Arbitration of Employment Law Claims

Certificate Webinar Series
February 8, 2023

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and
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First, Exciting News About Us

- Nexsen Pruet merging with Maynard Cooper & Gale as of April 1
- Both firms share same values and commitment to client service
- Cultures of both firms very similar
- Maynard Cooper based in AL and has offices in eight states, but not SC or NC
- Combined we will have 550 lawyers in 10 states
- Including 35 employment and labor lawyers covering full range of workforce matters

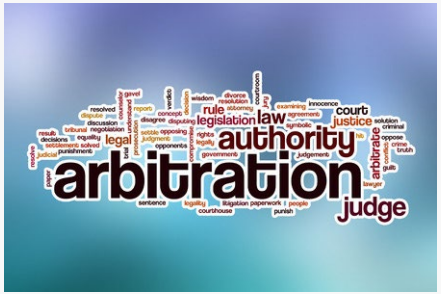
NEXSEN | PRUET will be Maynard Nexsen

Our New Footprint

- We will be able to help the clients of both firms in more locations

Overview

- Pros and cons of requiring arbitration
- Federal Arbitration Act
  - Encourages resolution of disputes through arbitration
- 2018 SCOTUS decision on class action waivers
- Recent court decisions interpreting FAA
  - Two SCOTUS
  - One Fourth Circuit
  - Others
- Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act
- Tips for employers on developing an arbitration program



What is Arbitration?

- Form of “alternative dispute resolution”
- Alternative to trial in court
- Arbitrator resolves case instead of judge
- Not mediation
- Parties must agree to arbitrate
- Included in many agreements between businesses and between businesses and consumers

Arbitration in Employment Context

- To be enforceable, agreement to arbitrate must meet basic due process requirements
  - Clear/fair procedures
    - Written in plain English (or Spanish, etc.)
- Caveat: Employee who signs enforceable arbitration agreement can still file complaint with government agency (EEOC, DOL, NLRB, etc.)
  - Because agreement is between employer and employee only

Pros of arbitration

- Non-jury
- Control over selection of arbitrator
- Non-public forum, so more confidential
- Usually quicker and more efficient
- Usually less costly
- Plaintiff's lawyer may lose interest in case after finding out about arbitration agreement

Cons of Arbitration

- Difficulty in obtaining summary dismissal
  - Or injunctive relief
- Possibility of “split the baby” decision
- Limited right to appeal
  - Corruption, fraud, misconduct unless otherwise specified
- Employer usually responsible for most of fees and costs
- Possibility of challenge to enforceability, which can delay resolution
- Perception arbitration is unfair to employees

Federal Arbitration Act

- Generally requires that courts enforce valid arbitration agreements
  - Exception for transportation workers
  - New exception for sexual harassment/assault claims
- Generally trumps …
  - State arbitration laws unless agreement says a state's law applies
  - Alternative arbitration procedures unless agreement says alternative procedures apply

Epic Systems v. Lewis (U.S. May 21, 2018)

- Class action waivers in employment arbitration agreements enforceable under FAA and do not conflict with NLRA Section 7
  - Section 7 protects employees who engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection"
- 5-4 majority: In FAA "Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings"
- So employers can require workers to arbitrate legal claims on individual basis, in effect prohibiting class/collective actions

New Developments in 2022

- Supreme Court: *Morgan v. Sundance* and *Saxon v. Southwest*
- Fourth Circuit: *Coady v. Nationwide Motor Sales Corp.*
- Congress: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

Morgan v. Sundance (U.S. May 23, 2022)

- Taco Bell employee brought putative nationwide class action against franchise/employer for violations of the FLSA
- Employees signed arbitration agreement to arbitrate "any employment dispute" when they applied for work
- Franchisee/employer initially defended lawsuit without any mention of arbitration agreement, including filing an (unsuccessful) motion to dismiss and engaging in mediation with Plaintiffs

Morgan v. Sundance (U.S. May 23, 2022)

- Eight months into litigation, franchisee/employer raised the arbitration agreement and moved to compel
- ISSUE: Did franchisee/employer waive their right to arbitrate the dispute by not previously raising the issue?
- Under Eighth Circuit precedent, there was a different/higher "waiver" standard for arbitration
  - Required showing of "prejudice"
  - Circuit split on this issue of heightened waiver

Morgan v. Sundance (U.S. May 23, 2022)

- Eight mo… …rbitration agreeme…
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  - Requi…
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Vacated and Remanded
Employer WAIVED right to arbitrate dispute

Southwest Airlines Co. v. Saxon (U.S. June 6, 2022)

- Ramp supervisor brought putative class action against her employer, Southwest, for violations of the FLSA
- Southwest moved to enforce its arbitration agreement with the employees and to dismiss the case
- HELD: Saxon and class members belong to a "class of workers engaged in foreign or interstate commerce" to which FAA § 1's exemption applies

Southwest Airlines Co. v. Saxon (U.S. June 6, 2022)

- Ramp supervisor brought putative class action against her emp
- Sou t w. the
- HEL of work o which FAA's exemption applies

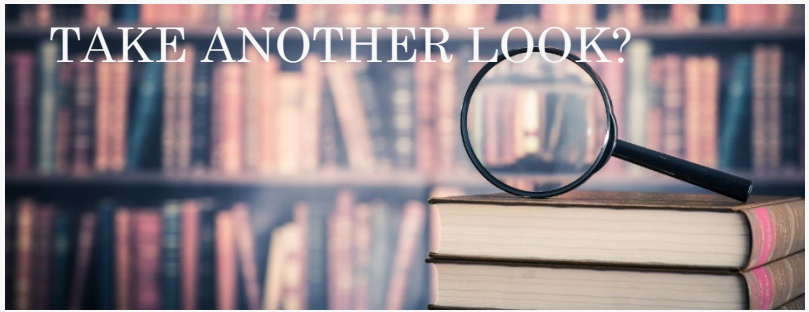
Motion to Compel Arbitration DENIED based on FAA exemption

Southwest Airlines Co. v. Saxon (U.S. June 6, 2022)

- CAUTION: Even if there is a valid arbitration agreement, the FAA includes exemptions for certain classes of workers who cannot be forced to arbitrate employment disputes
- Such Section 1 exemptions are rare—usually involves those classes of workers who perform a direct or necessary role in the flow of goods involving interstate or foreign commerce

Southwest Airlines Co. v. Saxon (U.S. June 6, 2022)

- After *Saxon* (FAA exemption), Plaintiffs filed Petition for rehearing *en banc* in *Bissonnette v. LePage Bakeries*
  - Second Circuit decided appeal following *Saxon* (U.S. Jun. 2022)
  - Second Circuit panel (not en banc) considered argument already but the ultimate judgment remained the same
  - Plaintiffs argue that *Saxon* changes the outcome of the case



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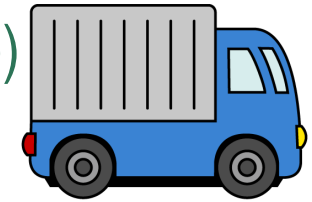
Petition still pending

Southwest Airlines Co. v. Saxon (U.S. June 6, 2022)

- Supreme Court granted certiorari to ***Dominos Pizza LLC*** to decide whether drivers who transport items from a distribution center to customers in the same state count as a "class of workers" engaged in interstate commerce (thus qualifying for exemption under FAA section 1)
  - If yes, the FAA says no arbitration for such workers
- SCOTUS Justices remanded to Ninth Circuit for further consideration in light of its decision in *Saxon* (the ramp supervisor/airline case)



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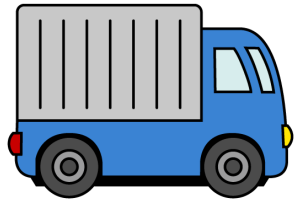
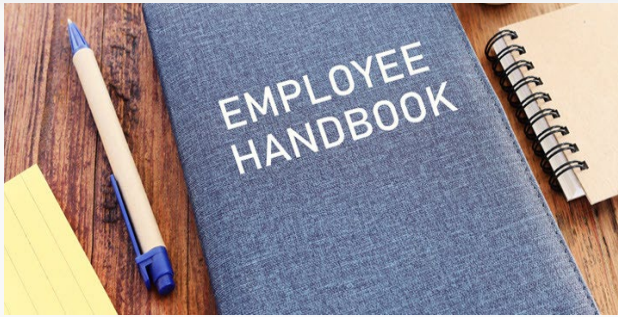
  - center
  - worker
  - exemp
    - If yes
- SCOTU
  consideration in light of its decision in *Saxon* (the ramp supervisor/airline case)

SCOTUS sent back to Ninth Circuit Court of Appeals to reevaluate in light of *Saxon*



Coady v. Nationwide Motor Sales Corp. (4th Cir. Apr. 25, 2022)

- Former employees sued in federal court in MD alleging wage payment claims
- Employer moved to compel arbitration because employees had signed for receipt of employee handbook, which contained section requiring arbitration claims
- But acknowledgement of receipt for handbook said employer had "the right, from time to time, to … change, abolish or modify existing policies … with or without notice"



Coady v. Nationwide Motor Sales Corp. (4th Cir. Apr. 25, 2022)

- Former employees brought action in U.S. District Court for District of MD
- Emp… …d sign… …ction requ…
- But … …had "the right… …g polic…

Motion to Compel Arbitration DENIED and Affirmed by Fourth Circuit

Coady v. Nationwide Motor Sales Corp. (4th Cir. Apr. 25, 2022)

- District Court sided with employees and held modification clause applied to arbitration agreement, making it illusory
- Fourth Circuit agreed, analyzing issue as matter of contract interpretation and applying MD contract law

Coady v. Nationwide Motor Sales Corp. (4th Cir. Apr. 25, 2022)

- Fourth Circuit:
  - Presumption favoring arbitration in FAA does not apply to preliminary question of whether arbitration agreement is valid under state contract law
  - Under MD law promise to arbitrate is illusory and unenforceable if employer reserves right to modify agreement at any time without notice
  - So arbitration agreement was not enforceable and employer stuck litigating in court

PRACTICE POINTS

REVIEW STATE LAW FOR SPECIFIC REQUIREMENTS

- Is arbitration agreement included as part of employee handbook?
  - Consider setting it out in separately signed document that is clear and definite
- Does it meet state law requirements for enforceable agreement?
  - Offer, acceptance, and consideration (not illusory)
  - Not obtained by fraud, duress, or undue influence

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- **Signed into law on March 3, 2022**
  - **Applies to claims that arose or accrued after that date**
- **Amends FAA:**

> [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.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- Future litigation anticipated over scope and interpretation of new law
- Does “sexual harassment dispute” include alleged sex discrimination claim?
- Also, sexual harassment claims are often brought alongside other claims; for example, retaliation, FLSA, FMLA, etc.
  - Would other claims be arbitrated?

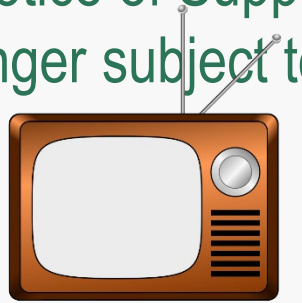
PRACTICE POINTS

REVIEW ARBITRATION AGREEMENTS

- Insert carve out?
- Does agreement mention sexual harassment/assault claims?
- How about arbitration provision in employment agreement?

Tantaros v. Fox News Network, LLC (S.D.N.Y. Sept. 30, 2022)

- Former Fox News host brought sexual harassment and other claims against Fox News, among others in 2019
- Fox News/Defendants relied on mandatory arbitration agreement to compel arbitration of employment dispute
- After passage of the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act," Plaintiff filed "Notice of Supplemental Authority" arguing, in part, that the claims are no longer subject to mandatory arbitration based on the new law



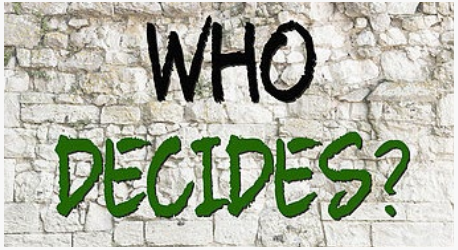
Tantaros v. Fox News Network, LLC (S.D.N.Y. Sept. 30,

- For exa
- Former
- Fox Ne
- After pa

Defendants' Motion to Dismiss GRANTED - Case Subject to ARBITRATION (law not retroactive)

Arbitrability

- **WHO DECIDES** the threshold ***issue of arbitrability***?
  - Who decides if agreement is enforceable and/or if specific claims are within an agreement's scope?
    - Are these issues that are for the arbitrator to decide or for the court to first decide?



  - Even if an arbitration agreement is otherwise enforceable, resolution can get tied up in court proceedings dealing with these types of issues, which may delay the arbitration process
    - **PRACTICE POINT: Be sure that your arbitration agreement makes clear and unambiguous who decides what (arbitrator or court)**

Arbitrability

- **General Rule**: Arbitrability is generally an issue for the court to decide
  - This is the rule that a court would generally apply in the absence of a different choice that is clear from the written agreement
- **NOTE:** This general rule can be set aside by contracting around it – the arbitration agreement must specifically address the issue of who decides arbitrability, and the agreement should be clear and unmistakable about the parties' agreement on the issue

Arbitrability

- Again, if you want the arbitrator to decide the threshold issue of arbitrability rather than a court,

MAKE THIS CLEAR AND UNMISTAKABLE through a *specific* provision of the arbitration agreement!

For example….

Lynch et al. v. Tesla, Inc. (W.D. Tex. Oct. 13, 2022)

- 500 laid-off factory in Nevada and California filed a lawsuit in federal court on behalf of themselves and others as a putative class
- Alleged violations of the WARN Act related to layoffs
- Tesla moved to Compel Arbitration of all of the claims
- Plaintiffs argued that the issue of whether the claims were covered by each individual's arbitration agreement was an issue for the Court to decide rather than an arbitrators Tesla's Motion to Compel Arbitration GRANTED

Lynch et al. v. Tesla, Inc. (W.D. Tex. Oct. 13, 2022)

- 500 laid-off factory in Nevada and California filed a lawsuit in federal court on
- Alleged v
- Tesla mo
- Plaintiffs ed by each indi rt to decide ra ation GRANTE

Motion to Compel Arbitration GRANTED and Federal Case DISMISSED (not stayed)

Lynch et al. v. Tesla, Inc. (W.D. Tex. Oct. 13, 2022)

The Court:

PRINCIPLE: arbitration agreements can contract as to the issue of who decides arbitrability of claims despite the general rule that a court decides

STANDARD: Clear and Unmistakable Evidence

- The Tesla-employee arbitration agreements incorporated the JAMS rules, which state:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.[5]

- "The express adoption of this rule 'presents **clear and unmistakable evidence that the parties agreed to arbitrate arbitrability**."

Comet et al. v. Twitter, Inc. (N.D. Cal. Jan. 13, 2023)

- Current and former Twitter workers must arbitrate their WARN Act claims relating to layoffs
- The 5 named Plaintiffs signed arbitration agreements requiring their disputes to be arbitrated individually (did not "opt out" of arbitration)
- Proposed class action
- Twitter moved to Compel Arbitration of the claims individually
- Court GRANTED Twitter's Motion as to the named Plaintiffs
- Plaintiffs had waived their right to bring class actions

Comet et al. v. Twitter, Inc. (N.D. Cal. Jan. 13, 2023)

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- The 5 na
- Proposed
- Twitter m
- Court GR
- Plaintiffs

Motion to Compel Arbitration GRANTED as to the 5 Named Plaintiffs

Corporan v. Alston and Bird LLP (N.D. Ga. Jan. 25, 2023)

- Former employee brought FLSA (OT) and retaliation claims
- Plaintiff had signed an employment agreement with a "confidentiality" and "arbitration" clause
- Defendant moved to Compel Arbitration
- Plaintiff argued that the claims did not fall within the scope of the arbitration agreement and argued fraud in the inducement
- Court GRANTED finding that the claims did fall within the arbitration provision and that contract formation questions were best left to the arbitrator

Corporan v. Alston and Bird LLP (N.D. Ga. Jan. 25, 2023)

- Former e
- Plaintiff h ality" and "arbi
- Defendar
- Plaintiff a arbitratio
- Court GR ti provision arbitrator

Motion to Compel Arbitration GRANTED & Case Administratively Closed

KEEP IN MIND – ARBITRATION…

RENEWED FOCUS AND ATTENTION

- Be aware of changing law
- Review existing arbitration agreements to ensure enforceable
- If agreement is unenforceable could result in lengthy and costly litigation, undoing the benefits of opting for arbitration

PRACTICE POINTS

TERMS TO CONSIDER FOR AGREEMENTS

- How to start arbitration process (written request)
- Time limit
- Covered claims (anything arising out of employment and/or termination)
- No class or collective claim as plaintiff or class member
- Excluded claims

PRACTICE POINTS

TERMS TO CONSIDER FOR AGREEMENTS

- Procedural rules (AAA, JAMS, AHLA, etc.—but not necessarily by them)
- Written award and specific findings of fact
- Costs (paid by employer less filing fee employee would have paid if claim filed in court?)
- No change to at-will status

QUESTIONS?

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