

Arbitration of Employment Law Claims

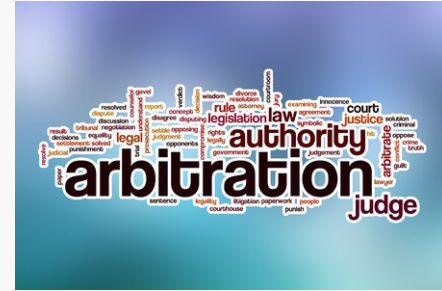
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Overview

- **Pros and cons of requiring arbitration**
 - **Federal Arbitration Act**
 - **Encourages resolution of disputes through arbitration**
 - **2018 SCOTUS decision on class action waivers**
 - **Recent court decisions interpreting FAA**
 - **Two SCOTUS**
 - **One Fourth Circuit**
 - **Others**
 - **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act**
 - **Tips for employers on developing an arbitration program**
- 



What is Arbitration?

- **Form of “alternative dispute resolution”**
- **Alternative to trial in court**
- **Arbitrator resolves case instead of judge**
- **Not mediation**
- **Parties must agree to arbitrate**
- **Included in many agreements between businesses and between businesses and consumers**



Arbitration in Employment Context

- **To be enforceable, agreement to arbitrate must meet basic due process requirements**
 - **Clear/fair procedures**
 - **Written in plain English (or Spanish, etc.)**
- **Caveat: Employee who signs enforceable arbitration agreement can still file complaint with government agency (EEOC, DOL, NLRB, etc.)**
 - **Because agreement is between employer and employee only**



Pros of Arbitration

- **Non-jury**
- **Control over selection of arbitrator**
- **Non-public forum, so more confidential**
- **Usually quicker and more efficient**
- **Usually less costly**
- **Plaintiff's lawyer may lose interest in case after finding out about arbitration agreement**



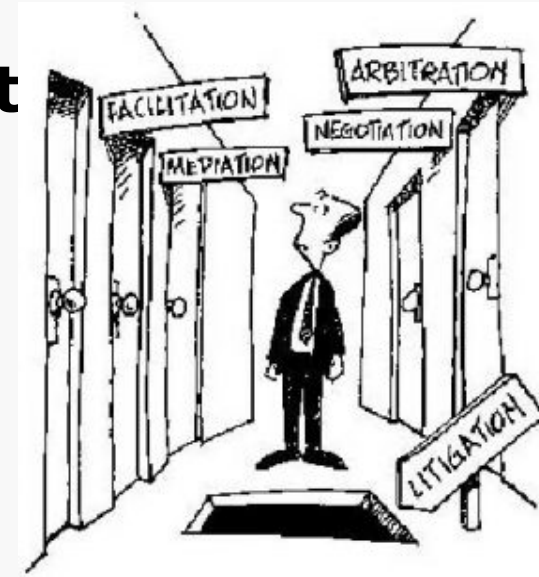
Cons of Arbitration

- **Difficulty in obtaining summary dismissal**
 - **Or injunctive relief**
- **Possibility of “split the baby” decision**
- **Limited right to appeal**
 - **Corruption, fraud, misconduct unless otherwise specified**
- **Employer usually responsible for most of fees and costs**
- **Possibility of challenge to enforceability, which can delay resolution**
- **Perception arbitration is unfair to employees**



Federal Arbitration Act

- **Generally requires that courts enforce valid arbitration agreement**
 - Exception for transportation workers
 - New exception for sexual harassment/assault claims
- **Generally trumps ...**
 - State arbitration laws unless agreement says a state's law applies
 - Alternative arbitration procedures unless agreement says alternative procedures apply



Epic Systems v. Lewis (U.S. May 21, 2018)

- **Class action waivers in employment arbitration agreements enforceable under FAA and do not conflict with NLRA Section 7**
 - **Section 7 protects employees who engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection”**
- **5-4 majority: In FAA “Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings”**
- **So employers can require workers to arbitrate legal claims on individual basis, in effect prohibiting class/collective actions**



New Developments in 2022

- **Supreme Court: *Morgan v. Sundance* and *Saxon v. Southwest***
- **Fourth Circuit: *Coady v. Nationwide Motor Sales Corp.***
- **Congress: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act**



Morgan v. Sundance (U.S. May 23, 2022)

- **Taco Bell employee brought putative nationwide class action against employer/franchisee for alleged violations of the FLSA**
- **Employees had signed arbitration agreement to arbitrate “any employment dispute” when they applied for work**
- **Employer defended lawsuit without any mention of arbitration agreement, including filing an (unsuccessful) motion to dismiss and engaging in mediation with Plaintiffs**





Morgan v. Sundance (U.S. May 23, 2022)

- **Eight months into litigation, employer raised the arbitration agreement and moved to compel**
- **ISSUE: Did employer waive its right to arbitrate the dispute by not previously raising the issue?**
- **Under Eighth Circuit precedent, there was a different/higher waiver standard for arbitration**
 - **Required showing of “prejudice” to other party**
 - **Circuit split on this issue of heightened waiver**





Morgan v. Sundance (U.S. May 23, 2022)

- Eight members of the arbitration panel
- ISSUE: Whether the employer waived its right to arbitrate
- Under the Federal Arbitration Act (FAA), an employer's waiver of its right to arbitrate is enforceable if the employer's conduct is "inconsistent with the arbitration agreement"
- Required the employer to prove that it waived its right to arbitrate
- Circuit Court of Appeals for the Tenth Circuit

**Vacated and
Remanded
Employer WAIVED
right to arbitrate
dispute**

Employer raised
the issue
right to
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Southwest Airlines Co. v. Saxon (U.S. June 6, 2022)

- **Airplane cargo loader/ramp supervisor brought putative class action against her employer, Southwest, for alleged violations of the FLSA**
- **Southwest moved to enforce its arbitration agreement with the employees and to dismiss the case**
- **HELD: Saxon and class members belong to a “class of workers engaged in foreign or interstate commerce” to which FAA § 1’s exemption applies**



Southwest Airlines Co. v. Saxon (U.S. June 6, 2022)

- Ramp supervisor brought putative class action

against
the

- Southwest Airlines
agreed to
casualty

- HELD
"class"

commerce to which FAA § 151 exemption applies

**Motion to Compel
Arbitration DENIED
based on FAA
exemption**

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ss the

state



Southwest Airlines Co. v. Saxon (U.S. June 6, 2022)

- **CAUTION:** Even if there is a valid arbitration agreement, the FAA includes exemptions for workers who cannot be forced to arbitrate employment disputes
- “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”
- Section 1 exemptions apply to workers who perform a direct or necessary role in the flow of goods involving interstate or foreign commerce



Coady v. Nationwide Motor Sales Corp. (4th Cir. Apr. 25, 2022)

- **Former employees sued in federal court in MD alleging wage payment claims**
- **Employer moved to compel arbitration because employees had signed for receipt of employee handbook, which contained section requiring arbitration claims**
- **But acknowledgement of receipt for handbook said employer had “the right, from time to time, to ... change, abolish or modify existing policies ... with or without notice”**



Coady v. Nationwide Motor Sales Corp. (4th Cir. Apr. 25, 2022)

- Former employees brought action in U.S. District Court for claims
 - Employees claimed harassment, arbitration
 - But employees claimed without notice
- Motion to Compel Arbitration DENIED and Affirmed by Fourth Circuit**



Coady v. Nationwide Motor Sales Corp. (4th Cir. Apr. 25, 2022)

- **District Court sided with employees and held modification clause applied to arbitration agreement, making it illusory**
- **Fourth Circuit agreed, analyzing issue as matter of contract interpretation and applying MD contract law**



Coady v. Nationwide Motor Sales Corp. (4th Cir. Apr. 25, 2022)

- **Fourth Circuit:**
 - **Presumption favoring arbitration in FAA does not apply to preliminary question of whether arbitration agreement is valid under state contract law**
 - **Under MD law promise to arbitrate is illusory and unenforceable if employer reserves right to modify agreement at any time without notice**
 - **So arbitration agreement was not enforceable and employer stuck litigating in court**





PRACTICE POINTS

REVIEW STATE LAW FOR SPECIFIC REQUIREMENTS

- **Is arbitration agreement included as part of employee handbook?**
- **Consider setting it out in separately signed document that is clear and definite**
- **Does it meet state law requirements for enforceable agreement?**
 - **Offer, acceptance, and consideration (not illusory)**
 - **Not obtained by fraud, duress, or undue influence**



Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- **Signed into law on March 3, 2022**
- **Applies to claims that arose or accrued after that date**
- **Amends FAA:**

[A]t the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.



Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- **Future litigation anticipated over scope and interpretation of new law**
- **Does “sexual harassment dispute” include alleged sex discrimination claim?**
- **Also, sexual harassment claims are often brought alongside other claims; for example, retaliation, FLSA, FMLA, etc.**
 - **Would other claims be arbitrated?**





PRACTICE POINTS

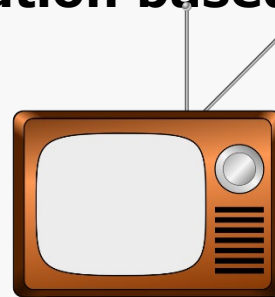
REVIEW ARBITRATION AGREEMENTS

- **Insert carve out?**
- **Does agreement mention sexual harassment/assault claims?**
- **How about arbitration provision in employment agreement?**



***Tantaros v. Fox News Network, LLC* (S.D.N.Y. Sept. 30, 2022)**

- **Former Fox News host brought sexual harassment and other claims against Fox News, among others in 2019**
- **Fox News/Defendants relied on mandatory arbitration agreement to compel arbitration of employment dispute**
- **After passage of the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,” Plaintiff filed “Notice of Supplemental Authority” arguing, in part, that the claims are no longer subject to mandatory arbitration based on the new law**



Tantaros v. Fox News Network, LLC (S.D.N.Y. Sept. 30, 2022)

- For example – Order and Opinion issued on Sept. 30, 2022
- Former Fox News anchor and other co-defendants
- Fox News Network, LLC and its affiliates agreed to arbitrate disputes with its employees
- After plaintiff was sexually assaulted by a Fox News anchor, she filed a lawsuit against Fox News and the anchor. The lawsuit alleged that the anchor had sexually assaulted her and that Fox News had covered up the assault.

**Defendants' Motion to
Dismiss GRANTED -
Case Subject to
ARBITRATION
(law not retroactive)**



KEEP IN MIND – ARBITRATION...

RENEWED FOCUS AND ATTENTION



- **Be aware of changing law**
- **Review existing arbitration agreements to ensure enforceable**
- **If agreement is unenforceable could result in lengthy and costly litigation, undoing the benefits of opting for arbitration**



PRACTICE POINTS

TERMS TO CONSIDER FOR AGREEMENTS

- **How to start arbitration process (written request)**
- **Time limit**
- **Covered claims (anything arising out of employment and/or termination)**
- **No class or collective claim as plaintiff or class member**
- **Excluded claims**



PRACTICE POINTS

TERMS TO CONSIDER FOR AGREEMENTS

- **Procedural rules (AAA, JAMS, AHLA, etc.—but not necessarily by them)**
- **Written award and specific findings of fact**
- **Costs (paid by employer less filing fee employee would have paid if claim filed in court?)**
- **No change to at-will status**



QUESTIONS?

