# Roundup of Recent Employment Arbitration Law Developments

Report of the National Academy of Arbitrators

Employment Law Committee

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## Introduction

This Roundup is not comprehensive. It covers only recent developments of interest to NAA members who hear, or are interested in, employment cases.

## Topic 1

## Workers Exempt from Coverage Under Section 1 of the Arbitration Act (FAA).

9 U. S. C. § 1 limits the coverage of the FAA. It says, in the relevant part of section 1:

> …but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

The exceptions for seamen and railroad employees are clear. The exception for "any other class of workers engaged in foreign or interstate commerce" continues to be litigated.

In *Circuit City v. Adams*, 532 U.S. 105 (2001) the Supreme Court decided the Section 1 exemption did not apply to Circuit City employees. Justice Kennedy, held that following the more descriptive terms "seamen" and "railroad workers" the term "any other class of workers engaged in foreign or interstate commerce" should apply only to contracts of "transportation workers." 532 U.S. at 116.

In *New Prime, Inc. v. Oliveira*, 586 U.S. ____, 139 S. Ct. 532 (2019),the agreement delegated arbitrability determinations

to the arbitrator. The Court had to determine who decides if the Section 1 exemption applies, and whether the "transportation workers" exemption applies to an "independent contractor" truck driver engaged in interstate hauling? The Court determined it decides the Section 1 question and that the drivers were exempt.

New Prime is an interstate hauling company. Mr. Oliveira and other drivers signed "independent contractor" agreements with arbitration agreements that delegated arbitrability decisions to the arbitrator.

Oliveira sued on behalf of himself and other drivers alleging failure to pay lawful wages. New Prime moved to compel arbitration. Plaintiff responded that he was a "transportation worker" covered by the Section 1 exemption. New Prime responded that the exemption did not displace the arbitrator's role in deciding arbitrability and that the exemption only applies to employees, not independent contractors.

The Court first held that courts cannot issue an order to compel arbitration under Sections 3 and 4 of the FAA if the "contract of employment" is exempt under Section 1. Consequently, a court must decide this issue.

The Court next interpreted the terms "worker" and "contracts of employment" as they would have been commonly understood when the FAA was passed in 1925. Then, the term "contract of employment" "usually meant nothing more than an agreement to perform work. Most people would have understood

Section 1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work." 139 S. Ct. at 539.

Dictionaries treated "employment" "more or less as a synonym for 'work,'". Then-contemporary court cases and statutes confirm this understanding. 139 S. Ct. at 540. Finally, the Court concluded, the reference to "workers" as opposed to "employees" or "servants" further confirms this holding. 139 S. Ct. at 541.

Topic 2

Post *Oliveira* Developments

FAA exemption does not impact arbitration agreements that reference state laws or even those that only contain a reference to the FAA.

Two New Jersey Supreme Court cases addressed whether arbitration agreements exempt under the FAA would be enforceable under the New Jersey Arbitration Act (NJAA) N.J. S.A. 2A: 23B-1-36, they are. Both cases, *Arafa v. Health Express Corporation*, and *Colon v. Strategic Delivery Solutions, LLC*, were decided in the same opinion. ____ N. J. ____, ____ A. 3d ____,(2020).

In *Arafa* plaintiff was a driver who delivered pharmaceutical products from pharmacies and medical offices to customers throughout the state and surrounding areas. His arbitration agreement stated it was "governed by" the FAA. It contained a class action waiver and an "Enforcement Clause" that

provided, "In the event any portion of this agreement is deemed unenforceable, the remainder of it will be enforceable." Arafa filed a class action alleging violation of New Jersey's Wage and Hour and Wage Payment laws, among other claims. The trial court granted the Health Express Motion to Dismiss and Compel Arbitration and ordered the class to pursue all claims on an individual basis. The Appellate Division reversed holding the plaintiff was exempt from the FAA and that this undermined the entire jurisdictional premise of the parties' arbitration agreement.

In *Colon*, the defendant was a licensed freight forwarder and broker. The employment agreements contained an agreement to arbitrate under the FAA, as well as a class action waiver. Colon and others filed a class action alleging violations of New Jersey laws by failing to pay overtime wages and illegally withholding monies. The trial court granted the Motion to Dismiss and Compel Arbitration. The Appellate Division agreed but remanded for a determination of whether plaintiffs were engaged in interstate commerce. If they were not, they would be required to arbitrate under the FAA. If they were exempt under the FAA, the Court held it would "enforce the arbitration provision under the NJAA" and it held there was an unambiguous waiver to proceed as a class on their statutory claims.

The New Jersey Supreme Court recognized federal preemption of any state rule discriminating on its face against arbitration

but also recognized that the FAA permits states to regulate contracts with arbitration agreements, under general contract principles.

In *Arafa*, it was undisputed that the Section 1 "transportation worker" exemption of the FAA applied. The Court reversed the Appellate Division. It held that the individual arbitration agreements were enforceable under the NJAA and that the class members would have to proceed in individual arbitrations. The Court also followed the U.S. Supreme Court's decision in *New Prime* and held the arbitration agreement applied to independent contractors.

In *Colon*, the Court ruled that either the FAA or the NJAA applied to compel arbitration. Both statutes are nearly identical and were held to enunciate the same policies favoring arbitration. The Court remanded the case for a determination on whether the FAA Section 1 exemption applied.

In both cases the Court found an express invocation of the NJAA in the arbitration agreement was unnecessary to establish a meeting of the minds because "the NJAA has applied automatically as a matter of law to all non-exempted arbitration agreements from its January 1, 2003, effective date on ____" ____N. J. at ____; and later said, "No express mention of the NJAA is required to establish a meeting of the minds … its application is automatic." ____ N. J. at ____.

Because each state has its own arbitration statutes, some the Uniform Arbitration Act, some the Revised Uniform Arbitration Act, and some *sui generis*, litigants in each state may face inconsistent decisions when transportation workers are considered exempt under Section 1 of the FAA.

Topic 3

Workers on the Borderline Between Exempt and Non-Exempt Under Section 1 of the FAA.

It is clear that long-haul truck drivers are exempt transportation workers under Section 1 of the FAA. It is less clear for other transportation workers. Amazon employs "last-mile" local drivers who go to centralized Amazon warehouses to pick up packages shipped interstate and then deliver them to local customers. Most of those drivers never cross state lines. They all sign independent contractor arbitration agreements with class action waivers. When "last-mile" drivers brought wage and hour lawsuits in two cases, the First and Ninth Circuits held the transportation worker exemption of the FAA applied to them; *Waithaka v. Amazon.com*, 966 F. 3d. 10 (1st Cir. 2020), and *Rittman v. Amazon.com*, 971 F. 3d. 904 (9th Cir. 2020).

In *Waithaka*, the First Circuit concluded, "Waithaka and other last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers engaged in ... interstate commerce, regardless of whether the workers themselves physically cross state lines." 966 F. 3d at 26. The

agreements provided for  Washington State law, which permits class action waivers. Massachusetts law makes class action waivers in employment agreements unenforceable. Applying conflict-of-laws principles, the Court decided "that individual arbitration cannot be compelled pursuant to state law here." (in Massachusetts) 966 F. 3d at 26.

In *Rittman*, the Ninth Circuit interpreted the words, "engaged in foreign or interstate commerce" to encompass the "last-mile" drivers.  "We conclude that Am Flex delivery providers fall within the exemption, even if they do not cross state lines to make their deliveries."  971 F. 3d at 919.

The Court then held there was no valid arbitration agreement.  It first rejected Amazon's contention that the parties agreed to a choice-of-FAA provision even if the FAA itself was inapplicable.  Then it rejected Amazon's contention that Washington State law would require arbitration.  Applying Washington State law to severability clauses and to construing ambiguous contract language against the drafter, the Court affirmed the District Court's holding that there was no valid agreement to arbitrate.  971 F. 3d at 921.

At the other end of the “interstate” spectrum are workers who initiate transportation of people or goods (call them "first-mile" drivers).  These drivers include Uber and Lyft drivers who transport people, and meal delivery drivers like Door-Dashers, who deliver restaurant meals to the customers.

These workers are subject to individual employment agreements with arbitration provisions and class action waivers. There are thousands of pending individual arbitration claims. One law firm blog identified 12,501 Uber claims, 3,420 Lyft claims, and 5,879 DoorDash claims. As an example, in *Austin v. DoorDash, Inc.*, No. 1:17-cv-12498-IT (D. Mass. September 30, 2019) the District Court found that the transportation worker exemption did not apply to the Door-Dashers before the Court. While the meals delivered often contained food or drinks which were packaged out of state, the drivers did not cross state lines and the meals were deemed the product of the in-state restaurants. The Court held:

> While several of the *Lenz* factors weigh in favor of finding Plaintiff to be a transportation worker, others weigh against that finding. Reviewing these together, the Court finds that Plaintiff is not a transportation worker exempted from the FAA. The Court notes that the outcome of this case may well be different if a driver alleged that he crossed state lines to deliver goods, as might occur where a delivery driver is stationed close to a state's border. Similarly, the outcome of this inquiry may also be different for an on-demand driver who delivers groceries for a store that buys goods in interstate commerce. Such circumstances, however, are not alleged by Plaintiff. The Court, therefore, concludes that Plaintiff is not a transportation worker exempted by Section 1 of the FAA. Accordingly, the arbitration agreement must be enforced.

In a similar vein, the Third Circuit, in *Singh v. Uber Technologies, Inc.*, 939 F. 30 210 (3d Cir., 2019), reversed a District Court order that compelled arbitration without

determining whether the Section 1 exemption applied to New Jersey Uber drivers who drove passengers on occasion to New York. The Court rejected Uber's attempted distinction between transportation of cargo and passengers, and that they drove "only locally," without any record evidence. Absent that evidence the Court could not determine whether the drivers in Singh's putative class action were transportation workers "engaged in ... interstate commerce."

The Court remanded the case to the District Court to permit introducing evidence to determine if the Uber drivers were "engaged in interstate commerce" or in work so closely related thereto as to be in practical effect part of it. 939 F. 3d at 226.

In the middle of the spectrum are cases like *Eastus v. ISS Facility Services, Inc.*, 960 F. 3d. 207 (5th Cir. 2020). ISS employed Eastus as an account manager to supervise 25 part-time and 2 full-time ticketing and gate agents for ISS's customer Deutsche Lufthansa, AG., Inc., at the George Bush Intercontinental Airport in Houston, Texas. The agents Eastus supervised ticketed passengers, accepted or rejected baggage and goods, issued tags for baggage and goods, and placed baggage and goods on conveyor systems. As needed, Eastus would handle passenger baggage herself.

Eastus brought employment discrimination claims against ISS and Deutsche Lufthansa. They moved to compel arbitration and Eastus claimed she was exempt as a transportation worker under the FAA. The Court said at most, Eastus was involved in loading and unloading airplanes, not in the actual movement of airplanes in interstate commerce. She was compared to longshoremen who unload and load ships and warehousemen who do the same with trucks. She was held not exempt. 960 F. 3d at 212.

How Courts treat workers who drive in large metropolitan areas near state borders, especially with large airports nearby (e.g., Kansas City, Missouri, and the surrounding Missouri and Kansas counties), will rely on the specific facts, conflicting state laws, and whether the FAA is deemed to apply.

Topic 4

*Henry Schein, Inc., v. Archer & White Sales, Inc.,*

586 U.S. , 139 S. Ct. 524 (2019) and its Progeny.

*Schein* was an antitrust case. The parties agreed to arbitration under the AAA Commercial Rules which provided the arbitrator would decide issues of arbitrability. The arbitration agreement contained an exception "for actions seeking injunctive relief." Archer and White sued seeking injunctive relief, at least in part. Schein invoked arbitration under the FAA. The District Court decided who should decide

arbitrability using the Fifth Circuit's "wholly groundless" exception, which allows a court to deny referral to arbitration if the request is "wholly groundless" under the arbitration agreement. The various Courts of Appeal differ on the existence of a "wholly groundless" exception.

The Supreme Court ruled:

> In sum, we reject the "wholly groundless" exception. The exception is inconsistent with the statutory text and with our precedent. It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. 586 U.S. at ___, 139 S. Ct. at 528.

The Court reversed and remanded to the Fifth Circuit to determine if there was "clear and unmistakable evidence" the parties had agreed to arbitrate arbitrability.

On remand, the Fifth Circuit (535 F. 3d. 274, 2020) held there was no clear and unmistakable evidence the parties had agreed to arbitrate "actions seeking injunctive relief," and that the carve-out made the action filed by Archer and White seeking injunctive relief not arbitrable.535 F. 3d. at 282 and 283.

Schein again sought certiorari, which was granted. On January 25, 2021, after oral argument on December 8, 2020, the

Writ of Certiorari was dismissed as improvidently granted. 592 U.S. ___, (2021).

It appears that courts will determine arbitrability when the applicability of an exception to the arbitration agreement is contested, unless that arbitrability determination is clearly and unmistakably delegated to the arbitrator.

Topic 5

Class Action Waivers - Ambiguities.

In *Lamp Plus, Inc. v. Varela*, 587 U.S. ___, 139 S. Ct. 1047 (2019), the class waiver language in an employee's arbitration agreement was ambiguous. When the employee sued on behalf of himself and other employees the Federal District Court ordered arbitration, not on an individual basis, but on a class-wide basis. On appeal, the Ninth Circuit applying California law and construing the ambiguity against the drafter affirmed. 701 Fed. Appx. at 670, 672 (2017)

The Supreme Court majority relied on *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), which held "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." 559 U.S. at 664. The Court stressed the consensual nature of arbitration agreements and the "fundamental" difference "between class arbitration and the

individualized form of arbitration envisioned by the FAA." (Case citations omitted.) 587 U.S. at ___, 139 S. Ct. at 1416. The Court pointed out that while individual arbitration offers benefits of "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes ... class arbitration lacks those benefits ... and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." 139 S. Ct. at 1416.

The majority held:

> Our reasoning in *Stolt-Nielsen* controls the question we face today. Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agree to "sacrifice the principal advantage of arbitration." *Concepcion*, 563 U.S. at 348, 131 S. Ct. 1740.

*Lamps Plus* was a 5-4 ruling with Chief Justice Roberts writing the opinion which Justices Thomas, Alito, Gorsuch, and Kavanaugh joined. Justices Ginsberg, Breyer, Sotomayor, and Kagan filed three separate dissenting opinions. The majority opinion, that ambiguity is not a sufficient basis to find consent for class arbitration, is likely to prevail for the foreseeable future.

*Bigger v. Facebook, Inc.*, 947 F. 3d at 1043 (7th Cir. 2020), was a case of first impression in the Seventh Circuit. The issue was whether employees who signed arbitration

agreements providing for individual arbitration of wage and hour claims should have been ordered by the District Court to receive notice of a pending opt-in collective action. Facebook argued receiving the notice would confuse employees, given that most had waived the right to proceed in a collective action, and that the notice would unfairly amplify settlement pressure. Bigger argued the District could later determine, after discovery, whether anyone who opted-in is "similarly situated" to the named Plaintiff (i.e., had not signed an arbitration agreement).

The Seventh Circuit found "guidance in the goals and dangers of collective actions and in the neutrality a trial court must maintain when facilitating notice to potential plaintiffs." 947 F. 3d at 1049. It concluded:

> Given these considerations, we conclude that a court may not authorize notice to individuals whom the court has been shown entered mutual arbitration agreements waiving their right to join the action. And the court must give the defendant an opportunity to make that showing. 947 F. 3d at 1050.

Citing *Lamps Plus*, the Court held a trial court did not have to take the employer at its word and that determining whether a valid arbitration agreement exists is generally within the court's authority to resolve as a "gateway" question. 947 F. 3d at 1051. See also, *Fedor v. United Healthcare, Inc.*, 976 F. 3d 1100 (10th Cir.2000), reversing a District Court Order compelling arbitration.

> "The issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged such a clause." 976 F. 3d at 1105.

Topic 6

Arbitration Agreements Held to be Unenforceable.

In an unpublished per curiam opinion, the Eleventh Circuit, in *Hudson v. P.I.P., Inc.*, Case No. 19, 11004 (11th Cir. November 22, 2019) affirmed in part and reversed in part the District Court holding that the provision in the arbitration agreement that "each party to any arbitration will pay its own fees and expenses, including attorney's fees, and will share other fees of arbitration" was not enforceable as to a claim brought under the FLSA. The lower court ruled that the offending provision was not severable and it denied the Motion to Compel Arbitration. On appeal, the Court upheld the ruling that the attorney's fees and costs provision was unenforceable. It held, however, that even in the absence of a severability clause, the trial court should determine under state law (Florida) if the provision was severable. If so, it should sever the language and compel arbitration.

In an Ohio case, *Thomas v. Hyundai of Bedford*, 141 NE 3d 1088 (Ct. of Appeals, 8th Dist., 2020), (not accepted for review, 151 NE 3d 1489 (Sup. Ct. 2020)), the trial court had

stayed proceedings pending arbitration. Under the employment agreement, both parties agreed "Covered Disputes" included "any actual or alleged claim or liability, regardless of its nature, that ... its owners, (etc.) ... wished to bring against an employee, or that employee wished to bring against ... its owners, (etc.) ..." The employee sued the owners for race discrimination and retaliation under Ohio law. The employee resisted the owners' Motion to Stay on the grounds that the public policy of Ohio was "so strong" as to permit direct access to the courts and because the agreement was unconscionable.

The Court of Appeals held the public policy argument was unavailing; case law found arbitrable claims under Ohio's discrimination and retaliation laws.

As to unconscionability, the Court set out the common analysis that the agreement had to be both substantively unconscionable (the term is "so one-sided as to oppress or unfairly surprise" a party), and procedurally unconscionable (in the forming the agreement one party has such superior bargaining strength that the other party lacks a "meaningful choice" to enter into the contract). 141 NE 3d at 1094.

The Court found both substantive and procedural unconscionability. The employee was required to "arbitrate any claim whatsoever" he might have against the owners, managers,

members, officers, agents, insurers, and other employees, "regardless of the nature of the claim."

The Court held:

> Thus, although the relationship of the parties to the agreement is one of employer and employee, the agreement, by its terms, includes as arbitrable all claims between the parties, even those that are outside the scope of the employment relationship. 141 N.E. 3d at 1094-1095.

It reversed and remanded. Courts continue to frown on both employees and employers who delay in moving to compel arbitration, as well as on parties who never ask for an Order to Compel Arbitration or Stay Proceedings. In an unpublished per curiam opinion, *Sabatelli v. Baylor Scott & White Health*, Case No. 19-50047, 2020 WL 6164342 (5th Cir. October 21, 2020), Sabatelli brought age and disability discrimination claims in Federal Court and the Court granted summary judgment. Sixteen months later he filed an arbitration demand claiming his forced resignation was a violation of his employment agreement. The District Court granted a motion arguing arbitration was not available because of the delay.

On appeal, the Fifth Circuit affirmed and held:

> "A party waives the right to arbitrate by 'substantially invoking the judicial process' to the 'detriment or prejudice' of the other side."

The Court found filing the suit substantially invoked the judicial process. Because his discrimination and breach of

contract claims overlapped, and all arose out of his discharge, the Court found prejudice to his employer.

In *Garcia v. Haralambos Beverage Co.*, Case No. B296923 (Ct. of Appeals, 2nd Dist., Division 5, January 4, 2021) the California Court of Appeals ruled an employer waived its right to compel arbitration. Garcia filed his original complaint on November 11, 2016. On January 31, 2017, he filed an amended putative class action for various wage and hour complaints. The parties stipulated to transfer venue to the Los Angeles Superior Court on March 7, 2017. On March 17, 2017, Defendant filed its answer asserting defenses, one of which was that the claims were subject to an arbitration agreement.

On June 23, 2017, the trial court stayed the action ordering the parties to file a Joint Status Conference Statement that included any jurisdiction, venue, contractual arbitration/judicial reference issue a party intended to raise. In the Joint Statement Defendant reported that "at the moment the Defendant does not intend to raise jurisdiction or contractual arbitration." At the November 9, 2017, Initial Status Conference, the parties agreed to participate in class-wide mediation. The Defendant did not express an intention to arbitrate Plaintiffs' individual claims. On February 20, 2018, the parties agreed to a Protective Order to facilitate the production of class-wide information. On March 15, 2018, in

another Status Statement, Defendant again reported "at this time" it did not intend to challenge jurisdiction, venue or contractual arbitration but it purported "to reserve the right to raise any of those later if discovery should reveal new facts or evidence, including the right to compel arbitration."

After another Status Conference and two sets of class-wide discovery with no objection from Defendant , the parties met and conferred on discovery issues and details of the notice to putative class members. On June 29, 2018, Defendant sent a letter to Plaintiffs demanding arbitration and stating the intent to file a Motion to Compel if there was no agreement to arbitrate by July 6, 2018. At an informal discovery conference on August 14, 2018, the Court ordered Defendant to produce certain materials by August 24, and the parties to complete the notice process by August 31.If the Defendant wanted to file a Petition to Compel Arbitration the parties would first meet and confer and, if there was no agreement the Petition to Compel "may be filed and briefed."

On November 20, 2018, Defendant filed its Motion to Compel Arbitration and a request for a stay. On November 27, Plaintiffs filed their opposition and raised the defense that Defendant had waived its right to arbitrate by its unreasonable delay and conduct inconsistent with the right to arbitrate, which misled and prejudiced them.

The Court held a hearing on March 6, 2019. On March 18, 2019, it issued its Order denying the Motion to Compel Arbitration. The Court found that from the time Defendant filed its Answer (March 17, 2017), it knew of the arbitration policy and failed to conduct a diligent search for the arbitration agreements that were found in June 2018. Even after that, Defendant continued to act in a manner inconsistent with the right to arbitrate. The Court found Plaintiffs had been prejudiced by spending time and money engaging in class-wide discovery and preparing the Class Notice and filing discovery motions.

The Court of Appeals looked at three key factors. First, it found a delay before seeking the stay. Second, it found actions inconsistent with the right to arbitrate. Third, it found prejudice to the Plaintiffs. It affirmed the lower court order denying arbitration.

Given the facts in *Garcia*, the decision breaks no new ground. A two-year delay is obviously too long. But what about six-months or one-year? How much participation in the court case is too much? How much prejudice must exist? Each trial court will probably apply its own yardstick unless an appellate court in that jurisdiction has created a precedential bright line.

In *U.S. ex rel. Dorsa v. Miraca Life Sciences,* ___ F. 3d ___, Case No. 20-5007 (6th Cir. December 30, 2020), the Sixth Circuit had to decide whether an arbitration agreement could be pled to dismiss a retaliation claim in a *qui tam* action. Dorsa was an executive with Miraca when he learned of a purported scheme to defraud the government. On September 20, 2013, he filed a False Claims Act (FCA) claim under seal in a *qui tam* action. On September 24, 2013, he was fired. In his First Amended Complaint filed in November 2013, and his Second Amended Complaint filed in March 2017, both under seal, he alleged unlawful retaliation. The U.S. intervened as a party in November 2018. The District Court partially unsealed the case in January 2019, and Dorsa and the U.S. dismissed the *qui tam* claims in May 2019.

Miraca then moved to dismiss the remaining retaliation claim under Rule 12(b)(1)(3) and (6) of the Federal Rules of Civil Procedure and the FAA. Miraca argued Dorsa failed to state a retaliation claim because he had agreed to resolve all claims arising out of his employment through binding arbitration. In the alternative, Miraca argued that the District Court did not have subject matter jurisdiction because of the arbitration agreement and the suit was brought in an improper venue. The District Court denied the Motion to Dismiss.

Miraca filed a Notice of Appeal stating it was appealing "as a matter of right pursuant to 9 USC Section 16 ... the Opinion and Order denying its Motion to Dismiss ... which declined to require Plaintiff to pursue his retaliation claim in arbitration."

Dorsa filed a Motion to Dismiss the Appeal for lack of jurisdiction because neither 28 USC Section 1291 nor 9 USC Section 16 supply jurisdiction and Miraca never asked for a stay of the action or an order compelling arbitration.

The Court, in a 2-1 decision, found it lacked jurisdiction over the appeal. It held the only possible source of jurisdiction was 9 USC Section 16, which only permits "an appeal to be taken from an order" either "refusing to stay any action under Section 3 of this Title" or "denying a petition under Section 4 of this Title to order arbitration to proceed."

Under the rubric "Be careful what you ask for, you may get it," an employer persisted in asking Missouri Courts to have the arbitrator decide arbitrability based on a delegation clause in its arbitration agreement. In round one in the case of *Caldwell v. Unifirst Corp*., the trial court, in an employment discrimination case, denied the employer's Motion to Compel Arbitration. It found the agreement was unenforceable because it was not supported by consideration. The Missouri Court of

Appeals, Eastern District, affirmed, 570. W. 3d 590 (Mo. App. E.D. 2018) (Caldwell I).

The Missouri Supreme Court took transfer and then retransferred the case back to the Court of Appeals with directions to reconsider the case in light of the Supreme Court's decision in *Soars v. Easter Seals Midwest*, 563 S.W. 3d 111, 114 (Mo. Banc 2018), which held the delegation provision was severable and should be reviewed separately from the underlying arbitration clause.

On reconsideration, the Court of Appeals reversed the trial court's denial of the Motion to Compel under the parties' valid and enforceable delegation provision giving the arbitrator, not the trial court the authority to decide the threshold issue of arbitrability. 583 S.W. 3d 84 (Mo. App. E.D. 2019) (Caldwell II). The case was remanded with instructions to stay the civil case and let the arbitrator decide the arbitrability issue.

The arbitrator heard the case on the threshold issue and issued his decision that under Missouri law there was not adequate consideration for the arbitration clause of the agreement because there was not mutuality in the promises to arbitrate. The employment agreement had a choice of law provision requiring Massachusetts law to govern.

Unifirst moved to vacate the order because the arbitrator exceeded his power by refusing to apply Massachusetts law and by

finding insufficient consideration to support the arbitration clause. The trial court denied the motion and confirmed the award.

In round three, the Court of Appeals affirmed. ___ S.W. 3d ___, (Case No. ED108409 Mo. App. E.D. October 27, 2020). The Court held that in Missouri "issues regarding contract formation must be resolved under the law of this State." ___ S.W. 3d at ___. The Court then held that the principle of severability is "critical" in this case "because there are actually three separate contracts," the underlying employment agreement, the arbitration agreement, and the delegation clause. Each one required an offer, acceptance, and consideration. The Court upheld the arbitrator's determination that there was a lack of mutuality of consideration for the arbitration agreement.

Unifirst got the decider – but not the decision – it desired.

Topic 7

Federal Circuit Court Split on Federal Court Jurisdiction to Confirm or Vacate or Modify Arbitration Awards Under Sections 9, 10, and 11 of the FAA.

In *Vaden v. Discover Bank*, 556 US 49 (2008), the Supreme Court addressed the proper standard for determining federal jurisdiction when faced with a Petition to Compel Arbitration

under Section 4 of the FAA. It rejected the "Well Pleaded Complaint" rule and adopted the "Look Through" approach, "under which a Federal Court may 'Look Through' a Section 4 Petition to determine whether it is predicated on an action that 'arises under' federal law." 556 US at 62. (Construing the language of Section 4 "any United States District Court which save-for [the arbitration] agreement, would have jurisdiction under Title 28 in a civil action or in admiralty of the subject matter of a suit arising out of a controversy between the parties.")

After *Vaden,* a split in the circuits developed over whether there was federal jurisdiction under the FAA to confirm (Section 9), vacate (Section 10), or modify (Section 11) arbitration awards. The Third and Seventh Circuits took the approach that the "Look Through" approach does not apply to Sections 9, 10, and 11 because of the language differences between them and Section 4. See *Goldman v. Citigroup Glob. Markets, Inc.*, 834 F. 3d 242, 252 (3d Cir. 2016); *Magruder v. Fid. Brokerage Services, LLC*, 818 F. 3d 285, 288 (7th Cir. 2016).

The First, Second, and Fourth Circuits took the approach that the "Look Through" approach should be extended to cases under these Sections to determine whether federal subject matter jurisdiction exists where the underlying arbitration proceeding would have been subject to federal jurisdiction but for the arbitration clause. See *Ortiz-Espinosa v. BBVA Secs. Of Puerto*

*Rico, Inc.*, 852 F. 3d 36, 47 (1st Cir. 2017); *Doscher v. Sea Port Group Secs., LLC*, 832 F. 3d 372, 381 (2nd Cir. 2016); *McCormick v. Am. Online, Inc.*, 909 F. 3d 677, 679 (4th Cir. 2018).

In *Quezada v. Bechtel OG & C Construction Services, Inc.*, 946 F. 3d 837 (5th Cir. 2020), the Fifth Circuit joined the First, Second and Fourth and applied the "Look Through" approach to find federal jurisdiction to confirm the award before it. *Quezada* was a 2-1 decision.

The current 4-2 split will probably eventually reach the U.S. Supreme Court.

Topic 8

Federal Preemption is Alive and Well

Advocacy groups for employees and consumers have been trying in recent years to have state legislatures adopt some limits on pre-dispute arbitration agreements. In July 2018, New York passed a law banning arbitration of sexual harassment claims. Enforcement of the law was enjoined in *Latif v. Morgan Stanley & Company, LLC*, 2019 WL 2610985 (S.D. N.Y. June 26, 2019) (citing *AT&T Mobility, LLC v. Concepcion*, 563 US, 333, 341 (2011). "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the [Federal Arbitration Act]."

In the State of Washington, the Washington Law Against Discrimination (WLAD) was amended in response to the #Me Too movement to prohibit employers from requiring employees to waive their rights to publicly pursue their claims under the WLAD and to prohibit use of a confidential resolution process in any contract or employment agreement. In *Logan v. Lithia Motors*, No. 18-2-19068-1 SEA (July 12, 2019), the King County Superior Court held the new state law's exclusion of arbitration claims was "preempted by federal law." (Citing *AT&T Mobility*.)

On October 10, 2019, California Governor Gavin Newsom signed Assembly Bill 51 (AB-51) which prohibits and criminalizes the use of certain employment arbitration agreements. In *Chamber of Commerce of U.S. of A. V. Becerra*, No. 2: 19-cv-02456-KJM-DB (E.D. Cal. 2020), a coalition of business organizations brought suit to enjoin enforcement of AB-51. On the eve of the effective date of January 1, 2020, the District Court issued a TRO. On February 6, 2020, the District Court granted a Preliminary Injunction reported at 438 F. Supp. 3d 1078 (E.D. Cal. 2020).

Under AB-51 a "person" could not, as a condition of employment, require any applicant or employee "to waive any right, forum, or procedure" for any violation of the California Fair Employment and Housing Act (CFEHA) or the Labor Code, and an "employer" could not "threaten, retaliate or discriminate, or

terminate" any applicant or employee for a "refusal to consent to the waiver of any right, forum, or procedure for a violation of the CFEHA or this Code(the Labor Code)."

The Court took judicial notice of the published legislative history of AB-51. That history revealed the legislators' concerns with waivers and arbitration agreements and frustrations with Governor Brown's previous vetoes of three Acts having similar purposes. The legislative analysis recognized that given the Supreme Court's decision on FAA preemption "there is little doubt that, if enacted, [AB-51] would be challenged in court and there is some chance ... that it would be found preempted."

Defendants challenged the Court's subject matter jurisdiction and the standing of plaintiffs. As to jurisdiction, the Court was convinced that it had jurisdiction under 28 USC Section 1331 over preemption claims to enjoin state officials from interfering with federal rights. As to standing, the Court was also convinced the plaintiff associations met the Constitutional threshold to establish organizational standing.

The Court then went on to hold “unequal footing,” and “interference with the fundamental attributes” of private arbitration, both existed as a basis to find AB-51 is preempted by the FAA.

The Court found AB-51 placed arbitration agreements on an unequal footing with other contracts. It dismissed the argument that AB-51 did not regulate agreements, but rather regulated the behavior of persons and employers. The legislative history showed the primary target of the Bill was agreements to arbitrate. Defendants argued that the Bill applied to other contracts as well as to arbitration agreements. The Court responded, "Other types of employment provisions may tangentially fall within AB-51's ambit, but the law's clear target is arbitration agreements, given the sponsors' concern regarding the overabundance of arbitration agreements in the California employment market." 438 F. Supp. 3d at 1098. AB-51 was held to be preempted by the FAA "because it singles out arbitration by placing uncommon barriers on employers who require contractual waivers of dispute resolution options that bear the defining features of arbitration." 438 F. Supp. 3d 1099.

As to interference with arbitration as a basis for FAA preemption, the Court pointed out that there was a likely deterrent effect on employers' use of arbitration agreements given the civil and criminal sanctions associated with violating the law. On the civil side, there were enforcement procedures for the FEHA Director to follow and private right-to-sue options. On the criminal side, a misdemeanor violation carried exposure of up to six-months imprisonment or a fine up to

$1,000. The Court ruled, "Given the penalties imposed on employers found to violate AB-51, the Court finds the law also interferes with the FAA and for this reason as well is preempted." 438 F. Supp. 3d 1100.

Employing the standard considerations for granting preliminary injunctions, the Court held plaintiffs were likely to prevail and that the balance of equities and the public interest justified injunctive relief.

Topic 9

The Future of Employment Arbitration

Candidate Joe Biden pledged to be "the strongest labor President you have ever had." The Protecting the Right to Organize Act (PRO Act) was a cornerstone of his election platform. See the Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, Joe Biden for President: official campaign website (2020, https://joebiden.com/empowerworkers/.

As the Biden Plan applied to mandatory arbitration it provided:

> **Ensure workers can have their day in court by ending mandatory arbitration clauses imposed by employers on workers.** Sixty million workers have been forced to sign contracts waiving their rights to sue their

> employer and nearly twenty-five million have been forced to waive their right to bring class-action lawsuits or joint arbitration. These contracts require employees to use individual, private arbitrations when their employer violates federal and state laws. Biden will enact legislation to ban employers from requiring their employees to agree to mandatory individual arbitration and forcing employees to relinquish their right to class-action lawsuits or collective litigation, as called for in the PRO Act.

The PRO Act was introduced in the current session of Congress by House and Senate Democrats. This Act could have significant implications for all private-sector employees in the country. The PRO Act was passed in the House of Representatives in 2020 and never reached a vote in the Senate. The current version encompasses more than fifty significant changes to current law and seeks to overhaul the NLRA for the first time in more than 70-years. Some of the most noteworthy aspects of the PRO Act include:

- Effectively overturn state "right to work" laws
- Codify the "ABC test" to deem independent contractors "employees" covered by the NLRA

- Limit the ability of employers to contest union election petitions and allow unions to engage in coercive tactics long held to be unlawful
- Restrict the ability of employers to obtain labor relations advice
- Facilitate union organizing in micro-units
- Redefine the definition of "supervisor" to include more frontline leaders as "employees" covered by the NLRA
- Change the definition of "joint employment" and force businesses to alter their structures or face liability
- Give employees the right to utilize employer electronic systems to organize and engage in protected concerted activity
- Prohibit employers from using mandatory arbitration agreements with employees
- Force parties into collective bargaining agreements via interest arbitration
- Expand penalties for violations of the NLRA

In addition to prohibiting employers from using mandatory arbitration agreements, the Act would also make it illegal for any employer "to enter into or attempt to enforce any agreement, express or implied, whereby ... an employee undertakes or promises not to pursue ... any kind of joint, class, or collective claim arising from or relating to the employment of such employee ..."

If passed, this would overrule the Supreme Court's decision in *Epic Systems, Corp. v. Lewis*, 584 US __, 138 S. Ct. 612 (2018).

On February 11, 2021, the Forced Arbitration Injustice Repeal Act (FAIR Act), another Bill previously passed in the House of Representatives, was reintroduced at the same time as the House Subcommittee on Antitrust, Commercial, and Administrative Law Committee held a hearing on "Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights." A video of the hearing, statements from House members, witness written testimony, and statements from interested parties can be found at https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3530. The proposed Act would ban mandatory, pre-dispute arbitration agreements in cases of employment, consumer, antitrust, and civil rights disputes.

Because of the narrowed margin of the Democrat majority in the House of Representatives and the current possibility of a filibuster in the Senate, requiring 60 votes to invoke cloture, both the PRO Act and the FAIR Act could face rough sledding in passing as drafted. In the committee hearing on the FAIR Act, some Republican committee members seemed amenable to parts of the Act. It may well be there is a path for narrower bipartisan legislation. When, and if, federal legislation concerning

mandatory arbitration agreements and class action waivers is passed, the world of employment arbitration could change rapidly and be substantially limited.

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