

# Labor and Employment Webinar

## Recent Developments in Agreements to Arbitrate Employment Disputes

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September 21, 2016



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# Agenda

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1. Introduction to arbitration
2. Benefits and drawbacks of mandatory arbitration for employment disputes
3. Types of employment disputes covered by mandatory arbitration agreements
4. Components of mandatory arbitration agreements
5. Challenges to enforceability and best practices

# Section 1

## Introduction to arbitration



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# What is arbitration?

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- Neutral third-party adjudicator (often with specialized experience or a retired judge)
- Hearing on the merits
- Outside of court/non-public
- Legally binding decision

# Section 2

## Benefits and drawbacks of mandatory arbitration for employment disputes



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## Benefits of arbitration

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- Ability to choose arbitrator
- Increased privacy
- (sometimes) Speedier
- (sometimes) Less costly
- (sometimes) Less onerous discovery
- Limited avenues for appeal
- Avoidance of an unpredictable jury trial

## Drawbacks

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- Lack of court formalities can lead to unpredictable pre-trial proceedings
- Potentially more administrative costs in some jurisdictions
- Some arbitration rules limit discovery and the right to file dispositive motions
- Potential for NLRB involvement (discussed later in more detail)
- Limited avenues for appeal (again)

# Section 3

**Types of employment disputes  
covered by mandatory arbitration  
agreements**



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# Types of disputes subject to arbitration

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- Discrimination, harassment and retaliation lawsuits
  - e.g., under Title VII, ADEA, ADA, and state equivalent anti-discrimination laws
- Breach of contract
- Defamation and other torts
- Wrongful discharge or violation of public policy
- Wage and hour claims
  - e.g., overtime, unpaid wages, meal and rest breaks, either under the Fair Labor Standards Act or analogous state law
- Other statutory claims
  - e.g., Family and Medical Leave Act and analogous state laws, Fair Credit Reporting Act and analogous state laws, Worker Adjustment and Retraining Notification Act and analogous state laws

## Types of disputes not subject to arbitration

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- Workers' compensation
- Unemployment insurance claims
- Unfair labor practice charges filed with the NLRB
- Discrimination or retaliation administrative complaints filed with the EEOC (or analogous state agencies)
- ERISA proceedings
- Class action claims (based on jurisdiction, more on this later)

# Section 4

## Components of Mandatory Arbitration Agreements



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# Key components

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- Identify the arbitration forum
  - JAMS
  - AAA
- Identify the procedural rules
  - Often the rules of the arbitration agency (e.g., JAMS rules, AAA rules)
  - Include a foreign language version if large segment of workforce is made up of a particular foreign language.
- Identify location of arbitration
  - Often the city where the employer is located or the arbitration agency's office nearest to where the employee works.

## Other key components (cont'd)

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- Example of identification clause:

Both the Company and Employee hereby agree that any claim, dispute, and/or controversy that Employee may have against the Company (or its owners, directors, officers, managers, employees, agents, insurers and parties affiliated with its employee benefit and health plans), or that Company may have against Employee, arising from, or related to this Agreement or the Employee's employment with the Company or the termination of that employment, shall, pursuant to the Federal Arbitration Act (9 U.S.C. §§ 1, *et seq.*), be submitted to and determined exclusively by binding arbitration in any forum and form agreed upon by the Employee and the Company or, in the absence of such an agreement, **under the auspices of the American Arbitration Association ("AAA") in the city of the AAA office nearest the location of the Employee's most recent place of employment with the Company, in accordance with the AAA Employment Arbitration Rules & Mediation Procedures (available in English and Spanish at [www.adr.org/employment](http://www.adr.org/employment))**. If the Employee is unable to access or print the AAA Employment Arbitration Rules & Mediation Procedures, the Employee may obtain a printout of them from the Employee's supervisor.

## Other key components (cont'd)

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- Jury waiver (if permissible)
- Fees/costs of arbitration (more on this later)
- Availability of court action for injunctive relief to enforce arbitration agreement
  - Be mindful of mutuality issues
- Governing law
  - Designated state will cover the interpretation of contract issues, but not the underlying substantive claims
- Reference to the FAA

## Class action waiver

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- NLRB has taken position that that a class action waiver is an unfair labor practice
  - Why? → because class action waivers restrict employee's right to act in a concerted manner to affect change in workplace conditions
  - Counterargument? → Federal Arbitration Act strongly favors arbitration, and employees' ability to bring class action claims is not a "substantive" right under the NLRA

## Class action waiver (cont'd)

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- Courts are currently split in affirming/rejecting the NLRB's position
  - Circuits affirming NLRB decision (finding class action waivers unlawful):
    - Seventh Circuit (IL, IN, WI)
    - Ninth Circuit (AZ, AK, CA, ID, HI, MT, OR, WA)
  - Circuits rejecting NLRB decision (finding class action waivers lawful):
    - Second Circuit (CT, NY, RI, VT)
    - Fifth Circuit (LA, TX, MS)
    - Eighth Circuit (AR, IA, MN, MO, ND, NE, SD)
  - Supreme Court is likely to weigh with three pending cert petitions including the NLRB requesting review
- In 7<sup>th</sup> and 9<sup>th</sup> Circuits not only is there a risk of a ULP charge, but risk arbitration provision will be invalidated
- If not included, risk that arbitration would proceed on a class basis
  - Lack of formal court procedures potentially increases difficulty of discovery

# Alternatives to including a class action waiver in order to avoid NLRB issue

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- Designate that arbitrator, has the authority to determine whether arbitration may proceed on a class basis
  - Trend in federal courts is that courts decide whether claims are sent to arbitration on an individual or class basis. *But see*, recent California decision.
- Use other language to signify that only claims between an individual employee and the employer are arbitrable
  - Counterargument: Arbitrator or court may interpret the agreement to permit class arbitration
- Make the obligation to arbitrate voluntary rather than mandatory through opt-out provisions
  - Counterargument: Employee may choose court in order to increase pressure of settlement
  - Increased administrative headaches with this approach

# Section 5

## Challenges to Enforceability and Best Practices



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# Standard for Enforceability Under State Law

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- Enforceability is a matter of state law
- Arbitration agreements are “contracts of adhesion” (take it or leave it), and may receive more scrutiny than negotiated agreements
- In most states, courts will analyze the following factors:
  - Assent
  - Mutuality
  - Lack of excessive cost splitting or filing fees
  - Adequate discovery procedures
  - Same remedies available as in court

## Special CA Considerations

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- California has refined these factors into a stricter “procedural and substantive unconscionability” test, which also includes:
  - Whether a copy of the arbitration rules are available and in the employee’s primary language
  - Whether the arbitration agreement is hidden in another agreement or easily discernable to the employee

# Questions?



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