ARBITRATION AND CLASS ACTION WAIVERS: THE PANACEA SOME SAY THEY ARE?

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I. Introduction

Following the U.S. Supreme Court's *Epic Systems* decision upholding the validity of class action waivers, many employers joined a frenzy to adopt arbitration agreements without considering all of the legal and practical ramifications. Keeping this trend in mind, Part II of this white paper discusses the Federal Arbitration Act, the split among the Circuit Courts of Appeal paving the way for *Epic Systems*, and the *Epic Systems* decision itself. Part III explores where employers and in-house counsel stand after *Epic Systems*. Most importantly, Part III provides specific drafting tips and strategies for employers seeking to roll out or revise arbitration agreements in light of this ruling. Finally, Part IV balances the pros and cons of implementing arbitration agreements and provides an overview of recent legislative and judicial advancements in this field about which employers should be aware.

II. Current Legal Standards And Brief History

A. Overview Of Federal Arbitration Act

The Federal Arbitration Act (FAA) governs employment arbitration agreements if the agreements are in writing, the transaction involves interstate commerce, and the agreement would be valid and enforceable as a contract under state law. Broadly speaking, the FAA provides the legislative framework for the enforcement of arbitration agreements and arbitral awards in the United States.[2] Congress enacted this statute with the express purpose of ensuring the validity, irrevocability, and enforceability of arbitration agreements.[3]

The U.S. Supreme Court and other courts throughout the United States have reaffirmed this stated purpose, emphasizing the FAA's embodiment of "a liberal federal policy favoring

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[2] Brielle Oshinsky, *Issues Surrounding the Legality of Class Action Waivers in Arbitration Agreements*, 12 BROOKLYN J. OF CORP., FIN. & COMM. L. 2, 421 (2018).
[3] 9 U.S.C § 2 (2012).

arbitration."[4] Under the FAA, if an asserted claim falls within the scope of the arbitration agreement, either party can ask the court to compel arbitration and stay (or even dismiss) the lawsuit pending the outcome of arbitration.[5] Importantly, the FAA preempts state laws that are inconsistent with its purposes. And so long as the relationship involves interstate commerce, a finding which courts construe broadly, the FAA will apply regardless of whether the lawsuit is filed in a state court or a federal court.[6]

When an employer includes a class action waiver in an arbitration clause, the FAA is invoked. The FAA's liberal construction as set forth by the courts plays a critical role in the success of employers ultimately enforcing these waivers. As some commentators describe, the creation of this federal policy favoring arbitration has been "transformational."[7] Indeed, under the FAA, the use of arbitration clauses has exploded in the last 30 years, with the clauses routinely making their way into employment agreements.[8]

In recent years, research from the Economic Policy Institute demonstrates that mandatory arbitration has become a condition of employment for more than 60 million workers across the country. Since the early 2000s, the percentage of workers employed in the private, non-union sector who are subject to mandatory arbitration has more than doubled, now exceeding 55 percent.[9] As of 2018, of the employers who require mandatory arbitration, roughly 30 percent include a class-action waiver in their agreement.[10]

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[4] *See e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983).
[5] 9 U.S.C §§ 3-4 (2012).
[6] Christopher Boran, Kenneth Kliebard, Steven Reed & Samuel Shaulson, *The Use and Enforceability of Class Action Waivers in Arbitration Agreements in the United States*, WESTLAW (2017) [hereinafter *Use and Enforceability*].
[7] Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 3, 533 (2014).
[8] *Id.*
[9] Jacqueline Prats, *Are Arbitration Agreements Necessary for Class-Action Waivers to Be Enforceable?*, FLORIDA BAR J. (Dec. 2018).
[10] *Id.*

Of course, that growth can largely be attributed not only to growing enforcement by the courts but also to effectiveness at mitigating class action risk, especially when spending on the defense of class actions was projected to hit $2.9 billion in 2018 alone with no signs of slowing down.[11] Although potential risks for employers do still remain, now that the U.S. Supreme Court has ruled on the enforceability of employment class action waivers in *Epic Systems Corp. v. Lewis*, more employers are likely to follow suit.[12]

B. Circuit Split Leads to the U.S. Supreme Court's Decision in *Epic Systems*

The rapid growth of arbitration clauses in employment contracts coupled with the proliferation of class action lawsuits created a perfect storm for the U.S. Supreme Court's grant of a writ of certiorari in *Epic Systems*.

The FAA and the National Labor Relations Act (NLRA) are decades-old statutes, passed in 1925 and 1935, respectively.[13] Each statute plays a major role in the employment relationship. As noted, historically, the FAA has broadly encouraged private dispute resolution through arbitration, while the NLRA protects employees and union members who engage in "concerted activities" for "mutual aid or protection" in the workplace.[14] In its seminal decision *In re D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012), the National Labor Relations Board (NLRB) ruled that class and collective action waivers in arbitration agreements violate Section 7 of the NLRA.[15]

While the NLRB took its position, the Courts of Appeals largely disagreed. Specifically, the Seventh and Ninth Circuit Courts of Appeals essentially adopted the NLRB's position, with

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[11] *Id*.
[12] See discussion *infra*.
[13] Megan Walker, *Epic Win: Supreme Court Saves Employment Arbitration as We Know It*, FISHER & PHILLIPS LLP (May 21, 2018), https://www.fisherphillips.com/resources-alerts-epic-win-supreme-court-saves-employment-arbitration.
[14] *Id*.; 29 U.S.C. § 157 (2012).
[15] *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012).

the latter opining that there is "nothing quite so 'concerted' as a piece of class or collective action litigation."[16] However, the Fifth Circuit, Second Circuit, and the Eleventh Circuit Courts of Appeals all maintained that the FAA and the NLRA do not conflict, thus permitting employers' inclusion of mandatory class action waivers in arbitration agreements.[17] This circuit split led to three cases—*Epic Systems Corporation v. Lewis*, *Ernst & Young, LLP v. Morris*, and *NLRB v. Murphy Oil USA, Inc.*—all of which essentially asked the same question: does an employment arbitration agreement containing a class and collective action waiver violate the NLRA, or are those agreements permitted by virtue of the FAA? The differing standards across the country created a circumstance for the U.S. Supreme Court to step in, which ultimately consolidated all three cases.

C. The 2018 *Epic Systems* Decision

Epic Systems essentially answers the question of whether employers and employees may agree to individually arbitrate employment-related claims. Consistent with the longstanding "liberal federal policy favoring arbitration," in a split 5-to-4 decision, the U.S. Supreme Court held that class action waivers in mandatory employment arbitration agreements do not violate the NLRA.[18] Rather, the Court held, arbitration agreements are enforceable under the FAA, which requires the enforcement of arbitration agreements according to their terms.[19]

In *Epic Systems*, each plaintiff was an employee who had agreed to individually arbitrate any disputes arising out of their employment and to forgo any right to bring or participate in class

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[16] Walker, *supra* note 13.
[17] *Id.*; *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Morris v. Ernst & Young*, LLP, 834 F.3d 975 (9th Cir. 2016); *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015).
[18] *Epic Sys.*, 138 S. Ct. at 1612.
[19] *Id.*

or collective claims.[20] Despite their agreements, the plaintiffs brought federal class or collective actions against their employers asserting wage and hour violations related to overtime pay under the Fair Labor Standards Act (FLSA) and corresponding state laws.[21] In each of those three consolidated cases, the plaintiffs argued that, under the NLRA, the class action waivers were unenforceable.[22]

Newly seated Supreme Court Justice Neil Gorsuch wrote the opinion for the majority and agreed with Epic Systems Corp., stating that the National Labor Relations Act "secures to employees the rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum."[23] Notably, the Court found that Section 7 "does not even hint at a wish to displace the [FAA]," and ultimately, the right to bring a claim, whether jointly or in a class action is not the kind of "concerted activity" either contemplated or protected under the NLRA.[24]

III. Enforceability Of Arbitration Agreements Post-*Epic Systems*

Post-*Epic Systems*, employment arbitration agreements must now be enforced according to their terms. However, as discussed in more detail below, the U.S. Supreme Court's blessing of arbitration agreements does not go without limits. With this in mind, Part A discusses where employers stand after *Epic Systems*. While employers fare much better under this decision, Part B discusses considerations for employers seeking to draft enforceable agreements under *Epic Systems* and state contract law.

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[20] Walker, *supra* note 13.
[21] *Id*.
[22] *Epic Sys*., 138 S. Ct. at 1616.
[23] *Id*. at 1619.
[24] *Id*. at 1616.

A. Where Employers Stand After The *Epic Systems* Decision

Justifiably, employers and in-house counsel may find themselves wondering where they stand after *Epic Systems*. As an initial matter, employers should take comfort knowing that—in most instances—they may continue incorporating and enforcing mandatory class action waivers in their employment arbitration agreements. When facing a threatened class or collective action in federal court, *Epic Systems* now stands as a powerful tool to move the proceeding to private, individual arbitration. And moving forward, as the dissenting opinion in *Epic Systems* points out, we may ultimately see fewer wage and hour claims as a result of the decision.

However, employers should not read *Epic Systems* as carte blanche to ignore employee rights when drafting arbitration agreements. For example, in January 2019, the U.S. Supreme Court unanimously distinguished the mandate of *Epic Systems* by broadly interpreting the FAA Section 1 exemption of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" in the context of transportation workers.

These workers were handed a rare win in *New Prime Inc. v. Oliveira*, where the court ultimately ruled that transportation workers, regardless of whether they are classified as employees or independent contractors, are exempt from the FAA.[25] Although a narrow ruling, the effects for the transportation industry are far-reaching. Specifically, over 545,000 trucks in the United States are operated by independent contractors, many of whom have contracts that

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[25] Felix Digilov & Anderson Scott, *End of the Road: SCOTUS Ruling Means Many Transportation Workers Are Now Exempt From Arbitration*, FISHER & PHILLIPS LLP (Jan. 15, 2019). https://www.fisherphillips.com/resources-alerts-end-of-the-road-scotus-ruling-means.

could ultimately be invalidated by the outcome of this case, to the extent they are not otherwise enforceable under state contract and arbitration laws.[26]

The contrast between *Epic Systems* and *New Prime* illustrates a rather simple, but critical point. Regardless of employment status, there are limits on the judiciary's longstanding favoritism for arbitration. Employers seeking to draft and implement an ironclad arbitration agreement must ensure its enforceability under state contract law. In particular, as in *New Prime*, courts may hold in some instances that the FAA does not govern the underlying agreement. In that scenario, employers can revert to state contract law and arbitration statutes to enforce the agreement. And as discussed more fully below, employees may also still challenge arbitration agreements with class action waivers under general contract defenses such as fraud, duress, unconscionability, lack of consideration, and waiver. Practically speaking, employers should also be aware of the potential employee and public relations issues that will likely follow the retention or rolling out of arbitration agreements to employees, especially in light of the growing #MeToo movement.[27]

B. Best Practices For Drafting Enforceable Arbitration Agreements

Employers drafting arbitration agreements with class action waivers should remain mindful of contract defenses such as laches, estoppel, lack of consideration, fraud, duress, unconscionability, and waiver. Employers need to consider whether these agreements will apply to current employees or solely to new hires, as the applicable rules may be different. Another consideration here is also whether a new class action waiver can be applied to any currently pending class or collective action.

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[26] *Id.*

[27] See discussion *infra*, Part III.B.

1. *Existence Of A Valid Contract*

As an initial matter, because arbitration agreements are contracts, the legality of whether a contract exists is reviewed under applicable state law. Therefore, there are varying types of acceptable arbitration agreements. In fact, depending on the state, courts have found pre-dispute arbitration agreements binding when contained in an offer letter, an application for employment, an employee handbook, stand-alone documents, or on benefit forms.

On the other hand, some states are not as quick to find that a contract exists. Accordingly, it is important that a company's agreement actually be considered a contract under the appropriate state law, which generally requires that the parties have the capacity to contract, that the parties mutually assent to the terms, and that valid consideration exists.

In addition to electronic signature and other mutuality concerns discussed *infra*, companies should also ensure that the agreement is only signed by those employees age 18 years or older, and not by any employees with mental infirmities that prevent them from having capacity, such as those with a legal guardian.[28]

2. *Mutuality*

Pre-dispute arbitration agreements require employees to agree to arbitrate any disputes arising out of the employment relationship before any dispute arises. Therefore, some courts require that these agreements be mutually binding, meaning that the employer must also be bound to arbitrate any potential claims against employees. If not, a court may find the agreement unconscionable as being too favorable to the employer. In fact, some third-party commercial

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[28] *See* Richard A. Bales & Matthew Miller-Novak, A Minor Problem with Arbitration, 44 MCGEORGE L. REV. 339, 350 (2013) (noting that courts that have directly addressed the issue are evenly split on whether to enforce an arbitration agreement against a minor when the arbitration clause is contained within an employment contract).

arbitration groups that provide arbitrators and arbitration services require mutuality in an agreement before assisting with arbitration. Judicial Arbitration and Mediation Services ("JAMS") is one such group.

Courts have taken an even harsher view. In one recent case, despite her signing of an arbitration clause, a Jenny Craig Inc. employee filed a lawsuit against her employer alleging her hours were drastically cut because of her age. There, the New Jersey appellate court held that the employee's agreement did not contain an enforceable arbitration clause because it did not specify an arbitral institution such as the American Arbitration Association (AAA) or JAMS.[29] In another case, an appellate court held an arbitration clause unenforceable when the arbitration process specified was not available at all when the parties executed the agreement.[30] Both cases present a clear lesson regarding enforcement. By not clearly specifying a forum or general process for the proceeding, courts may determine that the parties lacked a "meeting of the minds" sufficient to render the entire clause unenforceable.

Further, as discussed in more detail *infra*, employers should identify the claims covered by the agreement and should not restrict employees from filing charges with administrative agencies. Employers can also demonstrate mutuality by including provisions applicable to both parties, such as those providing for immediate provisional judicial relief. Such a provision should provide both parties with the ability to request temporary restraining orders or preliminary injunctive relief from courts in order to preserve the status quo in a dispute.

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[29] *Flanzman v. Jenny Craig, Inc.*, 2018 N.J. Super. 156 (N.J. Super. Ct. App. Div. 2018).

[30] *See Klein v. Emeritus at Emerson*, 446 N.J. Super. 545, 552-53 (N.J. Super. Ct. App. Div. 2016) (noting that when the parties contracted, their exclusive forum for arbitration was no longer available and, there being no agreement to arbitrate in any other forum, arbitration could not be compelled).

3. *Consideration*

Consideration must exist in every employment contract. Although federal law governs the arbitration agreement, whether consideration exists to create a valid contract is a state law determination.

Because agreements to arbitrate are governed by state contract law, the level of consideration necessary to demonstrate a valid agreement varies as applied to (1) applicants, (2) new employees, and (3) current employees.[31] For applicants, the employer's consideration of the employee for employment generally constitutes sufficient consideration with regard to an arbitration provision contained in a job application.[32] Likewise, courts in many states often view the employer's initial offer of employment to the applicant to constitute sufficient consideration for new employees.[33]

However, for *existing* employees, state laws can differ significantly. Although the most controversial form of consideration, the majority view among the states is that continued at-will employment constitutes sufficient consideration.[34] However, several state courts have held

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[31] Margaret Hershiser, Dan Wintz, Richard Vroman, Ryan Sevcik, *Conference Room Over Courtroom: the Enforceability of Arbitration Programmes in the US Workplace*, WESTLAW (Dec. 1, 2014), https://tmsnrt.rs/2S63v7d [hereinafter *Enforceability of Arbitration*].

[32] *See Adkins v. Labor Ready, Inc.,* 303 F.3d 496, 501 (4th Cir. 2002); *Henry v. Pizza Hut of Am., Inc.*, No. 607CV-01128-ORL-DAB, 2007 WL 2827722, at *5 (M.D. Fla. Sept. 27, 2007); *Martindale v. Sandvik, Inc.*, No. A-10-01 (N.J. July 17, 2002); *but see Marzette v. Anheuser-Busch, Inc.*, 371 S.W.3d 49, 52 (Mo. Ct. App. 2012) (holding an employer's willingness to consider an applicant for employment is insufficient consideration to support a prospective employee's waiver of the right to a jury trial).

[33] *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 368 (7th Cir. 1999).

[34] *See e.g.*, *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 293 (W. Va. 2018) (holding that a mutual agreement to arbitrate with an existing employee is sufficient consideration to support an arbitration agreement); *Chiafos v. Restaurant Depot*, LLC, 2009 WL 2778077 (D. Minn. 2009) (continued employment constitutes sufficient consideration for agreements to arbitrate); *Grimes v. GHSW Enterprises*, LLC, 556 S.W.3d 576, 581 (Ky. 2018) (an exchange of promises "to submit equally to arbitration" constitutes adequate consideration to sustain an arbitration clause); *Grose v. Didi, LLC,* No. CV176079775S, 2018 WL 2137773, at *3 (Conn. Super. Ct. Apr. 11, 2018) (noting that the defendant's promise to continue employing the plaintiff also serves as sufficient consideration."); *Marzulli v. Tenet S.C., Inc.*, No. 2015-002363, 2018 WL 1531507, at *4 (S.C. Ct. App. Mar. 28, 2018) (noting that, "we have held continued employment sufficient consideration to support arbitration agreements."); *Barker v.*

otherwise. In those states, when existing employees sign a "midstream" arbitration agreement and class action waiver, the employer must offer something above and beyond continued at- will employment in order to support the new obligations.[35] Common examples of valid consideration in an employee arbitration agreement beyond continued employment generally include other forms of consideration such as mutuality of the arbitration commitment, specialized training, increased benefits, additional vacation days, a promotion, a raise, or a cash bonus.

From a best practices standpoint, where executing the arbitration agreement at the beginning of employment is not possible, the employer should strongly consider whether it needs to extend additional consideration at the time of signing in order to support its enforceability. That agreement should specify exactly what additional consideration the employee is receiving, as some courts may even exclude an employer's evidence of additional consideration not referenced specifically in the agreement itself under the parol evidence rule.[36]

We recommend carefully considering whether to roll out any new arbitration agreement with a class action waiver with existing employees. Among others discussed above, a particular concern here is that rolling out any new agreement with existing employees may cause the

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Golf U.S.A., Inc., 154 F.3d 788, 792 (8th Cir. 1998) (concluding that under Oklahoma law, "mutuality of obligation is not required for arbitration clauses so long as the contract as a whole is supported by consideration"); *Avid Engineering, Inc. v. Orlando Marketplace Ltd.*, 809 So.2d 1, 4 (Fla. Dist. Ct. App. 2001) ("Because there was sufficient consideration to support the entire contract, the arbitration provision was not void for lack of mutuality of obligation"); *W.L. Jorden & Co. v. Blythe Indus., Inc.*, 702 F. Supp. 282, 284 (N.D. Ga. 1988) (holding that "where the agreement to arbitrate is integrated into a larger unitary contract, the consideration for the contract as a whole covers the arbitration clause as well.").

[35] *In re 24R, Inc.*, 324 S.W.3d 564, 566-67 (Tex. 2010) (holding that at-will employment does not preclude forming subsequent contracts, "so long as neither party relies on continued employment as consideration. . ."); *Cheek v. United Healthcare of Mid-Atl., Inc.*, 378 Md. 139, 161, (Md. Ct. App. 2003) (holding that continued employment cannot serve as consideration to support an arbitration agreement because if it could, no arbitration agreement could be found invalid for lack of consideration when performance has already occurred, no matter how illusory the agreement is); *Baker v. Bristol Care, Inc.*, 2014 Mo. LEXIS 207 (Mo. 2014) (employers cannot enforce employment arbitration agreements that merely promise continued at-will employment and include a unilateral right to modify).

[36] *See Dove Data Prod., Inc. v. DeVeaux*, No. 2008-UP-202, 2008 WL 9841167, at *5 (S.C. Ct. App. Mar. 24, 2008).

employee to go to an attorney out of fear that the employer is trying to "trick" them somehow. This could trigger litigation. Companies may also need to consider how to handle situations where existing employees are required to sign under the agreement but some refuse, which may result in having to terminate good employees. Lastly, when drafting the agreement, the law of the employer's specific state or states must be examined in order to determine the level of consideration required for enforceability purposes.

4. *Use Of Electronic Signatures*

It is clear that "[d]espite the FAA's express mandate that arbitration agreements be placed on equal footing with any other contract, judicial hostility to employment arbitration agreements remains common."[37] One area that presents potential pitfalls for employers is with regard to electronically-signed arbitration agreements. The use of electronic signatures has been subject to legal challenges, although most of these challenges tend to arise more from the practice of obtaining the signature as opposed to the legality of the signature itself.[38] In this area, employees tend to challenge arbitration agreements by claiming that they never signed them in the first place.

For example, in *Ruiz v. Moss Bros. Auto Group Inc.*, a California Court of Appeal refused to enforce an employer's arbitration agreement after the employer failed to present sufficient evidence that the plaintiff was the person who electronically signed the agreement.[39] There, the employee argued that he did not recall signing the agreement and would have remembered if he did.[40] Despite the employer's explanation that each employee was required to log into the HR system with a unique log-in ID and password in order to review and sign the agreement, the

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[37] Paul Cowie & Kevin Jackson, *Arbitration Agreements and the Use of Electronic Signatures*, 23 L. J. NEWSLETTERS EMP. L. STRATEGIST 2 (2015).
[38] *Id*.
[39] *Ruiz v. Moss Bros. Auto Group, Inc.*, No. E057529, 2014 WL 7335221 (Cal. Ct. App. Dec. 23, 2014).
[40] *Id*. at *785.

court did not find a sufficient explanation as to how such an electronic signature could only be placed by the employee at issue.[41]

By contrast, an Indiana District Court and an Ohio Court of Appeals enforced arbitration agreements with an electronic signature when adequate security procedures were found to be in place. In the Indiana case, the court enforced the agreement where the employer required the employee to click "I agree" to continue the new-hire orientation and offered an alphanumeric code as proof.[42] In the Ohio case, the employer avoided enforceability issues by requiring employees to affirmatively agree to arbitration through an electronic signature before moving from one electronic form to the next in order to complete the hiring process.[43]

Courts across the country continue to reach mixed results.[44] Keeping the evolving nature of this issue and these varying decisions in mind, best practices suggest that employers evaluate the ways in which signatures can be verified and attributed to an employee if questioned in court. Specifically, employers relying on an entirely electronic process should implement security procedures such as restricting unauthorized access to arbitration documents and requiring the use of personalized information as part of the electronic signature. If you send the agreement

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[41] *Id*. at *791.
[42] *Shimkus v. O'Charley's Inc.*, No. 1:11CV122TLS, 2011 WL 3585996 (N.D. Ind. Aug. 16, 2011).
[43] *Bell v. Hollywood Entertainment Corporation*, 2006 WL 2192053 (Ohio Ct. App. Aug. 3, 2006).
[44] *Compare Kerr v. Dillard Store Services, Inc., et al*., No. 07-2604-KHV, 2009 WL 385863 (D. Kan. Feb. 17, 2009) (refusing to enforce arbitration agreement when the employer did not have adequate security procedures restricting unauthorized access to the execution of the electronic documents); *Kaminsky v. Land Tec, Inc.*, No. F059896, 2011 BL 77072 (Cal. Ct. App., March 23, 2011) (refusing to consider an electronic document with names, but no "sound, symbol, or process" designating an electronic signature needed for a valid contract); *with Rosas v. Macy's Inc.*, No. CV11-7318PSG, 2012 BL 216913 (C.D. Cal., Aug. 24, 2012) (holding an employee's electronic signature to be binding when the agreement was presented in the context of a series of legally important tax and financial forms and the employee's personal information was required for the electronic completion of the forms); *Blake v. Murphy Oil USA, Inc.*, No. 110-CV-128-SAJAD, 2010 WL 3717245, at *3 (N.D. Miss. Sept. 14, 2010) (rejecting the plaintiff employee's argument that an electronic signature has no legal effect and granting the defendant employer's motion to compel arbitration).

electronically, include "I agree" check-boxes throughout an electronic agreement to ensure that you can demonstrate each employee's assent. The "I agree" language is *critical*.

Courts have recently found that a click box asking an employee to simply "acknowledge" an arbitration program rather than agree to it fails to unmistakably demonstrate explicit, affirmative assent.[45] Employers should also avoid "browsewrap" agreements in electronic arbitration agreements, where the terms are only accessible through a hyperlink as opposed to on the electronic display of the agreement itself. A copy of the fully executed agreement should be sent to the employee. In sum, when structured properly, electronic agreements or those requiring an electronic signature can be enforced under the FAA if the proper procedures are utilized and the employer can demonstrate assent.

5. *Unconscionability*

Litigating the enforceability of class waivers in employee arbitration agreements tends to involve arguments that the agreement is unconscionable. Under this line of analysis, an agreement will be found unenforceable if it is: (1) procedurally unconscionable and (2) substantively unconscionable. Arbitration agreements that are too favorable to the employer are generally held unenforceable as unconscionable. For this reason, the agreement must not be considered too "pro-employer."

Procedural unconscionability relates to the process of coming to the agreement. It is important to note that the employment relationship by its very nature will inherently involve some level of unequal bargaining power. However, this relationship alone does not constitute

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[45] *Skuse v. Pfizer, Inc.*, 2019 BL 14626 (N.J. Super. Ct. App. Div. Jan. 16, 2019) (finding an agreement unenforceable when it was presented to a workforce in a series of slides as a "training presentation," and the click box failed to require an explicit agreement, but rather asked the employees to "acknowledge" the program, which they would be deemed bound to if they failed to click the box and continued working for more than 60 days).

procedural unconscionability. Rather, procedural unconscionability may involve a number of factors such as a "take-it-or-leave-it" clause in the arbitration agreement, terms buried in the middle of the agreement in small font, or failure to provide the employee with a signed copy of the agreement.[46] Other circumstances of the process may also indicate procedural unconscionability, such as the manner and setting in which the agreement is signed. Notably, if the process used to obtain the employees signature is unfair, a court could determine that the agreement is unenforceable.

For example, in *Billingsley v. Citi Trends, Inc*., the Eleventh Circuit refused to enforce arbitration agreements that were entered into by store managers while FLSA litigation was already pending against the employer and which bound the store managers to arbitrate any FLSA claims.[47] There, the court noted that the agreements were gathered in a "blitzkrieg fashion" through "back-room" meetings that were "interrogation-like."[48] Specifically, the human resources representative who met with the store managers also advised the employer in its employment decisions—a condition the store managers were aware of—and the store managers were informed that the purpose of the meetings concerned the issuance of a new employee handbook instead of the company's new ADR policy.[49] The court found that these meetings interfered with the store managers' ability to make an informed choice as to whether to participate in the FLSA collective action.[50] Under those circumstances, the court permitted any potential plaintiffs who felt that they signed the arbitration agreement under duress to opt-in to the class action.[51]

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[46] *Enforceability of Arbitration*, *supra* note 32.
[47] *Billingsley v. Citi Trends, Inc.*, 560 F. App'x 914, 924 (11th Cir. 2014).
[48] *Id*. at 919.
[49] *Id*.
[50] *Id*. at 921.
[51] *Id*. at 924.

With decisions like *Billingsley* in mind, before signing the employer's arbitration agreement, employees should be given an opportunity to review the agreement, ask questions about the terms, and to consult an attorney. Lastly, because the educational background and level of sophistication of employees might vary, the meaning and consequences of the agreement should be fully explained in plain language. At a fundamental level, these agreements should explain that the parties are waiving their right to pursue claims in court and that the arbitrator's decision will be final and binding on both parties.

To limit a finding of procedural unconscionability, employers should also permit employees to opt out of the employer's agreement without risk to their continued employment. Employees ***should not*** be terminated if they opt out. Several courts have declined to find arbitration provisions procedurally unconscionable where an opt-out clause was included in the arbitration agreement.[52] The presence of an opt-out clause does not automatically prevent a judge from determining that an arbitration agreement is unconscionable. However, to minimize the risk of a finding of unconscionability, the employer should include this provision in bold face print or in all capital letters to satisfy varying state law requirements and should provide a rejection period within a reasonable period of time following its receipt, such as 30 days.

On the other hand, terms or conditions courts have deemed substantively unconscionable in the employment context include, but are not limited to:

- limiting discovery mechanisms, especially through overly broad confidentiality provisions;
- shortening or eliminating the statute of limitations for claims or eliminating forms of recovery available;
- limiting the ability to recover punitive or other damages;

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[52] *See e.g., Varon v. Uber Technologies Inc.*, 2016 WL 1752835, at *1 (D. Md. May 3, 2016); *Suarez v. Uber Technologies Inc.*, 2016 WL 2348706, at *1 (M.D. Fla. May 4, 2016).

- terms rendering the agreement illusory, such as retaining the unilateral right to modify or revise the agreement;
- lack of mutuality;
- requiring employees to split the arbitration fees with the employer or to front the costs of arbitration (except initial filing fees);[53]
- controlling who the arbitrator will be and not allowing any input by the employee; and
- excessively one-sided or oppressive rules regarding how the arbitration will be conducted.

To avoid a finding of substantive unconscionability, employers should agree to cover many or all costs of arbitration, to select a neutral procedure for choosing an arbitrator, and to permit the employee to obtain the exact same recovery or other relief allowed if that claim were to be pursued in court. Employers should also permit the employee to some form of discovery when pursuing a claim under the arbitration process.[54]

Additionally, employers might specify what rules will apply, such as the number of arbitrators, how the arbitrator(s) will be selected, if applicable, whether the decision will be unanimous, and where the arbitration will take place. However, in addition to the cost of self-administrated arbitration programs, a lack of mutuality can ultimately render them unenforceable. Accordingly, employers may prefer to specify that arbitration will proceed under the rules and procedures established by the AAA or JAMS.[55]

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[53] *See Greentree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

[54] *See Ramos v. The Superior Court of the State of California for the County of San Francisco*, No. CGC-17-561025 (Cal. App. 1 Dist. Nov. 2, 2018) (holding unenforceable as unconscionable a Winston & Strawn LLP arbitration agreement with a former income law partner after finding the agreement would prohibit the partner from attempting to "informally contact or interview any witnesses outside the formal discovery process" and would unreasonably dissuade other plaintiffs from filing a claim of discrimination).

[55] *Use and Enforceability*, *supra* note 6.

Employers should also choose a local arbitrator as some states prohibit arbitration agreements that require employees to travel out-of-state for arbitration.[56] If not provided under the rules of the applicable arbitration association, employers should consider whether to include the use of an appellate arbitrator.

Lastly, employers should consider including a "severability" clause in the arbitration agreement, which permits the court to strike any provision rendering the agreement unconscionable rather than invalidating it as a whole. First, the validity of arbitration agreements is a constantly evolving area of the law. Future court decisions may shed more light on the permissibility of certain terms. Second, this clause can be carefully drafted in a manner that excludes its application to the class waiver provision in the agreement.

6. *Class Action Waiver*

Most employers should include a class action waiver in their agreement. The recent Supreme Court case *Lamps Plus Inc. v. Varela*, illustrates this rather simple, but critical point.[57]

In *Lamps Plus*, the Court faced the issue of whether class arbitration is permitted when the parties' agreement contains an arbitration clause which is silent as to whether the parties authorized the arbitrator to conduct a class arbitration. Before reaching the U.S. Supreme Court, a 2-1 Ninth Circuit panel affirmed the district court's ruling allowing class arbitration claims to proceed, agreeing with the lower court that ambiguous language in the contract regarding class arbitration had to be construed against the drafter of the contract—in this case—Lamps Plus. While the Court focused on the lack of express language pertaining to class arbitration, several justices also connected this contractual issue to due process concerns. Specifically, the justices

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[56] Steven Gallagher, *Arbitration Agreements: Tips for Enforceability*, LEXOLOGY (Dec. 11, 2018), https://www.lexology.com/library/detail.aspx?g=a3309b72-c475-4e96-8837-eaf82926c60f.
[57] *See Lamps Plus, Inc. v. Varela*, No. 17-988 (U.S. argued Oct. 29, 2018).

inquired about, and may ultimately address, an arbitrator's power to bind absent parties to any type of representative ruling.

Ultimately, the Court could require, as a matter of due process, some basis for determining express consent by the absent parties to having all of the class members' claims determined through arbitration. Simply put, "unless every class member's arbitration agreement unambiguously authorized an arbitrator selected by a different class member to adjudicate the claims of absent class members, then the absent class members could not be said to have agreed to class arbitration (unless they separately 'opted in' to the class arbitration)."

With this case in mind, any arbitration agreement with a class action waiver should expressly state that the arbitrator is not given authority to conduct class arbitration. If a company's arbitration agreement does not already include that language, it should certainly be included in future versions.[58] Notwithstanding the employer's benefit derived from avoiding the cost of litigation, plaintiffs' attorneys are not as likely to bring suit against an employer in the first place if they cannot do so on a collective or class action basis. Depending on how the Court rules, employers should also consider an even more rigorous update of their arbitration agreements to include a class action waiver in a manner that addresses the due process concerns of absent class members raised in *Lamps Plus*.

Furthermore, although not at issue in *Lamps Plus*, employers in most states should avoid including a class action waiver in their employee handbook. As an initial matter, the goal of these agreements is enforceability. Therefore, the agreement should be included in a standalone document signed by both the employer and employee in order to demonstrate mutual assent.

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[58] Richard Reibstein, *INSIGHT: Ten Tips for Drafting Arbitration Clauses with Class Action Waivers in Independent Contractor Agreements*, BLOOMBERG BNA, (Nov. 8, 2018), https://www.bna.com/insight-ten-tips-n57982093731/.

Additionally, employee handbooks typically disclaim the creation of any contract of employment. As a result, employers should avoid placing language within the handbook that can be construed as creating a mandatory agreement. Doing so could not only contradict the at-will employment statements in the handbook, and thus alter at-will status, but could also create a situation where the enforceability of the agreement can be challenged.

7. *Waiver As A Contract Argument To Invalidate The Agreement*

Employees also possess the ability to invalidate the agreement on the basis of the employer's waiver of its right to arbitrate the underlying claim. Therefore, employers are well-served by moving to compel arbitration early in the litigation.

While no bright-line rule exists, waiver has been found in a variety of contexts. Generally, activity indicating acts inconsistent with, or the intent to repudiate, the right to arbitrate demonstrates waiver on the part of the employer. While the language used among the courts differs, waiver is typically found where the defendant employer in some way or another has "invoked the judicial process" and the plaintiff would be prejudiced by arbitration.[59]

For example, when a defendant filed a motion to dismiss and answers (as opposed to affirmative defenses, counterclaims, or summary judgment motions), the court held that no waiver of the right to arbitrate occurred because the defendant did not seek to litigate.[60] On the other hand, participating in a lawsuit without seeking arbitration or withdrawing a motion to compel has been found to demonstrate waiver.[61] Similarly, an employer seeking to gain a strategic advantage from formal discovery before filing a motion to compel demonstrates waiver. Several

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[59] *Trevino v. Select Portfolio Servicing, Inc.* (In re Jose Sr. Trevino), Adv. Pro. No. 16-7024, 2018 Bankr. LEXIS 3605 (Bankr. S.D. Tex. Nov. 14, 2018).

[60] *Id*.

[61] Charles F. Forer, *Losing the Right to Arbitrate by Waiving the Right to Arbitrate*, THE LEGAL INTELLIGENCER (Oct. 22, 2018), https://www.law.com/thelegalintelligencer/2018/10/22/losing-the-right-to-arbitrate-by-waiving-the-right-to-arbitrate/.

courts have also held that a party who fails to advance required arbitration fees that results in the arbitration provider's dismissal of the arbitration claim deprives the other party of the benefit" of the agreement, thereby waiving that party's right to arbitrate the underlying claim.[62]

Finally, employers should also keep in mind that in a variety of factual and procedural contexts, several courts have held that the right to arbitrate absent class members' claims can be waived if the issue is not raised prior to class certification.[63] Employers can potentially avoid such a finding by putting the plaintiff and court on notice of the right to arbitrate early on in order to avoid concerns about "gamesmanship," which many courts have expressed concerns about before determining that waiver occurred.[64]

Based on a review of the case law on this issue, best practices suggest that employers raise the right to arbitrate as quickly as possible to avoid a finding of waiver of the right to arbitrate. In doing so, however, the employer should also resist initiating any action that may be construed as participation in a lawsuit.

8. *Non-Waivable Claims*

Despite employees' ability to waive their right to file a lawsuit, some courts and administrative agencies take the position that employees may not waive their right to file administrative claims. Agencies that take this position include the Equal Employment Opportunity Commission (EEOC) and the NLRB.[65] The rationale behind the position of these agencies is that

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[62] *Id*.

[63] *See, e.g., In re Cox*, 790 F.3d 1112 (10th Cir. 2015); *In re Citigroup, Inc.*, 376 F.3d 23 (1st Cir. 2004); *Edwards v. First Am. Corp.*, 289 F.R.D. 296 (C.D. Cal. 2012); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237 (S.D.N.Y. 2005); *Elliott v. KB Home N.C., Inc.*, 752 S.E.2d 694 (N.C. Ct. App. 2013), cert. denied, 135 S. Ct. 494 (2014).

[64] *See, e.g., In re Cox*, 790 F.3d at 1119.

[65] *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 297-98 (2002) (indicating that an agreement to arbitrate discrimination claims did not preclude the EEOC from pursuing its own action against an employer).

"certain statutes serve to protect broader public policy considerations that extend beyond individual claims."[66]

When drafting, the agreement should make clear that an employee has a right to pursue employment-related benefits, such as workers' compensation or unemployment compensation benefits outside of arbitration. Employers should note the importance of including disclaiming language with respect to administrative claims that can be filed with the EEOC, NLRB, or a similar administrative agency. Such language might reference the employee's ability to pursue claims with administrative agencies but that they waive the right to obtain monetary damages to ensure that the mandatory arbitration agreements is upheld.[67] Further, when employees file a charge and receive a right-to-sue letter, the employer may still require the employee to arbitrate following the issuance of the right-to-sue letter.[68] As a result, the arbitration agreement should clearly indicate that arbitration is the sole and exclusive forum for the resolution of any claims subject to the employee's right-to-sue following the administrative process.[69]

9. *Governing Body Over Disputes And Arbitrability*

Generally, courts have held that the arbitrator will decide whether the arbitration agreement (including the class action waiver) covers a particular dispute or is otherwise enforceable. The incorporation of AAA rules has been found to trigger this result.

Keeping this in mind, employers should consider whether to include a "delegation clause" in the agreement specifying that the court, and not the arbitrator, will make this decision.

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[66] Stephen W. Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age and ADA Claims*, 37 ST. LOUIS U. L.J. 985, 990-93 (1993).
[67] *Id*.
[68] *See 14 Penn Plaza, LLC v Pyett*, 556 U.S. 247 (2009). However, note that the investigating agency may still bring litigation.
[69] Skrainka, *supra* note 67.

Employers may ultimately have more options to appeal any adverse decision by including such a clause. Federal courts are also more likely to enforce such a provision in light of *Epic Systems*.

On the other hand, when employers include a provision specifying that arbitrators should determine "who decides what is arbitrable," they can also rest easy knowing that courts will now enforce these provisions in no uncertain terms. Specifically, *Henry Schein Inc. v. Archer and White Sales Inc.*, decided by the U.S. Supreme Court in early 2019, cleared up a circuit split on the issue of delegation clauses as they relate to the enforceability of parties' delegations of arbitrability to an arbitrator. The *Henry Schein* ruling makes clear that where the parties elect to delegate the arbitrability issue to an arbitrator, the courts must respect that decision—even where it is clear on the face of the lawsuit that such claims are not arbitrable.[70] This recent decision undoubtedly solidifies employers' and employees' right to contract to have arbitrators decide not only the underlying merits of their disputes, but also the question of whether such disputes are arbitrable in the first place.

IV. Considerations For Employers Seeking To Implement Arbitration Agreements

Arbitration agreements present both pros and cons for employers seeking to implement them. Ultimately, whether the implementation of an arbitration agreement makes sense for the employer may depend upon the nature of its business and previous exposure to litigation.

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[70] Joshua Nadreau & Sara Zimmerman, *Grounded! Supreme Court Rejects Lower Courts' Ability to Axe Arbitration Agreements,* FISHER & PHILLIPS LLP (Jan. 18, 2019), https://www.fisherphillips.com/resources-alerts-grounded-supreme-court-rejects-lower-courts-ability.

A. Pros Of Arbitration Agreements

In the right circumstances, arbitration presents many advantages: quicker results, simpler procedures, less costs for employers and lawyers, lower risk of "sky-high" damage awards, and more confidentiality.[71]

First, from a public relations standpoint, many employers feel that violating employee rights is bad business, and thus seek to resolve claims with the minimum amount of transaction costs. As a result many companies prefer implementing mandatory arbitration programs to limit their exposure to class and collective actions and to quickly resolve disputes. As compared to litigation, most employers report faster and more efficient resolution of workplace grievances and concerns with a greater ability to spend time and money resolving actual workplace disputes as opposed to paying class action plaintiffs' lawyers. From an exposure standpoint, arbitration also reduces the risk of incurring large consequential and punitive damages.[72]

Second, some employers also believe there is increased predictability with arbitration, where trained legal professionals (often times retired judges) dictate the results of employment disputes rather than a jury. Third, many employers also prefer arbitration because the process is private and the proceedings and final outcome are more likely to remain outside of the public eye. Compared to litigation, a particular advantage here is a reduction in the risk of damage to the company's brand as well as a reduction in the possibility of copycat plaintiffs.

As for employees, arbitration provides a quick, cost-effective, and informal means of addressing a dispute with an employer. Procedurally, arbitration can actually benefit employees with legitimate claims for recourse. For example, ADA claims tend to fare poorly in the courts

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[71] Skrainka, *supra* note 67.
[72] *Id.*

because of restrictive interpretations given to the statute by the U.S. Supreme Court, while employment discrimination plaintiffs also remain less likely than others to obtain an early end to their case.[73]

Finally, employers should consider the social utility of arbitration agreements in their day-to-day operations. Employers operating without an arbitration agreement may ultimately have to weigh the difficult decision of firing an underperforming employee for fear of being hit with a six- or seven-figure judgment or retaining that employee and incur, among other workplace effects, poor quality work and lost productivity. What's more, a single disgruntled former employee can turn an individual claim into an expensive, public, and burdensome lawsuit—in some cases a class or collective action. Arbitration agreements with a class waiver clearly limit this exposure, ensuring that these claims will not bankrupt the employer and cause other employees to lose their jobs. With this in mind, employers operating without an arbitration agreement should consider whether these benefits outweigh the damages it could ultimately be exposed to if operating in the traditional legal system.

B. Cons Of Arbitration Agreements

Despite the advantages, arbitration does present several negatives and companies should certainly not view the process as a one-size-fits-all approach.

Arbitration presents several procedural challenges. Arbitration proceedings typically require a hearing and are less likely to be decided by a dispositive motion than court proceedings. Although a provision may be included to allow dispositive motions, such as motions to dismiss and summary judgment motions, it is unlikely that an arbitration will be resolved through a

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[73] *See* Kevin M. Clermont & Stewart J. Schwab, *Disability Agency Urges Congress to "Right" ADA Through Legislation*, 3 HARV. L. & POL'Y REV. 103, 122 (2009).

motion. Similarly, arbitrations do not lend themselves to offers of judgment. For both employers and employees, compelling discovery can be difficult without the enforcement powers of a judge. There can also be difficulties in compelling non-party cooperation in discovery.

Within these proceedings, arbitrators are sometimes believed to be likely to "split-the-baby" rather than making tough decisions in favor of employers, even if the law is clearly on your side. Of course, the employer must also always consider the possibility that it may ultimately lose a legal proceeding. When arbitration is utilized, appellate options become limited. As a result, an adverse award could be used as a stepping stone for the plaintiff's attorney in filing similar claims for other employees moving forward.

Further, while arbitration is generally thought to be cheaper than litigation, this is not always the case and in some instances arbitration can actually be quite expensive. In arbitration, companies must pay arbitration fees associated with the case to ensure that arbitration is not cost-prohibitive for an employee. In this way, some employers tend to feel that by requiring arbitration, employees are more likely to sue as they do not need an attorney and can avoid paying fees. In some cases, the filing fee alone, which some arbitrators require to be paid by the employer, may actually exceed the filing fees for federal court. For example, the nonrefundable filing fee for an individual employee filing a claim is capped by the FAA at $300 and the employer must pay a $1,900 filing fee and a $750 case management fee at the start of a case.[74] Employers who arbitrate will ultimately be required to pay these fees for each individual claim filed by a worker covered by a class or collective action waiver.[75]

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[74] *Id.*
[75] *Id.*

Moreover, a growing strategy among plaintiffs' lawyers in reaction to companies' use of class action waivers, especially post-*Epic Systems*, is the filing of dozens of individual arbitrations at a time.[76] As a result, the employer is on the hook for expensive arbitrator fees in many different jurisdictions. This "death-by-a-thousand-cuts" strategy can be costly and, ultimately, it allows plaintiffs' attorneys to gain leverage for a settlement.

The most recent victims of this strategy are Newport Beach-based Chipotle Mexican Grill and Buffalo Wild Wings, the latter of which was subject to a strikingly similar attack earlier this year.[77] Chipotle appeared to have won a major victory back in August 2018 after a federal judge sent more than 2,800 workers' claims of wage theft to individual arbitration. The victory in court backfired. Workers are flooding Chipotle with arbitration claims, with 150 already filed. More than 700 claimants also retained a single plaintiffs' attorney involved in the prior lawsuit. As a result, Chipotle could be facing thousands of individual arbitration claims spread across the country, almost all of the expenses of which it will have to bear itself—potentially tens of thousands of dollars per case.

Lastly, perhaps one of the most recent concerns unique to arbitration agreements relates to public relations. Employers have become increasingly aware of the national spotlight currently placed upon employee mistreatment, which has brought on waves of new litigation and union disputes. These disputes have occurred in contexts ranging from the #MeToo movement and the

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[76] Darcey Groden, *Workplace Law Predictions for 2019*, FISHER & PHILLIPS LLP, https://www.fisherphillips.com/resources-newsletters-article-workplace-law-predictions-for-2019.
[77] Michael Hiltzik, *Chipotle May Have Outsmarted Itself By Blocking Thousands of Employee Lawsuits Over Wage Theft*, L.A. TIMES (Jan. 4, 2019), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-chipotle-20190104-story.html; Ben Penn, *Buffalo Wild Wings Case Tests Future of Class Action Waivers*, BLOOMBERG BNA, https://www.bna.com/buffalo-wild-wings-n73014477328/.

LGBT context to the implementation of Artificial Intelligence in the workplace and the growing gig economy.[78]

Employers must consider several factors with regard to how and whether to address this growing public relations problem. First, while particularly relevant to Silicon Valley companies, businesses with two common traits are most at risk: (1) a consumer-focused business model that caters to public opinion and (2) a highly skilled workforce with the ability to demand concessions. Second, if the employer believes this optics problem to be particularly significant, like companies such as Google, Facebook, Airbnb, Uber, and Microsoft have, the employer can consider a carve-out for certain types of claims, such as sexual harassment. Lastly, because this trend among employers is so closely tethered to the #MeToo movement's ultimate goal of rooting out serial harassers that critics increasingly argue arbitration shields from the public, it is unclear at this stage whether this trend actually moves outside of Silicon Valley and into other industries throughout the country.

If it is determined that imposing a company-wide arbitration or class action waiver requirement may be negatively received, the company should consider whether, or even when, to implement. The company can potentially offset a potential optics problem by unveiling the new policy during a bonus rollout or an annual salary review.[79]

On balance, while there are some potential negatives, many employers continue to find arbitration to be the best choice for resolving employee disputes. Whether or not to implement a new arbitration agreement or expand an existing one to include a class or collective action

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[78] J. Hagood Tighe & Grant M. Wills, *"People Before Robots"—Possible Strike Over Driverless Buses*, FISHER & PHILLIPS LLP (Sept. 21, 2018), https://www.fisherphillips.com/autonomous-vehicles-blog/people-before-robots-possible-strike-over-driverless.

[79] Irving M. Geslewitz, *U.S. Supreme Court Verdict: Arbitration and Class Action Waiver Agreements in the Workplace are Valid*, NAT'L L. REV. (July 10, 2018), https://www.natlawreview.com/article/us-supreme-court-verdict-arbitration-and-class-action-waiver-agreements-workplace.

waiver is ultimately a business-centered decision based on a consideration of these aforementioned pros and cons.

C. Current Legislation And Judicial Advancements At The State And Federal Levels

Although employers have a clearer picture of where their class action waivers stand post-*Epic Systems*, the law at the state and federal levels regarding this issue is constantly evolving.

As noted, the media attention, social media campaigns, and large-scale employee activism surrounding the #MeToo movement and others like it is currently a driving force in politics. Several state legislatures have already attempted to ban mandatory arbitration of sexual harassment claims. Washington, Maryland, and New York each passed laws prohibiting mandatory arbitration in this context. However, those laws are either explicitly or presumptively preempted by the Federal Arbitration Act. The following states have considered or are now considering similar legislation: Arizona, Indiana, Kansas, Louisiana, Maryland Massachusetts, Minnesota, Missouri, New Jersey, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia.

On the federal side of the equation, a unanimous block of attorneys general from all 50 states and the District of Columbia recently asked federal lawmakers to prohibit the use of mandatory arbitration agreements when it comes to claims of sexual harassment.[80] Their letter to Congress points out that by ridding the nation of arbitration agreements in sexual harassment cases, which typically include secrecy clauses, Congress can "put a stop to the culture of silence"

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[80] Richard Meneghello, *States Ask Congress to Prohibit Arbitration in Sex Harassment Claims*, FISHER & PHILLIPS LLP (Feb. 13, 2018), https://www.fisherphillips.com/resources-alerts-states-ask-congress-to-prohibit-arbitration-in.

surrounding these claims.[81] If Congress decides to take the lead on this issue, agreements will need to be updated accordingly.

As for judicial advancements, the Kentucky Supreme Court just outlawed mandatory arbitration agreements for employees, making the Bluegrass State the first in the nation to do so.[82] A successful appeal to the U.S. Supreme Court is all but guaranteed although there are strong arguments that the issue is preempted by the FAA. Unlike employers in other states, those in Kentucky should ensure that their arbitration agreements are not mandatory, potentially through an opt-out provision.

In sum, in addition to state contract defenses, legislative and judicial developments over the next few years will likely play a growing role in the enforceability of these agreements in the future.

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[81] *Id.*

[82] Thomas Birchfield, *Kentucky Becomes First State to Prohibit Mandatory Arbitration as a Condition of Employment*, FISHER & PHILLIPS LLP (Oct. 5, 2018), https://www.fisherphillips.com/resources-alerts-kentucky-becomes-first-state-to-prohibit-mandatory.