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JUNE 2022

CLASS ACTION TRENDS REPORT

Traversing the arbitration terrain

On March 3, 2022, President Joe Biden signed legislation that makes predispute arbitration agreements and class action waivers invalid and unenforceable as to sexual assault and sexual harassment claims. On its face, the law is limited to those specific types of claims. However, legislative attempts to restrict arbitration rights persist at the federal, state, and local levels.

Also in March, the U.S. Supreme Court heard oral argument on several important arbitration-related matters. The Court's eventual rulings in these cases will have important implications for employers seeking to pursue arbitration in lieu of costly class litigation. Meanwhile, the plaintiffs' bar continues to deploy new tactics to avoid individual arbitration of disputes.

Eric Magnus, a principal in the Atlanta office of Jackson Lewis and co-leader of the firm's Class Action and Complex Litigation practice group, along with William Robert Gignilliat, IV, a principal in the Greenville, South Carolina office of Jackson Lewis and member of the firm's Class Actions and Complex Litigation practice group, Scott P. Jang, a principal in the firm's San Francisco office and member of the firm's California Class and Private Attorneys General Act (PAGA) Action group, and Samia M. Kirmani, a principal in the firm's Boston office, co-leader of the Jackson Lewis Workplace Training group, and member of the Advice and Counsel and Internal Investigations practice groups, dive into these complex issues and new developments, and offer guidance on navigating the current terrain.

Federal law bars mandatory arbitration, class waiver of sexual harassment/assault claims

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act), H.R. 4445, was signed into law on March 3, 2022. The Act amends the Federal Arbitration Act (FAA) to give employees who are parties to arbitration agreements with their employers the option of bringing their claims of sexual assault or sexual harassment in either arbitration or court.

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A WORD FROM MIA, DAVID AND ERIC

MIA FARBER

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In this issue of the *Class Action Trends Report,* we look at arbitration, and how class and collective actions and class waivers are affected by recent developments in arbitration. A new federal law has placed restrictions on utilizing mandatory arbitration or class waivers in resolving claims involving sexual harassment or sexual assault. The full extent of the fallout is still unfolding.

Meanwhile, the 2021-2022 U.S. Supreme Court term will be the most impactful term in years for employment arbitration. The Court's decisions will shape the parameters of the Federal Arbitration Act's (FAA) transportation worker exemption, which has been a quickly growing source of litigation and division among the circuits. Also, of particular interest to organizations with workers in California is the Supreme Court's refusal to allow the state's Private Attorneys General Act (PAGA) to effectively serve as a wholesale "get out of arbitration free card." On June 15, 2022, the Court held that bilateral arbitration agreements governed by the FAA may require arbitration of PAGA claims on an individual basis only.

We also look at how plaintiffs' counsel have sought to use mass arbitration as a way to force class resolution of disputes.

The law of arbitration is continually evolving. We will continue to keep you apprised of important emerging developments.

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The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily,* the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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Key provisions. The new legislation adds a section to the FAA which provides,

> [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.

"Sexual assault dispute" is defined as "a dispute involving a nonconsensual sexual act or sexual contact." "Sexual harassment dispute" is defined as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." The Act defines joint-action waiver as an agreement, whether or not part of an arbitration agreement, that would prohibit or waive the right of a party to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum.

The Act further provides that the validity or enforceability of an agreement will be determined by a court rather than an arbitrator, despite the existence of a contractual term to the contrary. Finally, the Act states that it shall apply with respect to any dispute or claim that "arises or accrues" on or after the date of the Act's enactment.

The Act defines joint-action waiver as an agreement, whether or not part of an arbitration agreement, that would prohibit or waive the right of a party to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum.

Background. The FAA provides that written agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In its landmark 2018 decision in *Epic Systems Corp. v. Lewis*, the U.S. Supreme Court reaffirmed that the FAA requires enforcement of arbitration agreements, including those with class action waivers, in accordance with their terms.

In response to *Epic Systems* and the #MeToo movement, several states enacted or proposed legislation curbing the use of arbitration agreements for sexual harassment claims, with some legislation expanding to other types of employment claims. Employers have successfully challenged these laws in court, arguing that the state laws conflict with the FAA as to arbitration agreements governed by the federal law.

However, as a result of the passage of the Act, the FAA will no longer preempt state #MeToo laws barring mandatory arbitration of sexual assault and sexual harassment claims.

Bottom line. Employers with arbitration agreements should expect to defend more sexual assault and sexual harassment claims in court, rather than arbitration, following enactment of The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.

Q&A: Understanding the new arbitration law

Jackson Lewis attorneys address several critical questions about the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act and its ramifications:

What types of claims are affected? As enacted, the Act applies only to "a case which is filed under Federal, Tribal, or State law and relates to the sexual assault and sexual harassment claims." This means that otherwise valid arbitration agreements remain valid and enforceable with respect to other types of claims, such as discrimination claims, Equal Pay Act claims, and even wage and hour claims. That said, we anticipate litigation over the scope of the law, particularly where sex assault or sex harassment claims accompany other claims, such as wage and hour class and collective claims. While legislative history supports the Act's application to sexual assault and sexual harassment claims only, plaintiffs' counsel may bring novel arguments before the courts in an effort to evade arbitration agreements and class waivers.

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What doesn't the Act affect? Except as discussed above regarding cases with arbitrable and nonarbitrable claims, the Act does not apply to claims other than for sex assault or sex harassment. It also does not affect post-dispute agreements to arbitrate, jury waivers, predispute mediation provisions, or existing claims in court or arbitration.

What if a claim arose prior to the enactment of the Act? The Act applies to invalidate arbitration agreements and class or collective action waivers with respect to any sexual assault and sexual harassment claim "that arises or accrues on or after the date of enactment [March 3, 2022]." Therefore, regardless of the date of the agreement at issue, the Act does not affect claims that arose or accrued *before* March 3, 2022. However, the issue of when a claim has "accrued" likely will be disputed in court.

Can employees still choose to arbitrate? Yes. Employees who are parties to an arbitration agreement may choose whether to pursue their sexual assault and sexual harassment claims in arbitration or court. While arbitration is not entirely confidential, it is inherently more confidential than litigation in court because of the absence of a public record. Therefore, employees who are parties to arbitration agreements may opt to choose the more confidential forum. The new law makes clear that, with respect to sexual assault and sexual harassment claims, it is up to the employee, not the employer, regardless of what an arbitration agreement says.

Although contrary to the intent of the Act, some claimants may try to pursue multi-party arbitrations by invoking the arbitration agreement (at their election) and repudiating the joint action waiver (also at their election). (See "Mass Arbitration Monkey Wrench" at page 8.)

Who will decide arbitrability? When an employee files a sexual assault or sexual harassment claim, a court, rather than an arbitrator, will decide whether claims are subject to arbitration under the Act, including cases filed on a classwide basis. This is true even if the arbitration agreement expressly provides that an arbitrator will make that determination.

Are class action waivers in sexual assault and harassment cases invalid? At the election of the employee, if the asserted claims fall within the Act's definition of sexual harassment or sexual assault, the class action waiver would not be enforceable. Employers facing a putative sexual assault or harassment class action will need to rely on the usual defenses to class certification, such as a lack of commonality or typicality between the class representative's claims and those of the remainder of the potential class.

Class action waivers as to other types of claims *should* remain valid pursuant to the Supreme Court's decision in *Epic Systems*. However, the plaintiffs' bar may attempt to convince a court to bootstrap class or collective claims outside the purview of the statute with covered sexual assault or harassment claims.

Should existing arbitration agreements be revised? Employers maintaining arbitration agreements should review them with the assistance of counsel against federal, state, and local laws to ensure enforceability. There are several factors to consider in determining whether a revision is necessary. These include the language of the agreement itself; whether the agreement contains severability or exclusion clauses; and whether there is a clause excluding claims that may not be subject to predispute arbitration as a matter of federal law. Further, in light of the Act, it may be beneficial to expressly exclude sexual harassment and sexual assault claims from the scope of the arbitration agreement, so that claimants cannot try to bring class claims in arbitration (by electing to void the class waiver, but not the arbitration clause).

If an employer concludes that revising its arbitration agreement is the proper course of action, then the employer must address the same contractual and employee relations concerns that were at issue during the agreement's initial rollout.

Additional legislative efforts

Will passage of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act prompt additional legislation, with more expansive reach? Possibly. Employers

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should closely monitor developments in this area, as the Act likely will be used as a template for further legislative efforts to prohibit predispute arbitration agreements for other types of employment claims. However, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act took years to pass in its current form, and its bipartisan passage is attributed largely to its narrow scope.

So far, federal bills limiting employers' ability to mandate arbitration of other types of employment disputes have stalled in the U.S. Senate:

- The Forced Arbitration Injustice Repeal (FAIR) Act (H.R. 963) would render invalid and unenforceable any predispute agreement to arbitrate a future employment, consumer, antitrust, or civil rights dispute. However, it would allow employees and consumers to agree to arbitration after a dispute arises. Likewise, no pre-dispute joint-action waiver would be valid or enforceable as to any employment dispute, consumer dispute, antitrust dispute, or civil rights dispute — meaning that class arbitration waivers would be invalid. On March 17, 2022, the U.S. House of Representatives passed an amended version of the bill. The 222-209 vote fell along party lines with only one Republican joining Democrats in support of the legislation. Senator Richard Blumenthal (D-Conn.) has introduced the companion legislation (S. 505), which has 39 cosponsors and is in the Senate Judiciary Committee. The FAIR Act passed the House in the last Congress, but stalled in the Senate, and we expect the latest version to face a similar fate.
- The Protecting the Right to Organize (PRO) Act, legislation intended to amend federal labor law, would make it an unfair labor practice under the National Labor Relations Act for an employer to enter into agreements with employees under which employees waive the right to pursue or a join collective or class-action litigation. H.R. 842 passed the House by a 225-206 vote in March 2021. A companion measure, S. 420, has sat in the Senate Health, Education, Labor and Pensions (HELP) Committee since February 2021. However, in a May 12, 2022 press statement, Senator Patty Murray (D-Wash), HELP Committee chair, stated, "I'll keep fighting to pass the PRO Act to help protect every worker's right to organize."
- The Build Back Better Act (H.R. 5376), an ambitious climate protection and social spending measure, cleared the House in November 2021. Tucked inside the massive bill was a provision that would prohibit employers from adopting class and collective action waivers by creating significant civil penalties. However, the updated bill that emerged from the Senate HELP Committee in December 2021 did not contain this provision and, in a January 2022 press conference, President Biden conceded that the legislation had stalled and was unlikely to advance in its current form.
- The latest federal bill seeking to restrict arbitration is the Employee and Retiree Access to Justice Act (S. 4219/H.R. 7740), introduced in the Senate and House on May 12, 2022. The legislation aims to bar mandatory predispute arbitration provisions and "coerced" postdispute arbitration clauses of any disputes arising under ERISA. The bill also would render unenforceable any pre- or postdispute provisions in which a plan participant or beneficiary agrees "not to pursue, bring, join, litigate, or support any kind of individual, joint, class, representative, or collective [ERISA] claim." S. 4219 has been referred to the Senate Committee on Health, Education, Labor and Pensions.

Federal agency plaintiffs not bound

In 2014, the U.S. Supreme Court held in *EEOC v. Waffle House, Inc.,* that the Equal Employment Opportunity Commission (EEOC) cannot be compelled to arbitrate a suit brought on behalf of employees who have signed predispute arbitration agreements. Even though the EEOC in that case sought monetary relief for the employee, the employee had no authority to control the litigation. The EEOC was not a party to the arbitration agreement and not bound by it, because the FAA "does not require *parties* to arbitrate when they have not agreed to do so," the Court explained.

Applying *Waffle House* to an enforcement action brought by the U.S. Department of Labor (DOL), the U.S. Court of Appeals for the Ninth Circuit ruled that the secretary of labor is similarly not bound by a private arbitration agreement when bringing a Fair Labor Standards Act (FLSA) enforcement action that seeks relief on behalf of one party to the agreement against the other party to the

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agreement. The appeals court affirmed the district court's denial of the defendant's motion to compel the secretary to arbitrate based on arbitration agreements that the defendant and his companies entered into with delivery drivers whom the secretary alleged were misclassified as independent contractors rather than employees.

In addition, employers' enforcement of arbitration agreements and other types of waivers against individuals themselves has become an EEOC focus, resulting in some of the more creative and novel cases that the agency has filed in recent years. For instance, the agency argued that certain arbitration agreements violated Title VII under a theory of resistance under Section 707 of the act. Although the agency did not have much success, it is expected to return to those types of novel arguments as it takes aim at arbitration agreements and other types of waivers.

[E]mployers' enforcement of arbitration agreements and other types of waivers against individuals themselves has also become an EEOC focus, resulting in some of the more creative and novel cases that the agency has filed in recent years.

The California landscape

In 2018, the California legislature passed Assembly Bill (AB) 51, a law that prohibits employers from implementing mandatory arbitration agreements as a condition of employment (though voluntary arbitration agreements with employees are permitted). The U.S. Chamber of Commerce filed a lawsuit challenging the law and, in 2021, a divided Ninth Circuit panel found that the FAA does not preempt AB 51 to the extent the statute seeks to regulate an employer's conduct *prior* to executing an arbitration agreement.

The Chamber filed a petition for rehearing *en banc*, arguing that the panel decision is in conflict with U.S. Supreme Court precedent. The petition also pointed out that the decision created a split over the reach of FAA preemption, noting that the First and Fourth Circuits have held state laws that discourage, or create obstacles in forming arbitration agreements are preempted by the FAA.

Meanwhile, the Supreme Court has decided another arbitration issue specific to California addressing the arbitrability of claims under the California Private Attorneys General Act (PAGA). The *qui tam*-like statute empowers private citizens to enforce the Labor Code by seeking monetary relief on behalf of similarly situated employees. (See "Supreme Court takes up arbitration" at page 7.) The Ninth Circuit has deferred consideration of the Chamber's petition challenging AB 51 until the Supreme Court rules on the PAGA case.

In the meantime, the preliminary injunction staying enforcement of AB 51 remains in effect pending a decision by the Ninth Circuit. Should the appeals court deny the Chamber's petition, the likely next step would be a petition for review by the Supreme Court. The Chamber also may move to stay the Ninth Circuit's decision becoming effective pending review by the Supreme Court.

Elsewhere in the courts…

Bakery delivery drivers not excluded from FAA. A divided panel of the U.S. Court of Appeals for the Second Circuit ruled that bakery delivery drivers were not excluded from coverage under the FAA as transportation workers since they were "in the bakery industry, not a transportation industry." The appeals court noted that, although the delivery drivers spent appreciable parts of their working days moving goods from place to place by truck, their customers (stores and restaurants) were not buying the movement of the baked goods; rather, the bakery charged them for the baked goods themselves. Accordingly, the district court appropriately compelled arbitration under an arbitration agreement.

Arbitration agreements foreclosed notice to opt-in plaintiffs. In a FLSA putative collective action brought by exotic dancers asserting that a gentlemen's club misclassified them as independent contractors, a divided panel of the U.S. Court of Appeals for the Fifth Circuit held that the district court "clearly and undisputedly erred" in approving notice to potential opt-in plaintiffs who had signed arbitration agreements that would have prevented them from participating in

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the collective action. Citing a 2019 Fifth Circuit opinion that barred the sending of notices to employees with valid arbitration agreements "unless the record shows that nothing in the agreement would prohibit that employee from participating in the collective action," the court concluded that the dancers' clear agreement to submit all disputes (including FLSA claims) to individual arbitration foreclosed their involvement in a collective action even though the agreement's class action waiver did not mention "collectives." Accordingly, the appeals court granted the employer's writ of mandamus asking that it vacate the district court's order certifying the collective action.

Rideshare company denied bid to arbitrate PAGA claims. A California appeals court denied a rideshare company's motion to compel arbitration of a driver's putative class action asserting the company misclassified its drivers as independent contractors and failed to reimburse them for necessary work expenses. Rejecting the employer's reliance on pre-employment arbitration agreements signed by its drivers, the California appeals court held in an unpublished opinion that a PAGA claim is brought on behalf of the state, and thus is not subject to any arbitration agreement between the employee and the employer. In addition, the initial issue of whether the driver could pursue his claim under PAGA as an aggrieved employee must be decided by the trial court, not an arbitrator. ■

Supreme Court takes up arbitration

A blow to PAGA. Bilateral arbitration agreements governed by the FAA may require arbitration of California Private Attorneys General Act (PAGA) claims on an individual basis only, the U.S. Supreme Court held on June 15, 2022. The Justices overruled the California Supreme Court's 2014 decision in *Iskanian v. CLS Transp. Los Angeles, LLC*, to the extent *Iskanian* effectively required PAGA claims to be adjudicated in court on a representative basis.

In *Iskanian,* the California Supreme Court invalidated provisions in arbitration agreements that waive the right to assert representative claims, including representative claims under PAGA. The U.S. Supreme Court stated that the FAA does not establish a categorical rule mandating enforcement of representative action waivers. However, the Court stated that PAGA's built-in mechanism of claim joinder conflicts with the FAA. The Court explained that *Iskanian's* prohibition on the contractual division of PAGA actions unduly circumscribes the freedom of parties to determine the issues subject to arbitration. Further, it violates the fundamental principle that arbitration is a matter of consent. To the extent California's rule precludes the division of PAGA actions into individual arbitrable claims and non-individual, non-arbitrable claims, the rule is preempted.

A more detailed discussion of the Supreme Court's decision can be found here.

Airline cargo loaders not covered by FAA. Individuals employed as ramp workers who frequently handle cargo for an airline are "transportation workers" exempt from the FAA, the Supreme Court held on June 6, 2022. Therefore, the employees are not required to arbitrate their wage-hour claims under the FAA. The Supreme Court made clear that, when determining whether workers qualify for the FAA's transportation worker exception, the analysis turns on the specific duties those workers perform and whether those duties directly involve interstate commerce, and the nature of the company or industry in which the workers are engaged has no bearing on the analysis. Thus, a ramp supervisor that loads and unloads cargo qualifies for the exception; however, airline employees whose duties are more removed from the interstate flow of transit (such as shift schedulers and website designers) likely would not qualify for the exception. A more detailed analysis of the Supreme Court's decision can be found here.

In recent years, the transportation worker exemption has emerged as a major issue in class action litigation, particularly as wage and hour lawsuits have proliferated among employees and independent contractors who claim they cannot be compelled to arbitrate because they fall within the exemption.

No look-through for review of arbitral award. On March 31, 2022, the Supreme Court held that under Sections 9 and 10 of the FAA, a federal district court may not examine the underlying dispute when determining whether it has

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jurisdiction over a motion to vacate or confirm an arbitral award. Rather, it can only look to the application submitted to the court in the request to vacate or confirm the award. In an 8-1 opinion, the justices noted that Congress did not replicate the look-through instruction found in FAA, Section 4 in Sections 9 and 10. Nor did Congress draft a global look-through provision, applying that approach throughout the FAA.

In the case at hand, the parties' applications raised no federal issue beyond Section 9 or 10 itself. The court could not look to the underlying suit, where a federal-law claim satisfying Section 1331 existed, to find that it had jurisdiction of the parties' applications under Sections 9 and 10 to vacate or confirm an arbitral award.

No prejudice showing required to assert waiver. On May 23, 2022, the Supreme Court held that a litigant is not required to show prejudice to establish that an opposing party has waived its right to arbitrate by litigating in court. The issue of prejudice typically does not enter into a contractual waiver analysis. Although numerous federal courts of appeals have cited the FAA and longstanding federal policy that favors arbitration of disputes to adopt "a rule of waiver specific to the arbitration context" that requires a showing of prejudice, the justices unanimously held that that the FAA does not authorize this "bespoke rule of waiver for arbitration."

As a practical matter, the Court's holding that a showing of prejudice is unnecessary when evaluating waiver in the context of an arbitration agreement means that employers will need to promptly assert their right to arbitrate under the terms of an agreement in the event of court litigation, or otherwise take steps to avoid a known relinquishment of that right. ■

Mass arbitration monkey wrench

Class and collective action waivers in arbitration agreements are a common strategy for employers seeking to resolve workplace disputes efficiently and economically. However, the plaintiffs' bar, eager to litigate disputes on a class basis, has sought to undermine the efficiencies of arbitration by adopting a strategy of filing hundreds or even thousands of individual arbitration demands against an employer alleging almost identical claims. The strategy, often deployed after a court has compelled arbitration of a putative class or collective action pursuant to an enforceable arbitration agreement, is meant to pressure the employer into waiving the arbitration agreement and relenting to a judicial forum or into high-dollar settlement negotiations.

Given that filing fees alone can cost several thousands of dollars per case, many employers simply cannot afford an onslaught of arbitration demands and the cost of defending hundreds or thousands of arbitrations.

Employers typically bear the expense of arbitration filing fees and costs. Given that filing fees alone can cost several thousands of dollars per case, many employers simply cannot afford an onslaught of arbitration demands and the cost of defending hundreds or thousands of arbitrations. The plaintiffs' bar has used the costs of arbitration to its advantage.

Notice of collective action

It is not uncommon for employers to have arbitration agreements in place for some employees but not others (who perhaps began employment before the employer adopted an arbitration agreement). In recent years, disputes have arisen as to whether employees with enforceable arbitration agreements should be entitled to receive notice of a collective action against the employer. From the defense perspective, there would seem to be no reason why an

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employee who cannot join a collective should receive notice of a litigation. However, plaintiffs' counsel have used notice as a tool to recruit potential arbitration claimants. That is, rather than seek to add these individuals to the collective, plaintiffs' counsel files individual arbitration demands on behalf of each claimant with an arbitration agreement.

Once plaintiffs' counsel has unearthed as many claimants as possible, arbitration is extremely cumbersome for the employer. If the employer does not waive arbitration, it is faced with defending claims both in court and in arbitration. If plaintiffs' counsel won't agree to have the same arbitrator consider all the related claims, the employer will face numerous arbitrators who are likely to issue different evidentiary rulings. Further, if one arbitrator makes the employer produce certain documents in discovery, opposing counsel has those documents in all pending arbitrations.

The judicial response to this circumstance has been mixed. The Fifth Circuit was the first federal appeals court to address the issue. In a 2019 decision, it struck down a district court ruling that required an employer to turn over to plaintiffs the personal contact information for 35,000 individuals (from a possible 42,000-member collective) who had entered into predispute arbitration agreements that included class waivers. The appeals court reasoned that a trial court may not send notice to employees with arbitration agreements "unless the record shows that nothing in the agreement would prohibit that employee from participating in the collective action."

If plaintiffs' counsel won't agree to have the same arbitrator consider all the related claims, the employer will face numerous arbitrators who are likely to issue different evidentiary rulings. Further, if one arbitrator makes the employer produce certain documents in discovery, opposing counsel has those documents in all pending arbitrations.

The U.S. Court of Appeals for the Seventh Circuit, addressing the issue in 2020, placed a higher burden on the employer seeking to avoid sending notice of a certified collective action to employees with binding arbitration agreements. It held that a district court "may" authorize notice of a collective action to individuals who have signed arbitration agreements waiving the right to join such actions,

> unless (1) no plaintiff contests the existence or validity of the alleged arbitration agreements, or (2) after the court allows discovery on the alleged agreements' existence and validity, (3) the defendant establishes by a preponderance of the evidence the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice.

Federal district courts in those circuits yet to have addressed the question are split.

California law aggravates fees dilemma

Under California's Forced Arbitration Accountability Act (SB 707), which took effect in 2020, if an employer fails to pay fees required for the commencement or continuation of an arbitration within 30 days of the payment's due date, the employer's conduct is deemed a material breach of the arbitration agreement. This deems the party in default of the arbitration to have waived its right to compel arbitration. In such a case, the employee may compel arbitration (and receive attorneys' fees and costs for doing so) or withdraw the arbitration claim and proceed in court. In addition, the law requires the court or arbitrator to issue appropriate sanctions against the employer, which may include monetary sanctions, issue sanctions, evidence sanctions, or terminating sanctions.

Legal challenges to the law have been unsuccessful to date. In a case that ended up at the Ninth Circuit, a federal judge in California refused to enjoin arbitration demands of 5,057 of the employer's 10,356 couriers, finding the employer was unlikely to succeed on the merits of its argument that the mass arbitration demands constituted a de facto class arbitration. Denying the employer's motion

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for judgment on the pleadings, the district court also held that SB 707 is enforceable, finding no conflict with the FAA and that the statute is neither preempted nor unconstitutional.

Another closely watched case asserting that the FAA preempted SB 707 involved a manufacturer that was facing 40,000 individual arbitration demands by disgruntled customers, each costing the company at least $3,200 in arbitration fees. The company filed a lawsuit in state court and moved for a preliminary injunction to halt the arbitrations and instead require each individual to have their claim heard in small claims court. However, the customers added federal antitrust claims to their arbitration demands and filed a lawsuit in federal court seeking to compel arbitration. The federal court declined to intervene, and the state court thereafter denied the manufacturer's motion for a preliminary injunction.

Among other things, the court found the manufacturer was unlikely to prevail on its claim that the FAA preempted SB 707 since its primary argument was that the statutory penalties for late payment discouraged arbitration, and that argument was not ripe because the company "has not yet blown any of its fee deadlines." Alternatively, if the court were to rule that the FAA preempted SB 707, the "proper remedy" would be to "enjoin the sanctions" mandated by the statute, not "halt the arbitration[s]."

A 'bellwether' alternative

Some arbitration providers have responded to the extraordinary expense employers face when plaintiffs initiate mass arbitration. The International Institute for Conflict Prevention & Resolution (CPR) has introduced an "Employment-Related Mass-Claims Protocol," which is triggered when there are more than "30 individual employment-related arbitration claims of a nearly identical nature" filed with CPR "in close proximity one to another." Under this procedure, such arbitration claims are randomly assigned numbers, and the claims numbered 1-10 will proceed to arbitration as "test cases," to be resolved within 120 days. The results of the test cases go to a mediator, who will then attempt to resolve the remaining claims. After a 90-day mediation period, the parties can elect to opt out of arbitration and proceed with the remaining claims in court.

This approach has not been well-received by the plaintiffs' bar and is being challenged in litigation. In a case brought against a nationwide food and delivery service, plaintiffs objected to the employer's inclusion of the CPR's Mass-Claims Protocol in its most recent version of its independent contractor agreement. They argued that CPR's 10-at-a-time arbitrations would force the vast majority of claimants to wait in the arbitration "queue," potentially for years. The plaintiffs also contended that the employer had switched from the rules of the American Arbitration Association to CPR to deprive the drivers of "a fair and impartial forum." They cited evidence that defense counsel had reached out to CPR to explore creating the Mass-Claims Protocol, which the employer now wanted to impose on the drivers. In their view, this relationship would give rise to systemic bias in favor of the defendant.

However, the district court granted the employer's motion to compel arbitration under the CPR protocol (with the exception of those plaintiffs who had successfully opted out of arbitration). The court observed that it was not a "a one-off protocol tailored to [the employer] but is openly available to other companies," and also "is not so biased that it negates the agreement to arbitrate." The court declined to opine, though, on whether the plaintiffs might have a valid claim, post-arbitration, that the arbitration decision should be vacated based on a lack of impartiality on the arbitrator's part. The parties are currently in mediation.

Takeaway

Given the evolving legal and political landscape, employers considering mandatory predispute arbitration agreements should consult with counsel to weigh their advantages and disadvantages and to pursue the best course of action for the organization. Employers with arbitration agreements in place should work with counsel to review those agreements to ensure they are enforceable to the fullest extent allowed by law and drafted in a manner that will optimize their utility as a means of controlling the costs and disruption of litigation, particularly class litigation. ■

Other class action developments

Collective action waivers in severance agreements enforceable. Former employees who entered into severance agreements in which they agreed not to join any collective actions against the employer asserting claims under the Age Discrimination in Employment Act (ADEA) failed to convince the Seventh Circuit that the district court erred in denying their bid for an injunction barring the employer from enforcing the collective action waivers contained in the agreements. The employees, who were 56 or 57 years old at the time they were terminated as part of a reduction in force, agreed to the collective action waiver in exchange for a lump-sum payment, 12 months of health and life insurance, career counseling, and reimbursement for job-related skills training. Relying on the U.S. Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, the Seventh Circuit agreed with the district court that Section 626(f)(1) of the ADEA applied to "substantive rights." Because a collective action is a "procedural mechanism," not a substantive right, a collective action waiver did not trigger any "right or claim" under the ADEA.

FCRA plaintiff did not suffer concrete harm. The U.S. Court of Appeals for the Eighth Circuit held that a job applicant lacked Article III standing to bring a purported class action against her prospective employer for alleged violations of the Fair Credit Reporting Act (FCRA). The plaintiff's job offer was revoked based on the contents of a third-party background screening report. She sued, contending that she should have been given an opportunity to explain the information contained in the report, among other claims. In 2016, the parties reached a tentative settlement agreement but four days later, the U.S. Supreme Court issued *Spokeo, Inc. v. Robins*, which held that a FCRA plaintiff had to show more than a "bare procedural violation" of the FCRA in order to have standing to sue. The Court said the plaintiff had to show she suffered an "injury in fact." The *Spokeo* decision prompted the defendant to move to dismiss for lack of standing. The district court approved the settlement without addressing standing, and the defendant filed an appeal. In an April 4, 2022, decision, the Eighth Circuit vacated the order approving the settlement and remanded for the district court to decide the standing issue. When the district court found the plaintiff had standing, the employer filed another appeal. The appeals court vacated the order, holding that the plaintiff did not establish concrete harm. It remanded with instructions to dismiss the suit for lack of standing. Subsequently, in a May 3, 2022, decision, the appeals court instructed the district court to return the case to state court.

Objection to PAGA settlement dismissed, class settlement vacated. The Ninth Circuit provided mixed results for two truck drivers who objected to a class settlement agreement resolving various wage and hour claims and allegations brought pursuant to the California PAGA for violations of California Labor Code Sec. 2802, which requires indemnification of expenditures and losses. The settlement provided that the employer would pay $7.25 million for the class claims, $2.4 million for attorneys'

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Supreme Court to review oil rig 'day rate' case

In April 2020, a three-judge panel of the Fifth Circuit held that paying an employee a set amount for each day that he works (i.e., on a "day rate" basis) does not satisfy the "salary basis" component required to qualify as overtime-exempt under the FLSA, regardless of whether the employee earns the weekly minimum salary (currently, $684) required for the exemption. The full Fifth Circuit subsequently heard the case and, in a 12-6 opinion, reached the same conclusion. The Sixth and Eighth Circuits previously had arrived at the same conclusion. The U.S. Supreme Court has granted certiorari and, presumably during next fall's term, will determine whether the analysis of Fifth, Sixth, and Eighth Circuits regarding the FLSA's salary-basis requirement was sound.

Read more about the issue before the Supreme Court in Jackson Lewis' Wage & Hour Law Update.

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fees, and $500,000 for the PAGA claim. The appeals court held that one objector could not object to the PAGA portion of the settlement because he was not a party to the underlying PAGA action, and so dismissed his appeal. With regard to the second objector, the appeals court vacated the district court's approval of the class action settlement agreement and remanded the class action for further proceedings because the lower court abused its discretion by applying an incorrect legal standard when evaluating the settlement.

[A] federal district court in Virginia granted an employer's request for certification of an interlocutory appeal to determine whether a two-step or one-step process should be used for FLSA collective certifications in light of the Fifth Circuit's recent adoption of the new one-step process.

CAFA minimum met in wage and hour class action. An employer that removed a state wage and hour putative class action to federal court amply established the $5 million amount in controversy required for federal jurisdiction under the Class Action Fairness Act (CAFA), the Ninth Circuit ruled. It found the district court erred in (1) imposing a presumption against CAFA jurisdiction and (2) assigning a $0 value for the amount in controversy for each of the claims where it disagreed with the employer's calculations. The district court's "zeroing out" of several claims because it disagreed with the employer's valuation was a "draconian" approach that required reversal. Under the proper analysis, the suit clearly met the $5 million requirement.

Premiums for meal, rest period violations are wages. In a class action suit brought under the California Labor Code's meal period provisions, the California Supreme Court held that extra pay provided to employees for missed meal and rest periods constitutes "wages" and, therefore, must be reported on statutorily required wage statements pursuant to Labor Code Sec. 226 and paid within statutory deadlines when an employee separates from employment pursuant to Labor Code Sec. 203. The decision means that if a California employer fails to pay premium pay for missed meal and rest periods, additional penalties for failure to provide an accurate wage statement and waiting time penalties also may be recoverable by plaintiffs.

Certification of collective gets interlocutory appeal. In a putative collective FLSA action brought by call center operators, a federal district court in Virginia granted an employer's request for certification of an interlocutory appeal to determine whether a two-step or one-step process should be used for FLSA collective certifications in light of the Fifth Circuit's recent adoption of the new one-step process. Under this process, district courts strictly scrutinize whether putative collective members are truly similarly situated at the outset of the case and, if needed, will authorize preliminary discovery to assist in this determination. In addition to noting the split in the circuits created by the Fifth Circuit's ruling and the Fourth Circuit's lack of clear precedent, the district court agreed with the employer that certifying an interlocutory appeal would materially advance the outcome of the litigation as resolving the issue would have a significant impact on the size of the collective.

Court lacked jurisdiction over out-of-state opt-ins. In the latest court ruling to address personal jurisdiction over out-of-state opt-in plaintiffs in FLSA collective actions, a federal district court in North Carolina held that it lacked jurisdiction over individuals who did not work for the defendant employer within the state, were not hired in the state, or whose employment with the defendant was not otherwise related to the state. In so ruling, the court determined that the U.S. Supreme Court's decision in *Bristol-Myers Squibb Co. v Superior Ct. of Cal.* applies to FLSA collective actions.

Court approves $23 million settlement for bakery distributors. A federal district court in Maine has granted final approval to a $23 million settlement of three related cases, ending a six-year battle pertaining to the employment status of bakery distributors for a national baked foods company and two of its subsidiaries. The distributors will receive offers of employment and monetary compensation from the $9 million settlement

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fund to address claims of unpaid overtime wages and to compensate the class members for business expenses and administrative fees they paid while classified as independent contractors. In addition, the distribution agreements will be terminated, and the bakery will repurchase the distribution rights for an estimated $6.6 million. The settlement also requires the company to pay $7.5 million in class counsel fees and costs.

Collective action over boot-up time advances. A federal district court in Pennsylvania held that pre-shift time spent by employees logging into company computers and work programs was compensable under the FLSA because the employees' work both depended and centered on their computer access. Denying a motion for summary judgment brought by the defendant applicant screening firm on the putative collective FLSA action, the court reasoned that employees booting up their computers was akin to preparing a tool that must be used throughout the workday. Moreover, whether the time spent by the employees was *de minimis* was a fact-specific inquiry for a jury to decide. However, the court granted the employer's bid for summary judgment on claims that it had a policy of allowing supervisors to shave time from employee timecards.

Preliminary approval of $2 million settlement for wage statement claims. A federal district court in California granted preliminary approval to a proposed $2 million settlement in a case involving allegations that a fast-food chain's wage statements failed to identify and account for overtime correctly. The proposed settlement class included approximately 5,500 class members and would result in an average recovery of $35 per wage statement. The court found that Rule 23(a), 23(b), and 23(e) requirements were met, with the only potential deficiency being the attorney fee provision and the seemingly excessive $10,000 service award to the named plaintiff. However, the court granted preliminary approval and indicated that those issues will be resolved as part of final approval.

Court approves $1.6M settlement for pizza delivery drivers. A federal district court in Colorado approved a $1.6 million class action settlement of claims brought by delivery drivers employed by a national pizza chain's franchisee. The drivers alleged the employer violated the FLSA and Colorado wage and hours laws when it paid drivers minimum wage while requiring them to pay their delivery expenses and failing to reimburse the costs. The settlement fund will be shared with 2,227 class members employed by the franchisee. ■

Legal challenges to DOL regulations

Trump-era Independent Contractor Final Rule improperly withdrawn. A federal district court in Texas vacated DOL rules that delayed the effective date of the Trump-era Independent Contractor Final Rule (Delay Rule), as well as a final rule issued by the Biden Administration that withdrew the rule (Withdrawal Rule). The court concluded that the Delay Rule violated the procedural requirements of the Administrative Procedure Act (APA) since its 19-day comment period was too short and limited in scope to provide a meaningful opportunity for notice and comment. The Withdrawal Rule also violated the APA because it was "arbitrary and capricious." Additionally, the court determined that the Trump Administration's Independent Contractor Status Rule became effective on March 8, 2021, the rule's original effective date, and remains in effect. The DOL has filed a notice of appeal.

Court won't halt DOL's 80/20 Rule for tipped workers. Associations representing restaurant operators lost their bid for a preliminary injunction challenging the DOL's reinstated regulation regarding wages for employees who receive tips as part of their earnings — the "80/20 Rule." A federal court in Texas noted the Rule's similarity to the DOL's prior 80/20 guidance, which governed the restaurant industry for decades before it was rescinded. The court also found that the operators' evidence of irreparable harm amounted only to speculative concerns that were insufficient to establish a substantial likelihood of irreparable harm.

On the JL docket

Upcoming Webinars

June 30, 2022	What You Need to Know About the Amendments to the Illinois Equal Pay Act 11:00 AM-12:00 PM CST
September 20, 2022	Connecticut Sexual Harassment Prevention Training Program for Supervisors and Managers 2:00 PM-4:00 PM EST
September 22, 2022	Connecticut Sexual Harassment Prevention Training Program for Non-Managers 2:00 PM-4:00 PM EST
December 13, 2022	Connecticut Sexual Harassment Prevention Training Program for Supervisors and Managers 2:00 PM-4:00 PM EST
December 15, 2022	Connecticut Sexual Harassment Prevention Training Program for Non-Managers 2:00 PM-4:00 PM EST

Upcoming Events

June 30, 2022	Long Island Breakfast Series, East End: Discrimination and Harassment Prevention Basics 8:00 AM-10:00 AM EST
July 14, 2022	Long Island Workplace Law Breakfast Series: Litigation Basics 8:00 AM-10:00 AM EST
July 28, 2022	Long Island Breakfast Series, East End: Litigation Basics 8:00 AM-10:00 AM EST

NEXT UP

In the next issue of the Class Action Trends Report, we'll take stock of the state of COVID-19 class action litigation, include litigation challenging employer vaccine mandates.