

Recent Trends in Employment Arbitration: What Employers Need to Know in 2019

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One of the numerous ways employers have sought to minimize their risk of exposure on potential claims from current and former employees is by requiring all employees to agree in writing that those claims must be brought privately in arbitration rather than in the courts. These

“mandatory arbitration” provisions are often presented to employees as either components of the company’s standard employment contract or independently as stand-alone waiver agreements. Particularly in states that recognize the promise of “continued employment” as sufficient consideration for entering into a new contractual arrangement with an employee, mandatory arbitration agreements can be presented at virtually any time during the employee’s tenure. For employers, forcing potential claims against the company to proceed privately in front of an arbitrator, rather than in court before a judge, is hugely advantageous for multiple reasons.

However, notwithstanding the U.S. Supreme Court’s steadfast devotion to enforcing employment arbitration provisions as written, recent developments in state law and organized labor present new threats to the status quo. This article aims to educate practitioners and employers alike on those developments and highlight some of the potential risks of adopting mandatory arbitration provisions for all employees across the board.

Employment Arbitration Provisions

Mandatory arbitration has traditionally benefited employers in several critical ways. For example, and

perhaps most importantly, employment arbitration provisions typically include “class waivers” that prohibit employees from banding together to bring employment claims as a group. Although critics of these waivers historically lamented that they ran afoul of the federal right to collective action under the National Labor Relations Act, the U.S. Supreme Court upheld such waivers just last year in *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018). Similarly, forcing cases into arbitration means the claims are handled privately by an arbitrator, effectively keeping any high-profile allegations out of the public eye, as would be the case if the claims were brought through the courts. Furthermore, arbitration has traditionally been viewed as more cost-effective and expedient than litigation, although some have challenged that notion in recent years.

In spite of the benefits that typically inure to employers through these provisions, the leverage employers may legally exert over employees to sign such provisions, and the steady stream of criticism from employment and labor rights groups pertaining to these provisions, the U.S. Supreme Court has continued to enforce mandatory employment arbitration provisions widespread. Yet, in order to combat what critics view as an ever-increasingly business-friendly Court and its conservative majority, employee advocates have sought out new strategies in their respective industries to reclaim some of the leverage over employers. Likewise, some states have enacted statutes or issued critical decisions through their courts in an effort to chip away at the power of these provisions.

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The Google Walkout & Public Push-Back Against Mandatory Arbitration of Employment Claims

Thousands of Google employees working all over the world walked out of their respective offices on November 1, 2018, to protest (among other things) Google's practice of forcing arbitration agreements on its employees, which compelled all potential discrimination and harassment claims against the company into private arbitration.¹ The massive, world-wide demonstration was terrible publicity for the internet giant and, roughly a week later, the company buckled under the pressure. Google's CEO Sundar Pichai announced that sexual harassment and assault claims brought by *full-time* employees would no longer be forced into arbitration. However, this obviously left a large swath of potential claims still subject to mandatory arbitration, including any and all discrimination claims related to race, nationality, most gender claims, sexuality, and age to name a few, as well as all claims brought by *part-time* employees.

In response to what they deemed a half-hearted measure, four of the Google employee organizers issued a public statement calling on Google, as well as the *entire* tech industry, to eradicate forced arbitration agreements once-and-for-all and eliminate class waivers. The statement further called on all employees in the tech industry to "join our fight to end forced arbitration." A group of Google employees organized the Googlers for Ending Forced Arbitration to continue the lobbying efforts.² In a short time, the group has already launched a massive social media campaign via Instagram and Twitter to bring even more pressure to bear on the world's largest search engine company. Commercial superpowers, such as Facebook, Microsoft, and Uber, have taken note and reluctantly made changes to their mandatory arbitration policies as well.

One of the central complaints of the Google protesters relative to forced arbitration was that sexual harassment and Title VII-type discrimination complaints were being

handled in private, such that the alleged perpetrators could continue their behavior with relative impunity leaving other employees at potential risk.³ Specifically, they've stated that "Ending forced arbitration is the gateway change needed to transparently address inequity in the workplace."⁴ This is a similar criticism as was publicly launched against the Fox Corporation by Gretchen Carlson earlier in 2018 in the wake of her high-profile dispute with former Fox News Chair and CEO, Roger Ailes.⁵

State Law Attempts to Curtail Enforceability of Mandatory Arbitration Agreements

As stated in the above, the U.S. Supreme Court's conservative majority in May of last year reviewed an appeal from the Seventh Circuit involving the enforceability of class waivers in mandatory employment arbitration agreements. That case, captioned *Epic Systems v. Lewis*, addressed the central issue of whether an employer's arbitration agreements that it issued to its employees violated the National Labor Relations Act's protections for "collective action" by requiring "individualized proceedings," *i.e.*, the agreements included "class waivers." Seizing upon well-established Supreme Court precedent, including *AT&T Mobility v. Concepcion* and others, which hold that the Federal Arbitration Act requires arbitration provisions to be enforced as written, Justice Gorsuch wrote the majority opinion siding with the employer.⁶ In it, he stated, "Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act."⁷

While that decision seemed to foreclose any possible in-road against class waivers and/or mandatory arbitration provisions in employment agreements, some states were not convinced. In particular, the Kentucky Supreme Court issued a published decision in a case called *Northern Kentucky Area Development District v. Danielle*

Snyder on September 27, 2018, a mere four months after the U.S. Supreme Court decided *Epic Systems*. In *NDAA v. Snyder*, the state Supreme Court held that the Kentucky state law codified in K.R.S. 336.700(2),⁸ which “prohibits employers from conditioning employment on an existing employee’s agreement to [arbitrate all employment claims],” was not preempted by the Federal Arbitration Act. As a consequence of that holding, the Kentucky Supreme Court justices unanimously declared that NDAA’s practice⁹ of requiring all its employees to sign arbitration agreements was unenforceable as a matter of state law.¹⁰

In its decision, the Kentucky Supreme Court seemed to be thumbing its nose a bit at the U.S. Supreme Court on the arbitration issue. Friction between the two courts on the arbitration issue appeared to mount earlier in 2018, when the U.S. Supreme Court reversed a Kentucky Supreme Court decision that invalidated a mandatory arbitration provision in a nursing home agreement on Kentucky state law grounds.¹¹ While many assumed that NDAA would file a petition for writ of certiorari so that the U.S. Supreme Court would revisit the arbitration issue in its case as well, it did not.

Kentucky’s stated public policy to protect employees from mandatory arbitration agreements appears distinctly at odds with the U.S. Supreme Court’s position to enforce such provisions according to their terms. As such, the tension creates an uncertain situation in the law and employers are placed in the precarious position of trying to determine whether their arbitration provisions will be enforced. Only time will tell whether other states elect to follow Kentucky’s example and issue similar decisions. At the very least, this tension is likely to lead to “forum-shopping” where litigants rush to file their lawsuits in whatever court, either federal or state, where more favorable law will be applied.

Conclusion

Although employers have generally taken the view that it remains in their best interests to force arbitration

agreements on their employees, recent events suggest taking a fresh look at that strategy. For one, the employee protests at Google and elsewhere indicate there may be growing public animosity towards mandatory arbitration agreements, which could affect a business’s operations if the same type of grassroots social media lobbying phenomena takes hold amongst that company’s employees. Additionally, depending upon in which state the employer is located, state law may reflect a contrasting position to prevailing Supreme Court law that generally favors both mandatory arbitration provisions and class waivers.

Employers and their counsel should cautiously consider the impact of these two parallel developments in current events and consider whether changes can be made to their policies while still providing protection against the burdens of employment litigation. For example, providing employees with the ability to “opt-out” of arbitration agreements might be a good way of protecting against state law prohibitions against conditioning employment on the execution of such an agreement. In addition, providing incentives to employees in exchange for agreements to arbitrate their employment claims and/or sign mandatory arbitration agreements might effectively immunize those agreements from collateral challenges. The best way to navigate these difficult issues, however, is to be proactive and consult an employment practices attorney to discuss all the available options.

Endnotes

- ¹ Melanie Ehrenkranz and Bryan Menegus, *Google Walkout Organizers Demand an End to Forced Arbitration Industry-Wide*, GIZMODO.COM (Dec. 10, 2018 10:00 AM), <https://gizmodo.com/google-walkout-organizers-demand-an-end-to-forced-arbit-1830975799>.
- ² Nitasha Tiku, *Tech Workers Unite to Fight Forced Arbitration*, WIRED (JAN. 14, 2019 9:00 AM), <https://www.wired.com/story/tech-workers-unite-fight-forced-arbitration/>.
- ³ Kathy Gurchiek, *Google Employees Fight Forced Arbitration Agreements*, SHRM.ORG (Jan. 15, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/google-employees-fight-forced-arbitration-agreements.aspx>.
- ⁴ *Id.*

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⁵ Hope Reese, *Gretchen Carlson on how forced arbitration allows companies to protect harassers*, Vox.com (May 21, 2018 11:44 AM), <https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court>.

⁶ *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018).

⁷ *Id.* at 1628.

⁸ The Kentucky statute at issue reads: “Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.”

⁹ The mandatory arbitration provision at issue specifically stated as follows: “As a condition of employment with the District, you will be required to sign the attached arbitration agreement. ... You may revoke your acceptance of the agreement by communicating your rejection in writing to the District within five days after you sign it. However, because the agreement is a condition of employment, your employment and/or consideration for employment will end via resignation or withdrawal from the process.”

¹⁰ *Northern Kentucky Area Development District v. Snyder*, No. 2017-SC-000277, 2018 Ky. LEXIS 363, at **1-2 (Ky. 2018).

¹¹ *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421 (2017).

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