Workplace arbitration agreements: where we are and where we're going

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The past decade has seen a variety of hot topics emerge in the labor and employment law field. This includes independent contractor classification, state and local paid sick leave and similar laws, and the expansion of anti-discrimination laws. Undoubtedly, however, the issue of mandatory workplace arbitration agreements is at or near the top of the list.

In that vein, many employers require their employees to agree to arbitrate employment-related legal claims rather than pursue them in court. This is for a host of reasons, including that arbitration can be, and often is, mutually beneficial, allowing parties to resolve claims efficiently and privately. However, in response to vocal public criticism of arbitration agreements, a growing number of federal and state legislators are working to curb their use, particularly in the context of sexual misconduct.

This article will discuss the federal and state legal landscapes with respect to the use of arbitration agreements in the workplace, and where we may be headed in the future on that front.

Current federal landscape

Employment-related arbitration agreements have, under the Federal Arbitration Act (FAA), long been considered generally enforceable. Adopted in 1925, the FAA directs courts to enforce arbitration agreements according to their terms. (9 U.S.C. § 2, 4). The U.S. Supreme Court has repeatedly ruled that the FAA establishes "a liberal policy favoring arbitration agreements." (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

In 2001, therefore, the Supreme Court confirmed that agreements to arbitrate employment-related disputes between employers and employees are generally enforceable under the FAA. (*Circuit City Stores v. Adams*, 523 U.S. 105 (2001)). More recently, the Court held that employment agreements requiring individual rather than collective arbitration are enforceable and do not run afoul of employees' right to engage in protected concerted activity under the National Labor Relations Act (NLRA). (*Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018)).

Following *Epic*, the National Labor Relations Board (NLRB) clarified that, despite the enforceability of collective action waivers, it would continue to strike down arbitration agreements which interfered with employees' rights to access and file charges with the NLRB. (*See Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019)). The Board has, however, since assured employers that savings clauses, which remind employees of their NLRA rights, are sufficient to render an arbitration agreement lawful. (*Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70 (2020)).

That said, public sentiment toward mandatory arbitration clauses in employment contracts has soured in recent years. This is in part due to the perceived use of arbitration clauses to keep workplace sexual misconduct disputes confidential.

The federal government took notice of this change in public discourse. On March 3, 2022, President Joe Biden signed the bipartisan Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, thereby barring the enforcement of mandatory arbitration clauses for claims involving sexual misconduct. Specifically, the Act provides that an employee alleging sexual harassment or assault, whether individually or as a class representative, may pursue their claims in court rather than arbitration, regardless of whether they agreed with their employer to arbitrate their claims.

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Additional provisions include that a court (rather than an arbitrator) will decide whether the Act applies, and that the Act applies to any dispute or claim arising on or after March 3, 2022. The Act is also retroactive, meaning such clauses are also void in existing contracts.

What about state law?

Prior to passage of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, several state legislatures were not content to wait for action in Washington and, therefore, adopted

their own legislation over the last few years to limit mandatory workplace arbitration agreements.

New York, for instance, enacted Section 7515 of the New York Civil Practice Law and Rules (CPLR 7515) in 2018, thereby voiding predispute agreements to arbitrate sexual harassment claims. The next year, the state expanded the statute to apply to all claims of discrimination.

State laws have been met with mixed results in courts, which have generally held that such laws are preempted by the FAA (and thus view such laws as attempts to skirt federal arbitration law).

Other states, such as Illinois, Washington, and New Jersey, have passed similar legislation. And in 2019, California passed Assembly Bill 51 (AB 51), prohibiting employers from mandating arbitration agreements as a condition of employment for the most common types of employment law claims.

These state laws have been met with mixed results in courts, however, which have generally held that such laws are preempted by the FAA (and thus view such laws as attempts to skirt federal arbitration law). (*See, e.g., Kindred Nursing*, 581 U.S. 246, 251 (2017), holding that the FAA "preempts any state rule discriminating on its face against arbitration — for example, a law prohibiting outright the arbitration of a particular type of claim.").

For example, several New York state and federal courts have concluded that CPLR 7515 is preempted by the FAA. (*See, e.g., Gilbert v. Indeed, Inc.*, 513 F. Supp. 3d 374 (S.D.N.Y. 2021); *but see Newton v. LVMH Moët Hennessy Louis Vuitton Inc.*, No. 154179/2019 (N.Y. Sup. Ct. July 10, 2020)).

On the other hand, AB 51 was enjoined by a California district court, but this decision was reversed in a decision from a three-judge panel from the 9th U.S. Circuit Court of Appeals that held that the measure was not preempted by the FAA. (*Chamber of Commerce of the United States v. Bonta*, 13 F.4th 766 (9th Cir. 2021)). The 9th Circuit will soon rehear the case en banc, having paused proceedings pending the Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*. (142 S. Ct. 1906 (2022)).

In *Viking*, the Court considered the interaction of the FAA with California's Private Attorneys General Act (PAGA). PAGA empowers employees to sue their employers and seek civil penalties both individually and on behalf of all other aggrieved employees for violations of the California Labor Code.

California state courts prohibited waivers of the representative PAGA claims in arbitration agreements, while at the same time holding that individual and representative claims were inseparable. This logic freed employees from their agreements to arbitrate individual PAGA claims as well.

In a June 2022 ruling, however, the U.S. Supreme Court reversed course, holding that the FAA demands individual and representative PAGA claims be divisible, compelling the plaintiffs to arbitrate their individual claims per their agreements. The Court further held that the plaintiffs' representative claims must be dismissed, reasoning that standing under PAGA requires an individual claim.

Where we're going

Outside the sexual harassment context, workplace arbitration agreements remain enforceable under federal law. That said, it would not be entirely surprising to see legislators attempt to expand the recently passed Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act to encompass all manner of workplace disputes.

In fact, on March 17, 2022, the U.S. House of Representatives passed the sweeping Forced Arbitration Injustice Repeal Act of 2022 (FAIR Act), largely along party lines. The FAIR Act prohibits mandatory arbitration agreements for employment, consumer, antitrust, or civil rights disputes.

The FAIR Act also protects the rights of individuals and small businesses to participate in joint, class, or collective actions related to such disputes. (Notably, the FAIR Act is not retroactive; existing arbitration agreements would be preserved.) Having said all that, the FAIR Act's broad scope and lack of Republican support will likely doom it in the current Senate. Its passage, however, may indicate the potential direction of federal arbitration policy in the future.

Given the shifting legal landscape and unfavorable political climate for mandatory arbitration clauses in employment agreements, employers should stay abreast of legislative actions and employee sentiments on the issue.

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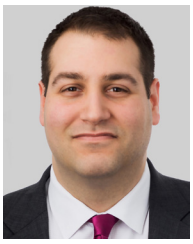
About the authors



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