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Ongoing Battles Remind Employers to Carefully Consider Their Approach to Arbitration Agreements

Article By:

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Hop into the time machine with me so I can take a quick victory lap before I revert to being the ever-cautious counselor.

Way back in October 2019, I not-so-subtly indicated my belief that a California statute banning employers from requiring employees to enter mandatory arbitration agreements would ultimately get struck down because it violates the Federal Arbitration Act's (FAA) preemption of state laws that disfavor arbitration agreements.

It took some time to get there — but turns out I was right. By way of background, in February 2020, a California federal judge entered a preliminarily injunction barring enforcement of the state's law prohibiting mandatory employment arbitration. In September 2021, a divided three-judge panel on the Ninth Circuit struck down that injunction, giving the law new life.

However, following the U.S. Supreme Court's ruling in the *Viking River* case, the same three Ninth Circuit judges decided on their own to revisit their earlier ruling. In February 2023 they reversed themselves, agreeing California's ban on mandatory arbitration agreements in the employment context violated the FAA.

Finally, on January 1, 2024, the same federal judge who imposed the original injunction closed the book on the matter, making the preliminary injunction barring enforcement of the state's law permanent (and even awarding attorney's fees to the prevailing employer interest groups that brought the case).

It feels good to have correctly predicted the future.[1]

If only I could predict today what comes next for mandatory arbitration in employment matters. The topic — particularly when it comes to class actions — has long been a focus of mine.

Over the years, I have observed a relatively consistent — but not exactly linear — theme of legislative and court efforts to restrict employer use of arbitration to mitigate class action and employment law risks, with such efforts often running afoul of the FAA. That is not to say that all such legislative efforts have failed, and the U.S. Supreme Court has consistently ruled for employer. For example,

just last year Congress amended the FAA via the Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act (EFAA), which provides plaintiffs access to civil forums (courts) even if they are subject to a mandatory arbitration agreement. And, in June 2022, the Supreme Court found in *Southwest Airlines v. Saxon* that certain airline workers who themselves did not cross state lines in the performance of their work nevertheless qualified for the FAA's narrow interstate "transportation worker" exemption to the FAA.

As we enter 2024, even if I cannot predict outcomes, I do expect the year will see continued significant legal attention devoted to mandatory arbitration. The Supreme Court has already agreed to hear another "transportation worker" case, and, since the *Saxon* decision, the "transportation worker" exception to the FAA has become a heavily litigated topic as more plaintiffs' attorneys in class action lawsuits argue for an expansive application of the transportation worker carveout.[2] It will also be interesting to see whether courts apply EFAA to claims based on events that occurred prior to the March 2022 passage of the law. And California employee-side lawyers surely have more up their sleeves on the arbitration front.

Given how much focus the use of mandatory arbitration in employment and class action waivers has received for more than a decade, one might think that arbitration is a panacea risk-management tool for all employers as well as a huge disadvantage for all employees, who should resist arbitration agreements no matter the likelihood of success. Such broad-strokes thinking, in my view, is misplaced for both sides. I have seen the value of the significant benefits mandatory arbitration offers but also some of the drawbacks that it can create. It certainly is not a panacea for employers and a black hole for employees.

The recent activity relating to arbitration does confirm one concept that is clear to me: arbitration's utility and enforceability remain fluid concepts that deserve ongoing attention and maintenance. For employers who currently have such a program, I suggest reviewing it in 2024 to confirm such a program still fits with the larger organizational goals and that the documentation allows for the longest possible shelf-life and prospects of enforcement. And for employers considering mandatory arbitration, realize that it is a potentially valuable but complicated undertaking that merits scrutiny and debate, supported by knowledgeable counsel.

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[1] If anyone wants to know next week's lotto numbers, give me a call and perhaps we can "arrange" something…

[2] Full disclosure: by the time this article publishes on January 8, 2024, this author will have completed oral argument before the Ninth Circuit Court of Appeals on what he views as a novel and significant "transportation worker" case.

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