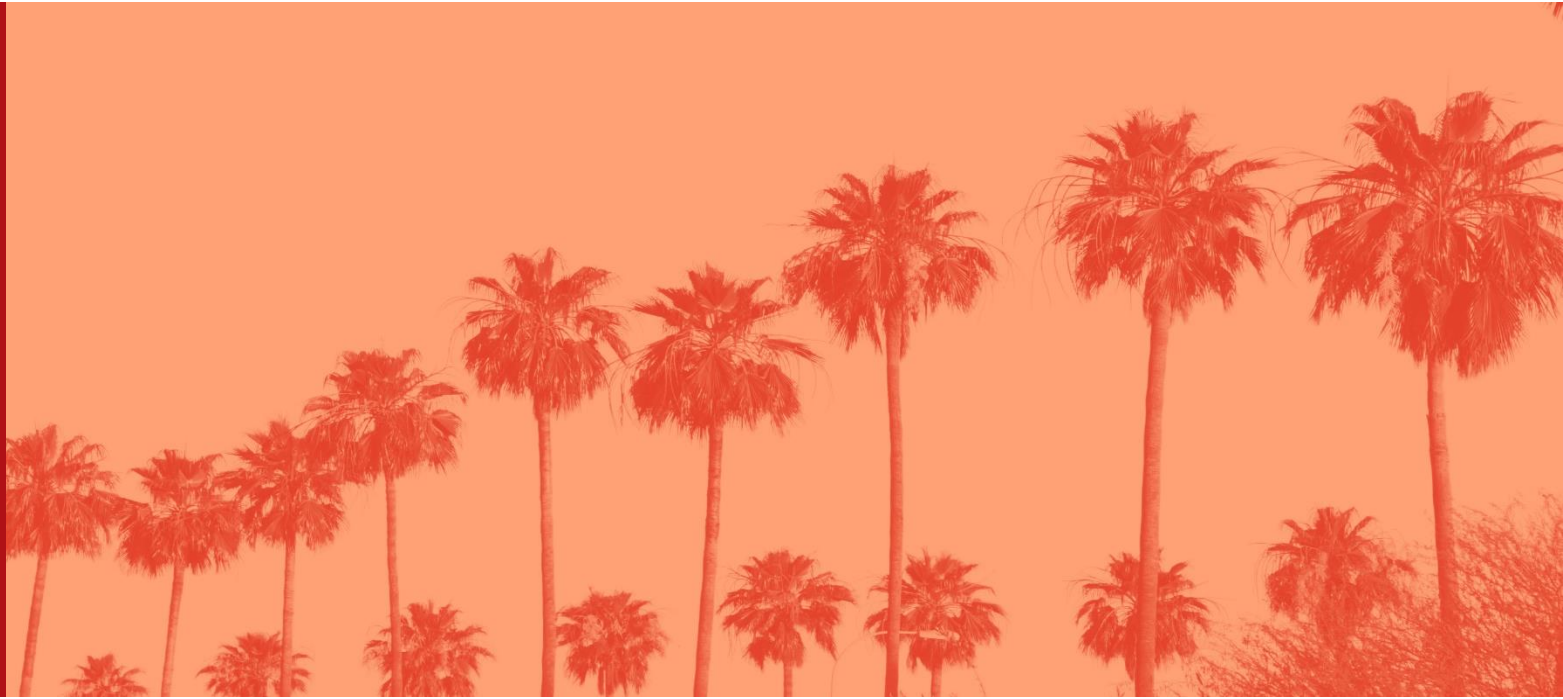


LOOKING AHEAD

- > Hagood Tighe – Columbia
- > Ryan Mulally – Domino's Pizza LLC



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Arbitration And Class Action Waivers: The Panacea Some Say They Are?

Overview

- > Review of how arbitration works and the FAA
- > Effect of *Epic Systems* on enforceability of arbitration agreements
- > State law consideration issues
- > Arbitration agreement provisions
- > Pros and cons of arbitration agreements
- > Legislative and judicial advancements
- > FAQs

How Arbitration Works

- > Private process to resolve disputes
- > Private arbitrator acts as the judge
- > No jury
- > Final and binding decision
- > Enforceable in court
- > Limited appeals

Federal Arbitration Act (“FAA”)

- > Express purpose of ensuring enforceability of arbitration agreements
- > Preempts state laws that are inconsistent with it
- > Either party can ask court to compel arbitration if FAA applies
- > Under FAA, arbitration clauses as condition of employment has doubled since early 2000s
- > Number likely to increase following *Epic Systems* decision
- > Class action waivers without arbitration agreements

Epic Systems v. Lewis

- > Plaintiffs' attorneys challenged class action waivers arguing that they violated the National Labor Relations Act ("NLRA")
- > Obama Board agreed and found class action waivers unlawful
- > Most federal courts disagreed, finding that the FAA preempted the NLRA

Epic Systems v. Lewis

- > Supreme Court Decision:
 - > 5-4 Decision- Upholding class action waivers under FAA
 - > Arbitration agreements must be enforced according to their terms
 - > Consistent with several Supreme Court decisions over last several years enforcing parties' arbitration agreements
 - > "Liberal federal policy favoring arbitration"
 - > Decision does not affect **state law considerations** related to arbitration agreements
 - > Ex: consideration, unconscionability, waiver, fraud, duress, etc.

State Law Consideration Issues

- > New Employees
 - > Initial job offer = consideration
 - > Can be condition of employment
 - > Recommend having employees and employers sign agreement
- > Existing Employees
 - > Majority View: Continued employment constitutes sufficient consideration for arbitration agreement
 - > Minority View: Consideration above and beyond continued employment needed
 - > Ex: Mutuality, increased benefits, additional vacation, promotion, raise, cash bonus, etc.
- > Depending on turnover, consider rolling out only to new employees to avoid issues

State Law Unconscionability

- > Opt-out procedures
 - > Makes argument for enforcement easier
 - > May be required in some jurisdictions
 - > Cannot fire employees who opt out
- > Statute of limitations
 - > Shortening the statute of limitations for claims or eliminating forms of recovery may limit enforceability
- > Illusory agreement
 - > Retaining the right to modify or revise the agreement may limit enforceability in some states

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.
 - > Incorporation of AAA rules has been found to trigger this result.
- > Consider whether to include a provision in the agreement specifying that the court, not the arbitrator, will make this decision
 - > Court more likely to enforce in light of *Epic Systems*
 - > More options to appeal adverse decision

Arbitrability

- > *Henry Schein Inc. v. Archer and White Sales Inc.*
 - > Most recent S. Ct. ruling on arbitration clauses (Jan. 8, 2019).
 - > Delegation clause might specify that arbitrator determines “who decides what is arbitrable”
 - > Lower courts must now respect that decision

Other Arbitration Provisions

- > Poison pill
- > Exclusions from agreement (NLRB, EEOC, etc.)
- > Arbitrator qualifications
- > Appellate Panel
- > Provisional injunctive relief prior to arbitration

Pros and Cons of Arbitration Agreements

> *Pros*

- > Class action waiver can avoid costly litigation
- > Arbitration can be less expensive than litigation (limited discovery)
- > Faster decisions
- > Greater predictability - maybe
- > Arbitration decisions are not as public as court decisions

Pros and Cons of Arbitration Agreements

> *Cons*

- > Arbitration can be expensive (AAA fees, arbitrator fees)
- > Arbitrators tend to split the baby
- > Less likely to prevail on motion to dismiss or summary judgment
- > May end up with multiple arbitrations
 - > Ex: Several restaurant chains currently facing hundreds of arbitrations. Thousands remain possible.
- > Growing PR issues
 - > #MeToo movement creating PR nightmare for companies using arbitration for sexual harassment claims

Legislative and Judicial Advancements

> Federal and State Level

- > #MeToo driving the debate
- > WA, MD, and NY recently passed laws prohibiting mandatory arbitration for sexual harassment claims
 - > Preempted by FAA

> Judicial Advancements

- > KY first state in nation to outlaw mandatory arbitration agreements

Arbitration Communications

- > Before rolling out arbitration agreement you may consider:
 - > Handbook policy explaining agreement
 - > New hire checklist
 - > Applicant acknowledgment
- > Still need the arbitration agreement signed by each employee (and employer)

Arbitration FAQs

- > Can I make employees sign a class action waiver without an arbitration agreement?
- > How long does it take for my arbitration program to be useful against class and collective action cases?
- > Should I refuse to hire employees that don't sign the arbitration agreement?
- > Can employees sign arbitration agreements electronically?

Arbitration FAQs (continued)

- > Can I just copy the arbitration agreement that another company is using?
- > Can I roll out an arbitration agreement during litigation?

FINAL QUESTIONS



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THANK YOU

FOR JOINING US

Hagood Tighe
htighe@fisherphillips.com
803-255-0000
Columbia, SC

Ryan Mulally
Vice President and Assistant
General Counsel
Domino's Pizza LLC
Ryan.Mulally@dominos.com