

To Arbitrate or Not to Arbitrate: Benefits and Drawbacks of Employer Arbitration Programs

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- *Please ask questions at any time.*

Employer Arbitration Programs

- What is an Employer Arbitration Program?
 - A program whereby the employer requires all new hires or existing employees to sign arbitration agreements as a condition of employment or continued employment.



Employer Arbitration Programs, cont.

- Employers must consider benefits and risks of the arbitration process and employee morale.
- Employers must consider the enforceability of the arbitration agreement.

Why Arbitrate?

- Types of claims subject to Arbitration in California?
- *California Arbitration Act* ("CAA")
(Regulates private arbitration in the State)
- *Federal Arbitration Act* ("FAA")
empties state laws that discriminate against it)



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Benefits of Arbitration for Employers

- Arbitrator awards are usually lower than jury awards.
- Arbitrators are not as easily swayed as juries by sympathetic arguments.



Benefits of Arbitration for Employers, cont.

- Lower costs of litigation.
- Less stringent procedural rules.
- Quicker and more efficient dispute resolution.

Benefits of Arbitration for Employers, cont.

- Lower costs of litigation may mean lower employment practices liability insurance premiums.
- Arbitrators are considered to be “expert” decision-makers in comparison to jurors.
- Some control over Arbitrator selection.

Benefits of Arbitration for Employers, cont.

- Confidentiality.
- Arbitration awards are often unknown and unpublished.



Benefits of Arbitration for Employers, cont.

- Class Waivers



Negative Considerations of Arbitration

- Arbitrators have unfettered discretion to decide issues of law which makes for limited grounds to review/appeal Arbitrator's decision(s).
- Defense costs in Arbitrator's fees can still be significant.



Negative Considerations of Arbitration, cont.

- Easier access to arbitration may mean a proliferation of employee disputes.
- Too little procedure.
- Constant Arbitrator contact can be used as Plaintiff's weapon.

Negative Considerations of Arbitration, cont.

- Arbitrators are known to appease both sides of a dispute by awarding part of the relief requested to each side.
- Arbitrators are not accountable to the electorate, press, or anyone else.

Negative Considerations of Arbitration, cont.

- Nightmare Arbitrator.
- Arbitrator awards often are unknown and unpublished.

Class and Collective Action Waivers

- *AT&T Mobility v. Conception*, 131 S.Ct. 1740 (2011)
- *Amex v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)

Risks, Exceptions, and Pitfalls

- As a general rule, Arbitration Agreements have evolved favorably for employers.
- However, there remain a number of situations in which employer may not be able to enforce individual Arbitration Agreements.



Risks

- Class Waiver is stricken from the Agreement and class-wide Arbitration commences.



Exceptions

- Employers cannot compel individual arbitration of employees' claims that are brought pursuant to the *Private Attorneys General Act 2004* (PAGA) statute.

Exceptions, cont.

- Courts reason that the State is the real party in interest in a PAGA action.
- Since the State is not a party to the arbitration agreement, those claims are not subject to the class waiver terms.

Exceptions, cont.

- FAA does not apply to workers “engaged in foreign or interstate commerce.”

Exceptions, cont.

- Last mile drivers are also excluded from the FAA
- *Rittmann v. Amazon.com, Inc.; Amazon Logistics, Inc.*, 9th Cir., No. 19-35381.



Rittmann v. Amazon.com, Inc.; Amazon Logistics, Inc.

- No break in the chain of delivery.
- AmFlex delivery providers are transportation workers and exempt from FAA.

AB 51

- In California, AB 51 (enacted January, 2020) prohibits employers from requiring employees to sign mandatory Arbitration Agreements that force discrimination, harassment, and wage claims into Arbitration.

AB 51, cont.

- 9th Circuit expected to rule shortly on whether to uphold a federal injunction that bars enforcement of AB 51.

California Specific Issues

- If the Agreement is covered by the FAA, then class waiver is enforceable. (*Iskanian v. Superior Court*).

California Specific Issues, cont.

- If Arbitration Agreement is not covered by the FAA:
 - Labor code 229 prohibits arbitration of certain wage-hour claims.
 - Must meet *Gentry v. Superior Court* test. The case created a four-part obstacle to class waivers specific to wage-hour claims.

Gentry v. Superior Court, cont.

- 4 part test with regard to overtime claims:
 - 1. The size of the potential individual recovery and whether it is “modest” or not;
 - 2. The potential for retaliation against members of the class;
 - 3. Whether members of the class may not be informed of their rights; and
 - 4. Other “real world obstacles” to the vindication of the putative class members’ right to overtime pay through individual and not class arbitration.

Gentry v. Superior Court, cont.

- Class Action Waivers in employment Arbitration Agreements will stand or fall under this test regardless of whether they are accompanied by an “opt-out” clause.

Implementing a *valid* Arbitration Agreement/ Program

- Review history of employment disputes to determine if suitable.
- Ensure proper drafting of Arbitration Agreement.



Employer Considerations

- Arbitration Agreements with Class Waivers and Third-party beneficiary language are still a main line of defense against wage-hour class actions.

Drafting a *valid* Arbitration Agreement

- Define what types of claims may be submitted to Arbitration.
- Must comport with standard California contract laws governing formation of a valid and enforceable agreement.

Armendariz v. Foundation Health

- An Arbitration Agreement will not be enforced in California if it is both procedurally and substantively unconscionable.



Drafting a *valid* Arbitration Agreement

- Stand-Alone Agreement.
- Handbook Acknowledgment.



Drafting Tips

- Include Employee Opt-Out.
- Avoid one-sided carve-outs where certain claims are available for one side but not the other.
- Specifically reference the Arbitration rules.

Drafting Tips, cont.

- Require Neutral Arbitrators. It is best to require a retired Judge.
- Allow for more than minimal discovery.
- Require a written decision by the Arbitrator.
- Allow for all relief available to the parties in Court; and
- Do not require employees to pay either unreasonable costs or fees.

Employer Take Away

- Employers must review their Arbitration Agreements to ensure validity under the FAA.
- Watch for Ninth Circuit case: *Chamber of Commerce v. Becerra*.



Thank you

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