need to actually have the employee see the agreement (electronically or on paper) before obtaining consent
 - Court held the agreement was “permeated with unconscionability” and therefore the *entire* agreement was thrown out

What's Next?

Need to Update Arbitration Agreements in CA

- *Ramirez v. Charter Communications* (July 2024)
 - Ensure mutuality of claims subject to and excluded from arbitration
 - Provisions that substantially deprive the rights available under federal or state law are prohibited
 - Avoid limiting statutes of limitations or if limiting statutes of limitations, make limits “reasonable”
 - Avoid changing attorneys’ fees statutes and one-way nature of same
 - Avoid pre-arbitration procedural requirements (mediation, etc.)
 - Avoid limiting government agencies’ authority to investigate (EEOC, etc.)
 - Make them as fair as possible (legislative purpose, etc.)
 - Make sure to include severability provision---saving grace here.
 - Deposition limits *might* be adequate, rest *might* be severable.

What's next?

- Arbitration agreements should be updated
 - Ensure the agreement contains all necessary pro-employee provisions
 - Sexual harassment / assault claims exempt
 - Carve out individual PAGA claims and stay non-individual claims
 - Address mass arbitration
 - New arbitrator providers?
 - New Era ADR, etc. (Flat fee models)
 - (Not an endorsement)

Moving forward...

Why?

- Arbitration agreements will still be challenged
 - Contract rules apply
 - Scope, waiver, undue influence, unconscionability, etc.
- Update procedures for employee signatures / consent to agreements
- Periodically review/update arbitration agreements to ensure they remain compliant and effective
- Appeals from arbitration decisions will still be largely immune from judicial review
 - Legal error is not enough

PAGA Reform's Impact on Arbitration

- Pre-Filing Steps
 - Audits
 - More violations can be cured
 - Penalties can be reduced by 85% if “all reasonable steps” taken
- Early Mediation
- Standing
 - Named Plaintiff must suffer LC violations
 - Better to have issue decided by arbitrator?
- Ending derivative claims

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Questions?

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Thank you!

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