2022 Labor & Employment Seminar

February 2-4, 2022

ARBITRATION – JUST HOW ENFORECEABLE IS YOUR AGREEMENT?

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Arbitration vs. Civil Litigation

Whether to compel arbitration and stay litigation can become a dilemma fraught with complex issues for many employers when considering which method of dispute resolution is best for the employer.

Many of the key factors affecting the decision are double edged swords:

- Should the decision maker be a jury, a single arbitrator, or a panel of arbitrators?
- How quickly can the parties reach a "final hearing"?
- The discovery process
- Legal fees and expenses
- Rules of evidence governing the proceeding
- Finality of a decision via binding arbitration or verdict
- Ability to engage in mediation prior to costly discovery or litigation
- Potential for a wide range of awards, damages, and costs

The Federal Arbitration Act ("FAA") sets out the legislative framework for the enforcement of arbitration agreements and arbitral awards in the United States. The FAA was intended to ensure agreements to arbitrate in commerce were "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA's implementing provisions provide that if a party to a contract containing an arbitration clause initiates contract-related litigation, either of the parties may ask the court to stay the litigation and compel the other party to resolve the dispute through arbitration. 9 U.S.C. §§ 3, 4.

"[T]he FAA articulates a strong public policy in favor of arbitration agreements." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003). Under the FAA, the Court's role in resolving the motion is limited to determining: (1) whether a valid arbitration agreement exists; and (2) whether the agreement encompasses the dispute at issue. See 9 U.S.C. § 4. Once the Court determines that "the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Indeed, the FAA "'leaves no place for the exercise of discretion by [the court], but instead mandates that [courts] shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.'" *Id*. (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original)).

Many states have similar policies in favor of arbitration as a speedy and theoretically inexpensive means of dispute resolution as compared to civil litigation. For example, until recently with the enactment of Labor Code section 432.6, California courts consistently affirmed the public policy favoring enforcement of arbitration agreements. See, e.g., *Armendariz v. Foundation Health Psychare Services, Inc.*, (2000) 24 Cal. 4th 83, 97-98. See also attached copy of a petition filed by the Chamber of Commerce challenging California Labor Code section 432.6.

According to the American Arbitration Association Rulebook preamble: "In 1995 the Employment Due Process Protocol was developed by a special Task Force composed of individuals representing management, labor, employment, civil rights organizations, private administrative agencies, government, and the American Arbitration Association. The Due Process Protocol seeks to ensure fairness and equity in resolving workplace disputes. It encourages mediation and arbitration of statutory

disputes, provided there are due process safeguards. It conveys the hope that ADR will reduce delays caused by the huge backlog of cases pending before administrative agencies and the courts. The Due Process Protocol 'recognizes the dilemma inherent in the timing of an agreement to mediate and/or arbitrate statutory disputes' but does not take a position on whether an employer can require a pre-dispute, binding arbitration program as a condition of employment.

The Due Process Protocol has been endorsed by organizations representing a broad range of constituencies. They include the American Arbitration Association, the American Bar Association Labor and Employment Section, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the National Society of Professionals in Dispute Resolution. The National Employment Lawyers Association has endorsed the substantive provisions of the Due Process Protocol.

Factors Affecting Enforceability of Arbitration Agreements

After facing several lawsuits and/or witnessing other companies bombarded with lawsuits, employers routinely required employees to execute arbitration agreements. However, employers now face yet another challenge: employees arguing that the arbitration agreement they executed is not valid and enforceable for a multitude of reasons: the signature is not mine because it was done electronically; I felt coerced into signing the arbitration agreement because my supervisor was looking over my shoulder; I did not understand the language of the agreement, so my signature is not knowing and voluntary; the Union signed the agreement, not me; etc.

Resolving the Matter Notwithstanding Arbitration

Employers encounter both pros and cons when compelling arbitration. However, the existence of an executed arbitration agreement can be a useful tactic in pre-suit settlement negotiations, both formal and informal, since plaintiff attorneys understand they are unlikely to obtain large emotionally motivated verdicts or punitive damages from a trained and dispassionate arbitrator. Unfortunately, there are also a number of cons to consider when deciding whether or not to implement arbitration agreements or to seek to compel arbitration under existing agreements, such as: (1) difficulty appealing an adverse decision; (2) ever-rising arbitration costs; (3) an arbitrator's desire to "split the baby"; (4) difficulty prevailing on a dispositive motion; and, (5) the unwillingness of some arbitrators to keep the parties on track and adhere to deadlines.

State v. Federal

Generally, federal law preempts state law, particularly when state actions attempt to block a clear Congressional mandate, such as the Federal Arbitration Act. However, some states, such as California, have become creative in ways around the FAA. In *Chamber of Commerce of the United States v. Bonta*, 2021 U.S. App. LEXIS 27659 (9th Cir. Sept. 15, 2021), the Ninth Circuit Court of Appeals reversed in a 2-1 Panel ruling the District Court's injunction of California Assembly Bill 51 (AB51), which imposes criminal and civil penalties on businesses that condition offers of employment on an employee's agreement to arbitrate workplace disputes. The District Court found AB51 preempted by the FAA.

However, the Ninth Circuit reversed, holding that there is no inconsistency with the FAA because the FAA envisions consent, not coercion, and AB51 largely deals with conduct occurring *prior* to execution of an arbitration agreement and not the contract itself. However, the civil and criminal sanctions were, in fact, preempted and continue to be enjoined. In her dissenting opinion, Judge Ikuta states, "Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act, the state bounces back with even more creative methods to sidestep the FAA." A petition for rehearing *en banc* was filed by the U.S. Chamber of Commerce on October 20, 2021 and is being briefed by the parties. If granted, a hearing is not likely to occur until later this year, with a possible decision in 2023.

Arbitration rules for employment actions for JAMS and AAA are found at the following links:

https://www.jamsadr.com/rules-employment-arbitration/english
https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf