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ARC AND AAA

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Recent developments in employment arbitration

IMPORTANT EMPLOYMENT-ARBITRATION-LAW DECISIONS FROM 2023 AND 2024

Employment arbitration continues to be a big issue in federal and California courts. (See *Recent Developments in Employment Arbitration Law from 2022 and 2023* by Stephen M. Benardo in the September 2023 issue of Advocate.) The latest developments in arbitration of PAGA claims are covered in a superb article by The Hon. Tricia A. Bigelow (Ret.) in this edition of Advocate.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") provides: "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute … 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."

When I wrote about the EFAA shortly after its enactment (see *Sexual Harassment, Sexual Assault, and Other Claims Not Subject to Mandatory Arbitration – Federal H.R. 4445 and California A.B. 51* by Stephen M. Benardo in the September 2022 issue of Advocate), I noted significant open questions regarding the EFAA's scope and application. We are starting to get answers.

What constitutes a claim "relating to the sexual assault dispute or the sexual harassment dispute?" In *Turner v. Tesla, Inc.* (N.D. Cal. Aug. 11, 2023) __ F.Supp.3d __, 2023 U.S. Dist. LEXIS 169581, the court broadly held the plaintiff's entire complaint would proceed in court, not arbitration. The court found causes of action for a) hostile environment sexual harassment and failure to prevent harassment were "sexual harassment-based claim[s]," b) discrimination, retaliation, and wrongful termination in violation of public policy based on opposing and reporting harassment were "substantially related to the underlying claim of sexual harassment."

Additionally, reporting workplace injuries due to sexual harassment (Lab. Code, § 6310) and failure to pay wages due upon discharge (Lab. Code, § 203) were also "substantially related" to sexual harassment claims because they were "intertwined" and "ar[ose] out of the same underlying facts." (See also *Arouh v. GAN, Ltd.* (C.D. Cal. March 22, 2024) 2024 U.S. Dist. LEXIS 53039 [collecting federal cases on "relates to" sexual harassment or assault].)

The EFAA is not retroactive: "This Act, and the amendments made by this Act, shall apply to any dispute or claim that arises or accrues on or after the date of enactment of this Act." What constitutes a "dispute?"

In *Kader v. Southern California Medical Center, Inc.* (2024) 99 Cal.App.5th 214, all but one of the alleged acts of sexual harassment occurred before the EFAA's March 3, 2022, effective date. The court held there was no "dispute" until at least the date the plaintiff filed his complaint with the California Department of Fair Employment and Housing (now the "Civil Rights Department") on May 27, 2022, so the plaintiff could proceed in court.

On the other hand, in *Arouh*, *supra*, the plaintiff filed his administrative complaint in February 2022, before the effective date of the EFAA. So, the *Arouh* claims were subject to arbitration.

Transportation exemption

Section 1 of the Federal Arbitration Act ("FAA") exempts transportation workers engaged in foreign or interstate commerce from FAA coverage. Courts are increasingly giving the exemption a broad definition.

In *Bissonnette v. Lepage Bakeries Park St., LLC* (2024) 601 U.S. 246, the U.S. Supreme Court held workers need not work in the transportation industry to qualify for the exemption. A worker delivering products for a baked-goods company might be exempt.

In *Carmona v. Domino's Pizza, LLC* (9th Cir. 2023) 73 F.4th 1135 and *Miller v. Amazon.com, Inc.* (9th Cir. Sept. 1, 2023) 2023 U.S.App. LEXIS 23309, the Ninth Circuit continued the trend of courts ruling delivery drivers who might not cross state lines can fall under the transportation exemption as "last-mile" delivery drivers of goods in interstate commerce.

In *Ortiz v. Randstad Inhouse Services* (9th Cir. 2024) 95 F.4th 1152, the Ninth Circuit went further and held a warehouse worker qualified for the transportation exemption because he played a "direct and necessary" role in the interstate commerce of goods and was "actively engaged" and "intimately involved with" transportation. Although the plaintiff did exclusively warehouse work, he "handled … products near the very heart of their supply chain, … the relevant goods were still moving in interstate commerce when the employee interacted with them, and … [he] played a necessary part in facilitating their continued movement."

In *Fli-Lo Falcon, LLC v. Amazon.com, Inc.* (9th Cir. 2024) 97 F.4th 1190, the Ninth Circuit held the transportation exemption did not apply to business entities contracting with Amazon, because the exemption only applies to a "worker." In his concurrence, Judge Thomas questioned the majority's implied conclusion that an entity can never qualify for the exemption, citing cases in other federal circuits asserting the exemption can still apply if the entity is a "sham."

Third parties

Generally, only parties to an arbitration agreement can be compelled to arbitrate. In *Mattson Technology, Inc. v. Applied Materials, Inc.* (2023) 96 Cal.App.5th 1149, an employee emailed himself his employer's proprietary information on his way out the door. The former employer sued the employee for breach of employment contract and sued both the employee and his new employer for misappropriation of trade secrets. The employee and the new employer moved to compel arbitration based on the arbitration agreement between the employee and the former employer. The trial court granted the motion to compel the former employer to arbitrate with the employee but denied the motion to compel the former employer to arbitrate with the new employer. The Court of Appeal affirmed on grounds that the new employer was not a party to the arbitration agreement and the former employer's claims against the new employer did not arise out of the employee's contractual obligations to the former employer.

In *Soltero v. Precise Distribution, Inc*. (June 18, 2024) 2024 Cal.App. LEXIS 383, the court held a client employer could not enforce the arbitration provision in the employment agreement between the employee and a staffing company. The court ruled that equitable estoppel did not apply because the employee only sued the client's employer, not the staffing company. Additionally, the meal- and rest-break claims arose from the alleged conduct of the client's employer, not from any obligation under the employment agreement, disagreeing with *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782. The client employer could not compel arbitration on a third-party beneficiary theory because the arbitration agreement referred to "related entities" of the staffing company but not to "clients." The client employer's agency theory failed because the employee's complaint did not allege the client employer was an agent of the staffing company or vice versa.

In *In re Uber Technologies Wage & Hour Cases* (2023) 95 Cal.App.5th 1297, the court held Uber and Lyft could not compel arbitration of the coordinated cases brought against them by the State of California and the Division of Labor Standards Enforcement ("DLSE"). The court reasoned that the State and the DLSE were not parties to the arbitration agreements between Uber and Lyft and the workers who were the subjects of the enforcement actions.

Formation of an arbitration agreement

In *Ramirez v. Golden Queen Mining Co., LLC* (2024) 102 Cal.App.5th 821, the court held the employee's

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statement that he did not recall signing the arbitration agreement was insufficient to create a factual dispute because a person can recognize their signature. *Ramirez* followed *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747 and *Prostek v. Lincare Inc*. (E.D.Cal. 2023) 662 F.Supp.3d 1100 and disagreed with *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, holding an employee's statement that she did not remember signing the agreement shifted the burden to the employer to prove she did.

In *Mar v. Perkins* (2024) 102 Cal.App.5th 201, the employee stated in writing to his employer that he refused to sign an arbitration agreement and receipt of the employee handbook containing an arbitration provision. The court held the employee's continued employment did not constitute acceptance of the arbitration provision or create an implied contract to arbitrate.

Delegation clauses

Once a court finds a valid arbitration agreement that covers the plaintiff's claims, the court will decide whether any contract defenses preclude enforcement unless the arbitration agreement contains a clear and unmistakable "delegation" provision that an arbitrator is to determine arbitrability.

In *Mondragon v. Sunrun Inc.* (2024) 101 Cal.App.5th 592, the court held issues of arbitrability were for the court, not an arbitrator, because a) mere reference to the AAA Rules giving the arbitrator power to determine "his or her own jurisdiction, including … the existence, scope, or validity of the arbitration agreement" is not clear and unmistakable to an hourly employee or consumer, b) a delegation clause does not deprive a court of authority to determine whether a carve-out covers certain claims, and c) where there is a provision giving a court power to sever unenforceable provisions of the agreement, there is no clear and unmistakable delegation to the arbitrator.

In *Holley-Gallegly v. TA Operating, LLC* (9th Cir. 2024) 74 F.4th 997, the trial court found the delegation provision unconscionable because the section of the arbitration agreement that included the delegation provision also included an unconscionable provision that if the agreement were found unenforceable, the employee waived the right to a jury. The Ninth Circuit reversed and enforced the delegation provision, applying the rule that an unconscionability challenge to a delegation provision is limited to the delegation provision itself. The jury waiver had no bearing on the delegation of arbitrability and would only apply after a determination that the agreement was unenforceable.

Unconscionability

The most common ground for challenging employment arbitration agreements is unconscionability. In *Hasty v. American Automobile Association of Northern California, Nevada & Utah* (2024) 98 Cal.App.5th 1041, the court found a high degree of procedural unconscionability. The arbitration agreement was imposed as a condition of employment and presented electronically in a small font and dense print with no clear indication of how the employee could view the agreement on a screen larger than her phone. The court also found the agreement lacked mutuality and substantively unconscionable because it included: a) a waiver of the right to any remedy or relief based on a finding of a government agency pursuant to an administrative charge, b) a requirement that arbitration proceedings be confidential, and c) a PAGA and class-action waiver – all of which the court found favored the employer.

In *Cook v. University of Southern California* (2024) 102 Cal.App.5th 312, the court held the arbitration agreement was substantively unconscionable because: a) the scope included all claims between the employee and the employer, not just claims arising out of employment, b) the duration was "indefinite" because it was not limited to claims up to the agreement's effective date, and c) the agreement lacked mutuality because it required the employee to arbitrate claims against the employer's "officers, trustees, administrators, employees or agents," but did not require these "related entities" to arbitrate claims against the employee.

Other grounds for not enforcing an arbitration agreement

In *Vazquez v. SaniSure, Inc.* (2024) 101 Cal.App.5th 139, the employee and employer entered into an arbitration agreement. She resigned and was rehired a few months later but did not execute a new arbitration agreement. The employee's employment ended again, and she filed a class action and PAGA case for wage and hour violations occurring solely during her second stint of employment. The employer moved to compel arbitration based on the agreement executed during the first employment. The Court of Appeal affirmed the denial of the motion to compel because a) the employee's first resignation revoked the arbitration agreement and b) the employee never agreed to be again bound by the original arbitration agreement.

Failure to timely pay arbitration fees

Under Code of Civil Procedure sections 1281.97 and 1281.98, if the drafter of an employment or consumer arbitration agreement fails to pay within 30 days of invoice the fees and costs to initiate a contracted arbitration (1281.97) or to continue the arbitration proceeding (1281.98), the drafter is in material breach, in default, and waives the right to compel arbitration. The other party then may elect to withdraw from the arbitration agreement, proceed in court, and seek sanctions.

Reynosa v. Superior Court (2024) 101 Cal.App.5th 967, *Doe v. Superior Court* (2023) 95 Cal.App.5th 346, and *Suarez v. Superior Court* (2024) 99 Cal.App.5th 32, added to the growing number of cases finding no wiggle room in these

statutes – payment of the total amount owed in 30 days means just that. In *Reynosa*, the court held a payment less than 1% short of the total amount owed constituted a material breach and default under the statute. In *Doe*, the court held that "the proverbial check is in the mail" was insufficient, and payment must arrive within 30 days. *Suarez* held that Code of Civil Procedure section 1010.6 adds two court days to service, which are not added when the invoice is sent via email (though Code of Civil Procedure section 12 might extend the 30 days if the 30th day is a holiday). In *Hohenshelt v. Superior Court* (2024) 99 Cal.App.5th 1319, *review granted* June 12, 2024, B327524, the court held neither the arbitration provider nor the arbitrator had the authority to extend the 30 days or to set a new deadline.

Hohenshelt and *Suarez* followed prior cases holding the FAA does not preempt sections 1281.97 and 1281.98. The dissent in *Hohenshelt* asserted that section 1281.98 runs afoul of the FAA because it singles out arbitration contracts to be voided for late performance when other contracts would not be. Since *Hohenshelt*, Courts of Appeal have split on the issue: *Keeton v. Tesla, Inc*. (June 26, 2024) 2024 Cal.App. LEXIS 407, section 1281.98 is not preempted; *Hernandez v. Sohnen Enterprises, Inc*. (2024) 102 Cal.App.5th 222, section 1281.97 is preempted when FAA, and not the CAA (California Arbitration Act) rules are to be followed.

Waiver

The U.S. Supreme Court held in *Morgan v. Sundance, Inc*. (2022) 142 S.Ct. 1708, a party asserting waiver under federal law does not need to show prejudice. On July 25, 2024, the California Supreme Court followed Morgan, holding "prejudice" is not a requirement to prove waiver of a contractual arbitration right. (Code Civ. Proc., § 1281.2) (See *Quach v. California Commerce Club* 2024 WL 3530266 overturning 20 years of precedence.)

For a recent case before *Quach*, see *Semprini v. Wedbush Securities Inc.* (2024) 101 Cal.App.5th 518, where a party employer litigating in court for nine months waived its right to compel arbitration.

Stay pending appeal of denial of motion to compel arbitration

California Code of Civil Procedure section 916 generally provides that civil cases are stayed pending appeal. Defendants commonly use the threat of lengthy delay pending appeal of denial of a motion to compel arbitration to force plaintiffs to stipulate to arbitration. The passage of S.B. 365 reduces that leverage by amending Code of Civil Procedure section 1294(a) to add: "Notwithstanding Section 916, the perfecting of [an appeal of the dismissal or denial of a petition or motion to compel arbitration] shall not *automatically* stay any proceedings in the trial court during the pendency of the appeal."

Stay after motion to compel arbitration is granted

In *Smith v. Spizzirri* (2024) 144 S.Ct. 1173, the U.S. Supreme Court held federal law requires a district court to stay court proceedings upon application of any party following the grant of a motion to compel arbitration.

In *Mattson Technology*, *supra*, the trial court compelled arbitration of an employer's trade secrets claims against its former employee, but ruled the former employer's trade secrets claims against the employee's new employer would remain in court. The trial court denied the new employer's motion for stay pending arbitration of the former employer's claims against the employee. The court of appeal reversed, holding Code of Civil Procedure section 1281.4 mandates a stay of court proceedings if claims in arbitration and in court are part of the same "controversy," unless the claims in arbitration can be severed. The party opposing a stay bears the burden of proof on severance. The former employer could not show grounds for severance because establishing the trade secrets claims against the employee required establishing claims against the new employer, and the claims shared common factual questions.

Motion to vacate arbitration award

In *FCM Investments LLC v. Grove Pham, LLC* (2023) 96 Cal.App.5th 545, a commercial arbitration, the arbitrator found a party's use of an interpreter was a tactical ploy to seem less sophisticated that reflected negatively on her credibility because the party had been in the U.S. for decades, engaged in sophisticated business transactions, and functioned as an interpreter herself. The adverse credibility finding was part of the basis for the arbitrator's award against the party. The court of appeal ordered the award vacated under Code of Civil Procedure section 1286.2(a)(3) as arbitrator misconduct, i.e., bias, which resulted in substantial prejudice.

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