The Latest Trends in Preventing and Defending Class and Collective Actions

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Introduction

This white paper explores four key areas regarding wage and hour law: (1) recent U.S. Department of Labor ("USDOL") developments; (2) selected litigation issues with regard to wage and hour class and collective actions; (3) considerations for employers with regard to arbitration; and (4) selected California class action considerations. Part I of this white paper provides a brief overview of the USDOL's regulatory initiatives, which are aimed at providing greater clarity to businesses and employees. Looking outside of the USDOL context, Part II provides an overview of the differences between class and collective actions, and considerations for employers litigating and settling such claims in the wage and hour context, including issues regarding notice, personal jurisdiction, requests for injunctive relief, and individual liability. Because arbitration agreements should be considered as a possible strategy to minimize the risks of class action litigation, Part III summarizes considerations for employers following the U.S. Supreme Court's *Epic Systems* decision. Finally, Part IV reviews some of the unique issues faced when litigating class actions in California.

I. USDOL Recent Developments: Regulatory Update

The USDOL under the Trump administration has been busy and apparently has no intentions of slowing down. In 2019 alone, the USDOL proposed changes regarding overtime, the regular rate, tip credit regulations, the fluctuating workweek, and joint employment. Below are some of the most significant USDOL developments this past year:

A. Joint Employment Analysis

On January 12, 2020, the USDOL announced its final rule with respect to the scope of joint employment liability for federal wage and hour matters.[2] Although much remains to be seen, this rule may usher in a new era, and could lead to fewer businesses being found to be joint employers by a court or agency when it comes to minimum wage, overtime, and other similar liability under the Fair Labor Standards Act ("FLSA"). However, many questions remain about various aspects of this rule, particularly how courts will apply the test's four factors as well as the alternative "catch-all" test.

[2] Marty Heller, Richard Meneghello, & John Polson, *Labor Department's New 4-Factor Rule Attempts to Limit Joint Employment*, Fisher & Phillips (Jan. 13, 2020), https://www.fisherphillips.com/resources-alerts-labor-departments-new-4-factor-rule-attempts.

Employers should now reexamine their business models to capitalize on the new standard, which will take effect on March 16, 2020.[3]

The new rule will determine whether a business is a "joint employer" — equally liable under federal wage and hour laws — through the use of a four-factor balancing test, which assesses whether the entity:

1. hires or fires the employee;
2. supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
3. determines the employee's rate and method of payment; and
4. maintains the employee's employment records.

The new rule also includes a "catch-all" provision, which states that factors not specifically included in the four-part test may still be considered in the joint employment determination. However, this catch-all provision only applies if such unenumerated factors are indicative of whether the potential joint employer exercises "significant control" over the terms and conditions of the employee's work. While the catch-all provision of the test is very broad and could potentially be abused, the proper interpretation of this alternative analysis is yet to be seen and may vary across different jurisdictions.

While specifying factors to consider, the new rule also provides what will not be factored into its joint employment consideration. For example, unexercised control over an employee is not relevant. Only actual exercise of one or more of the four control factors will be considered. Other factors deemed irrelevant under the new rule include franchisor relationships, enforcing legal obligations, standard human resource forms, "store-within a store" arrangements, health and retirement plans, and apprenticeships, among others.

In short, while not perfect, the USDOL's new joint employment regulation may provide employers with more flexibility and more certainty when it comes to wage and hour responsibilities.

B. Overtime Rule

On September 24, 2019, the USDOL announced the revised regulations regarding the minimum salary threshold for the FLSA's white-collar exemptions.[4] The rule, which USDOL estimated would expand overtime pay obligations to an estimated 1.3 million additional workers, took effect on January 1, 2020.

Under the so-called Overtime Rule, the minimum salary threshold is now $684 per week, annualized to $35,568 per year. The rule provides for one threshold regardless of which white-collar exemption, industry, or locality, subject to a few exceptions that already existed. Employers are able to credit certain non-discretionary payments in limited ways. The highly compensated employee exemption's total annual compensation requirement is set at $107,432 per year. There will be no "automatic" updates, or even a formal schedule of future adjustments to these figures, although employers can expect that the salary threshold will be assessed more frequently than it has been in the past. In addition, no changes have been made to the duties tests – the crux of the relevant exemptions. The changes under the rule are limited to the executive, administrative, professional, and

[3] U.S. Department of Labor, Joint Employer Final Rule Frequently Asked Questions, https://www.dol.gov/agencies/whd/flsa/2020-joint-employment/faq#3.
[4] Federal Overtime Rule, 84 Fed. Reg. 51306 (Sept. 27, 2019) (to be codified at 29 C.F.R. pt. 541).

derivative exemptions. Further, no change has been made to the various other exemptions (i.e. outside sales) that do not specifically include a salary requirement even if the employee happens to earn a salary.

Notably, the USDOL regulation only applies to the salary threshold for exemptions under federal law. It does not affect more generous salary thresholds under state and local law. By way of example, for large employers in New York City, the salary threshold is $1,125 per week, or $58,500 per year; likewise, the salary threshold in California is $1,040 per week, or $54,080 per year for larger employers. Consequently, employers must be knowledgeable about the laws and regulations for each jurisdiction where it has salaried employees.

C. Regular Rate

For the first time in over 60 years, the USDOL issued a final rule updating its interpretative guidance with respect to permissible exclusions from the "regular rate" used to calculate overtime premiums.[5] The rule announced on December 12, 2019 became effective on January 15, 2020. According to the USDOL, the proposed rule is intended to better reflect the modern workplace and provide clarity to employers on what types of compensation, benefits, or perks may be excluded from the regular rate. While the USDOL is fairly constrained by statutory language in this regard, these provisions provide needed clarity to employers and should help reduce litigation over what is and what is not included in the "regular rate."

Under the FLSA, non-exempt employees must be paid "at a rate of not less than one and one-half times the regular rate of which he is employed" for any hours the employee works in excess of 40 hours in a workweek. The "regular rate" is defined as "all remuneration for employment," subject to eight categories of exclusions. Unfortunately, these eight categories of exclusions have provided ample ground for extensive and costly litigation, as the decision to exclude a certain sum may have considerable impact on an employee's "regular rate," which, in turn, impacts the calculation of an employee's overtime pay.

The new rule is intended to provide clarity with respect to these allowable exclusions from the "regular rate":

- **Pay for Foregoing Holidays or Leave:** All forms of unused leave will now be treated the same for determining whether the sums paid are excluded from the regular rate. The prior regulation referenced only holiday and vacation time. The final rule acknowledges that many employers lump time off into "paid time off" and clarifies that the Department will treat all such time consistently with respect to whether it should be included in the regular rate.
- **Meal Breaks:** The final rule clarifies that pay received for a bona fide meal break period *does not* convert such time to hours worked, unless there is an agreement or past practice of doing so. It also removes reference to "lunch breaks" that had caused confusion.
- **Reimbursable Expenses:** The Department has removed the word "solely" from the following regulation: "where an employee incurs expenses on his employer's behalf or where he is required to expend sums *solely* by reason of action taken for the convenience of his employer." The word "solely" is not in the FLSA, and court decisions have emphasized that the expenses

[5] Joshua Nadreau, *Labor Department Offers Employers Some FLSA Clarity Through New "Regular Rate" Interpretation*, Fisher & Phillips LLP (Dec. 12, 2019), https://www.fisherphillips.com/resources-alerts-labor-department-offers-employers-some-flsa-clarity.

need only benefit the employer (but not solely benefit the employer). The final rule also announces that reimbursement expenses are *per se* reasonable so long as they reflect actual expenses or are at or below the amounts listed in the Federal Travel Regulation (a regulation used to determine reimbursements for federal employees).

- **Excludable Benefit and Perk Payments:** The "modernization" trend continues with an update to the list of "other similar payments" that are excludable, which are largely employer-sponsored, non-wage benefits. The USDOL's list of permissible exclusions now includes onsite "specialist treatments" (e.g., chiropractors, massage therapists, personal trainers, and EAP counseling); gym access/memberships; employee wellness programs; employee discounts on retail goods; and tuition reimbursement.
- **Show-Up Pay:** Under certain state and local laws, employers are required to provide a minimum payment if an employee reports to work and is subsequently sent home due to a lack of work. These payments are excluded from the regular rate. The final rule clarifies that new state and local laws that require "reporting pay" will be treated as "show-up" pay under existing regulations.
- **Call-Back Pay:** Call-back pay refers to a scenario when an employee completes their regular shift but is subsequently called back to work. In some jurisdictions, the employee is entitled to additional compensation simply for being called back in, such as a requirement to pay a minimum of four hours, regardless of how long the employee works. Under prior regulations, the "call-back" payment (not payments for hours worked) is excluded only if "infrequent" or "sporadic." The final rule broadens the exclusion, so long as the "call-back" payments are not "so regular that they are essentially prearranged."
- **Predictability Pay or Schedule Change Premiums:** Many cities, including New York City and Seattle, have enacted laws requiring payment when an employer changes an employee's schedule without appropriate notice. As with "call-back" pay, the final rule states that these payments are excludable as long as they are not "essentially prearranged."
- **"Clopening" Pay:** Clopening pay (referring to pay for workers required to work until closing on a late shift and then work an opening shift early the next morning) is required in some jurisdictions when there is not a minimum number of hours between the end of one shift and the start of another. Like predictability pay, the final rule permits exclusion of these payments as long as they are not so frequent to be considered "prearranged."[6]

The final rule also addresses a variety of other miscellaneous issues. For example, it reiterates that bonuses that merely label the payment as "discretionary" are not sufficient to guarantee that the pay is truly optional in nature. It also provides additional examples of excludable discretionary bonuses: employee-of-the-month bonuses; bonuses to employees who made unique or extraordinary efforts; most severance bonuses; and bonuses for overcoming challenging or stressful contributions. The rule likewise clarifies that it is the USDOL's position that contributions by an employer for "accident, unemployment, and legal services" are excludable under Section 7(e)(4)'s bona fide benefit plan contribution exception. The final rule also eliminates reference to "employment agreements" and "contracts" with respect to premium payments for hours of work in excess of a daily work period, holidays, or Sundays.

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[6] *Id*.

Employers relying on these exclusions also should consider other implications. Under 29 U.S.C. § 207(h)(1), excluded amounts are not wages for purposes of the FLSA's minimum wage requirement, which can be met by credits for certain facilities. At least until the USDOL addresses the definition of "wages" (scheduled for 2020), it remains to be seen whether or to what extent the regular rate changes will have unintended consequences.

D. Tip Credit

On October 7, 2019, the USDOL proposed for public comment significant changes to the "tip credit" regulations that govern tipped employees.[7] While many of the proposed regulatory changes were expected, some were not, and even the expected changes will require employers to recalibrate some of their policies assuming that the USDOL ultimately adopts the proposals into final law.

The FLSA currently permits an employer to take a "tip credit" for the amount between the direct cash wage it pays to an employee (at least $2.13 per hour or higher in some states) and the federal minimum wage (currently $7.25). If an employee does not receive a sufficient amount in tips to equal the tip credit amount, the employer must make up any difference. Employers may only take this credit for an employee who is engaged in an occupation in which he customarily and regularly earns more than $30 per month in tips.

Under the proposed rule, employers would be allowed to implement mandatory tip pools that include non-tipped or "back of house" employees (i.e. dishwashers) provided that the employee receives the full minimum wage without reliance on the tip credit. If an employer operates a mandatory tip pool, the employer would also be required to maintain records of the tips received by employees, even if the employer does not take a tip credit. Employers with a mandatory tip pooling arrangement would also be required to "fully distribute any tips the employer collects no later than the regular payday for the workweek in which the tips were collected, or when the pay period covers more than a single workweek, the regular payday for the period in which the workweek ends." In situations where it is not possible to ascertain the amount or distribution of tips by that payday, distribution would be required "as soon as possible following that payday." Employers are not permitted to keep any portion of tips under any scenario.

Notably, managers and supervisors still would not be allowed to participate in the tip pool regardless of whether the tip credit is taken. To determine whether an individual constitutes a "manager or supervisor," the USDOL would utilize the job duties test for the "executive exemption" under the FLSA. However, the USDOL would not consider the "salary basis" requirement as a factor in this analysis. Thus, an employee could be a "supervisor" for purposes of determining her ineligibility to participate in a tip pool because of her job duties even though she would not be considered executive-exempt because she was not paid on a salary basis.

Finally, under the proposed rule, employers would be able to take the tip credit for <u>all</u> of the time spent by an employee performing "related duties" (i.e. work that is not directly tip-producing itself) provided that such duties are performed contemporaneously with the tipped duties "or for a reasonable time immediately before or after performing the tipped duties." This would represent the final demise of the so-called "80/20 Rule," which has spawned much litigation, especially in the restaurant industry. To help employers understand the type of work that constitutes "related duties," USDOL would include any task

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[7] Ted Boehm, *USDOL Issues Proposed Changes to the Tip Credit Regulations*, Fisher & Phillips LLP (Oct. 7, 2019), https://www.fisherphillips.com/Wage-and-Hour-Laws/usdol-proposes-changes-to-the-tip-credit-regulations.

listed in a tip-producing occupation within the description on the Occupational Information Network ("O*NET") website. For example, the O*NET website lists "rolling silverware and filling salt and pepper shakers" as tasks for the Waitress and Waiter position. Thus, employers would be able to require tipped employees to perform these tasks, without any time limitation, provided that the tasks were performed contemporaneously with tipped duties or for a reasonable time immediately before or after performing the tipped duties.

Employers should be mindful of the very specific rules and regulations regarding tip credit and tip pooling as they currently stand because they are fertile ground for litigation. Employers also should pay attention to the proposed regulatory changes. For employees paid on a tip credit basis, tip credit notices compliant with the FLSA are required. Management may not sanction a mandatory tip pool that includes supervisors or managers. And while the 80/20 Rule appears to be doomed, employers should nonetheless evaluate the tasks performed by their tipped employees to ensure compliance with the current and proposed regulations.

E. Fluctuating Workweek

On November 4, 2019, the USDOL announced a proposed rule intended to clarify the "fluctuating workweek" under the FLSA.

In a nutshell, the so-called "fluctuating workweek" method of compensation calls for paying a non-exempt employee a salary that represents straight-time compensation for all of his or her hours worked in a workweek, including all hours worked over 40.[8] Thus, the regular rate is computed by dividing the total straight-time compensation by all of the workweek's hours worked. The salary itself is the "one" of the "one and one-half" for the overtime hours (just like it is for an employee paid 100% piece rate, commission, etc.). The FLSA-required overtime premium due for that work is figured at one-half of the regular rate.

The proposed regulation:

- Revises the existing fluctuating workweek regulation at 29 CFR 778.114, including its title;
- Clarifies the regulation by expressly stating that any bonuses, premium payments, or other additional pay of any kind are compatible with the fluctuating workweek method of compensation and that such payments must be included in the calculation of regular rate unless excludable under FLSA sections 7(e)(1)-(8); and
- Adds examples to better illustrate how the regulation works operationally.

The proposed modifications to the rule are designed to provide guidance for employers using the fluctuating workweek. For example, one pressing issue was whether the fluctuating workweek can be used when employees receive additional compensation, such as a bonus or commission.[9] The rule will provide clarity in light of case law which appeared to state that the fluctuating workweek was incompatible

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[8] Caroline Brown, *Attempting to Fix the Fluctuating Workweek*, Fisher & Phillips LLP (Nov. 4, 2019), https://www.fisherphillips.com/Wage-and-Hour-Laws/attempting-to-fix-fluctuating-workweek.

[9] *See Dacar v. Saybolt, L.P.*, 914 F.3d 917 (5th Cir. 2018) (noting that the USDOL made clear that the payment of bonuses and premium payments are incompatable with the [fluctuating workweek] method of computing govertime); *see also* Marty Heller, *Labor Department Shows No Signs of Slowing Down*, Fisher & Phillips LLP (May 31, 2019), https://www.fisherphillips.com/Wage-and-Hour-Laws/labor-department-shows-no-signs-of-slowing-down.

with additional variable compensation.[10] If the proposed regulation is finally adopted, it will serve to clarify the issue and ensure that employers can pay both a salary and additional compensation under a fluctuating workweek pay plan. Notably, the proposal falls short in that it continues to promote the proposition that fluctuating workweek is reserved for circumstances where an employee's hours actually fluctuate as opposed to the fact that the salary covers all the hours worked regardless of whether they fluctuate from workweek to workweek.

II. Class and Collective Action Litigation

There are many issues employers need to be aware of regarding class and collective action litigation in the wage and hour context. This section addresses some that have been the recent focus of courts handling such litigation. Set forth as background is a review of the differences between class and collective actions, followed by a more detailed discussion of considerations for employers when litigating and settling such actions in the wage and hour setting.

A. Class Actions vs. Collective Actions

While both class and collective actions involve litigation based on representative testimony for employees who claim to be aggrieved by a common unlawful practice or scheme, there are different considerations and legal standards with respect to each.

Employees who wish to bring a representative action under the FLSA must do so under the collective action mechanism provided by 29 U.S.C. § 216(b).[11] A collective action under the FLSA permits the claims of similarly-situated persons to be joined in a lawsuit as long as each claimant opts into the action by filing a written consent to join form with the court. This kind of action is referred to as an "opt in" action because in order to recover from any settlement or judgment, individuals in the class must affirmatively "opt in" or consent to be included in the lawsuit. Those who do not file a consent form cannot be bound to the judgment and may file a separate action. Because current or former employees must affirmatively consent to participate in a collective action, in the absence of tolling, the statute of limitations continues to run on employees who do not join the lawsuit.[12]

A class action may arise under certain state wage and hour laws where the plaintiff asserts claims common to an entire class of workers. Employees who wish to proceed on a representative basis may seek to have a class certified under Federal Rule of Civil Procedure 23.[13] Class actions are

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[10] *Cf* John Thompson, *USDOL Should Retract Fluctuating-Workweek Commentary*, Fisher & Phillips LLP (Feb. 7, 2017), https://www.fisherphillips.com/Wage-and-Hour-Laws/usdol-should-retract-fluctuating-workweek-commentary.

[11] 29 U.S.C. §216(b) provides

> An action … may be maintained against any employer … in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

[12] 29 U.S.C. § 255(a).

[13] To certify a class, a plaintiff must satisfy the requirements of Rule 23. Rule 23(a) requires plaintiffs to prove there are enough potential class members to make joinder impracticable (generally referred to as numerosity), Fed. R. Civ. P. 23(a)(1); that there are questions of law or fact common to the class (generally referred to as "commonality"), Fed. R. Civ. P. 23(a)(2); that the claims or defenses of the representative parties are typical of the claims or defenses of the class (generally referred to as "typicality"), Fed. R. Civ. P. 23(a)(3); and that the representative parties will fairly and adequately protect the interests of the class (generally referred to as "adequacy"), Fed. R. Civ. P. 23(a)(4). In addition to the

different from collective actions and, therefore, are governed by different rules. A class action, like a collective action, is a representative lawsuit where one or more individuals represents a group of similarly situated employees. Unlike a collective action, however, once a class is certified, a member of the class must expressly request to be *excluded* from the class to avoid being bound by any judgment or outcome. For this reason, class actions are referred to as "opt out" lawsuits. Because members of a class action must "opt out" if they do not want to participate in or recover from the lawsuit, participation is much higher than collective actions.

From a litigation perspective, the dichotomy between opt-in FLSA collective actions and opt-out Rule 23 class actions is significant. Generally, experience indicates that only 8-20% of potential claimants will join the lawsuit (i.e., "opt in") in response to notice. Conversely, less than 5% of class members opt-out of a Rule 23 class, meaning that the class action covers most, if not all, class members. Higher participation typical of a Rule 23 class means that the potential magnitude of the settlement and/or judgment is higher because it would cover almost all employees. Of course, hybrid class and collective actions are particularly troublesome for employers because notice of a collective action is sent early in the case and typically identifies a number of potential class members.

B. Selected Litigation Issues in Class and Collective Actions

i. Personal Jurisdiction Challenges

Whether federal courts in a particular state have personal jurisdiction over defendants for claims brought by non-residents in a class or collective action is a hotly contested issue in the courts. The 2017 decision of the United States Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court of California,* 137 S. Ct. 1773 (2017) has laid the groundwork for wage and hour litigators to challenge jurisdiction in putative nationwide collective actions. Currently, there is a split in authority among the district courts regarding the issue of personal jurisdiction when an out-of-state plaintiff attempts to bring an FLSA collective action against a non-resident corporation.

a. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017).

In *Bristol Myers*, the U.S. Supreme Court found that California state courts did not have specific personal jurisdiction over a prescription drug manufacturer for claims brought by out-of-state plaintiffs.[14] The ruling directed the dismissal of 592 non-California claims from 33 other states.[15] Specifically, the Court used "settled principles regarding personal jurisdiction" to come to its conclusion.[16]

> In order for a state court to exercise specific jurisdiction, the suit must aris[e] out of or relat[e] to the defendant's contacts with the forum. In other words, *there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in*

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requirements of Rule 23 (a), a party seeking class certification must satisfy the requirements of Rule 23(b). Most wage and hour cases are certified under Rule 23(b)(3) requiring a showing or predominance and superiority.

[14] *Bristol Meyers*, 137 S. Ct. at 1783-84.

[15] *Id*. at 1778.

[16] *Id*. at 1782

> *the forum State and is therefore subject to the State's regulation.* For this reason, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.[17]

The plaintiffs in *Bristol Myers* were not residents of California and did not suffer harm in the state and "all the conduct giving rise to the nonresidents' claims occurred elsewhere."[18] Thus, the Court established limitations on personal jurisdiction over nonresident defendants in mass actions and supported the view that plaintiffs cannot forum shop in large actions. Instead, the plaintiffs must sue where the corporate defendant has significant contacts for purposes of general jurisdiction or limit the class definition to residents of the state where the lawsuit is filed.[19] Nevertheless, the Supreme Court's decision was limited to personal jurisdiction issues in *state courts*, which has led to a split on the question of whether, and to what extent, the Supreme Court's analysis applies to class and collective actions pending in federal court.

b. Personal Jurisdiction for Defendants When FLSA Claims Are Brought by Non-Resident Plaintiffs in Class and Collective Actions

Because the Supreme Court in *Bristol Myers* specifically declined to decide whether its analysis would apply to federal court actions, the lower courts must decide whether the Supreme Court's analysis applies to class and collective actions pending in federal court. Though few courts have addressed this issue as it relates to FLSA claims, there appear to be two distinct approaches.

(i) Broad Interpretation of Personal Jurisdiction

Several district courts located in the Second, Ninth, and Eleventh Circuits have followed the precedent set forth in *Swamy v. Title Source, Inc*., No. 17-cv-01175 WHA, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017).[20] The Northern District of California in *Swamy* vehemently opposed applying *Bristol Myers* to FLSA class and collective actions, mainly for policy reasons:

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[17] *Id*. at 1780 (internal quotations and citations omitted) (emphasis added).
[18] *Id*. at 1782
[19] *Id*. at 1783-84
[20] *See e.g. Mason v. Lumber Liquidators, Inc*., No. 17-cv-04780, 2019 WL 2088609, at *6 (E.D.N.Y. May 13, 2019) (finding that defendant had forfeited a jurisdictional defense but adopting *Swamy* approach), *aff'd*, No. 17-cv-04780, 2019 WL 3940846 (E.D.N.Y. Aug. 19, 2019); *Gibbs v. MLK Express Servs., LLC*, No. 2:18-cv-00434, 2019 WL 1980123, at *14–16 (M.D. Fla. Mar. 28, 2019) (concluding that *Bristol-Myers* is inapplicable to FLSA collective action cases), *adopted in part, rejected in part*, No. 2:18-cv-00434, 2019 WL 2635746, at *2 (M.D. Fla. June 27, 2019) (finding ruling on personal jurisdiction unnecessary in light of denial of conditional certification); *Seiffert v. Qwest Corp*., No. 18-cv-00070, 2018 WL 6590836, at *2–3 (D. Mont. Dec. 14, 2018) ("This Court agrees with the reasoning in *Swamy*.... Nothing in the plain language of the FLSA limits its application to in-state plaintiffs' claims*."*), *denying certification of interlocutory appeal*, No. 18-cv-00070, 2019 WL 859045 (D. Mont. Feb. 22, 2019) ("*Bristol-Myers* does not establish a novel question. *Bristol-Myers* did not change the law.... It is well settled that the original plaintiff in a collective action under the FLSA dictates a district court's analysis of specific jurisdiction.") (first citing *Am. Tr. V. UBS AG*, 78 F. Supp. 3d 977, 986 (N.D. Cal. 2015) (stating in Rule 23 action that "claims of unnamed class members are irrelevant to the question of specific jurisdiction") and then citing *Senne v. Kan. City Royals Baseball Corp*., 105 F. Supp. 3d 981, 1022 (N.D. Cal. 2015) (noting in hybrid FLSA and Rule 23 action that "[i]n a purported class action, specific jurisdiction must be demonstrated by the named Plaintiffs")); [ECF No. 56 at 12–15].
(String cite from *Chavira v. OS Restaurant Services LLC*., 18cv10029-ADB, 2019 WL 4769101, *4 (D. Mass. Sept. 30, 2019).

> Unlike the claims at issue in *Bristol–Myers*, we have before us a federal claim created by Congress specifically to address employment practices nationwide. *See* 29 U.S.C. 202, 207(a). Congress created a mechanism for employees to bring their claims on behalf of other employees who are "similarly situated," and in no way limited those claims to in-state plaintiffs. 29 U.S.C. 216(b). Thus, our circumstances are far different from those contemplated by the Supreme Court in *Bristol–Myers*. The result of the rule [the defendant-employer] urges would be that each putative collective member not residing in either the state where the suit is brought, or a state where the defendant is domiciled, could not be part of the collective action. This would splinter most nationwide collective actions, trespass on the efficacy of FLSA collective actions as a means to vindicate employees' rights. This result is not mandated by *Bristol–Myers* and this order declines to extend *Bristol–Myers* in the manner [the defendant-employer] urges.[21]

(ii) Narrow Interpretation of Personal Jurisdiction

Some district courts located in the First and Sixth Circuits have taken a different route for FLSA claims and followed the precedent set forth in *Bristol Myers*.[22] The Northern District of Ohio was one of the first courts to address personal jurisdiction as it relates to claims brought by nonresidents in a collective action under the FLSA.

In *Maclin v. Reliable Reports of Texas, Inc*., the Northern District of Ohio applied *Bristol-Myers* and dismissed non-Ohio residents from a putative nationwide collective action when the defendant-employer was headquartered in Texas and did not have sufficient contacts with Ohio to justify the exercise of personal jurisdiction over the defendant with respect to the non-Ohio class members.[23] Only fourteen of the defendant's four hundred and thirty-eight employees worked in Ohio.[24] The defendant-employer did not dispute that the court had specific jurisdiction over the FLSA claim of the Ohio plaintiffs, only the nonresidents.[25]

The *Maclin* Court cited to two cases out of district courts in the Ninth Circuit, which did not apply *Bristol Myers* to FLSA class and collective actions.[26] The Northern District of Ohio refused to follow these courts, reasoning:

> [T]he Court cannot envisage that the Fifth Amendment Due Process Clause would have any more or less effect on the outcome respecting FLSA claims than the Fourteenth Amendment Due Process Clause, and

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[21] *Swamy*, 2017 WL 5196780 at *2.
[22] *See e.g., Chavira v. OS Restaurant Services LLC.*, 18cv10029-ADB, 2019 WL 4769101, *4 (D. Mass. Sept. 30, 2019); *Rafferty v. Denny's, Inc*., No. 5:18-cv-02409, 2019 WL 2924998, at *3–7 (N.D. Ohio July 8, 2019); *Roy v. FedEx Ground Package Systems, Inc*., 353 F. Supp. 3d 43 (D. Mass. 2018); *Maclin v. Reliable Reports of Texas, Inc*., 314 F. Supp. 3d 845, 850 (N.D. Ohio, 2018).
[23] *Maclin*, 314 F. Supp. 3d at 850 (N.D. Ohio, 2018).
[24] *Id*. at 849.
[25] *Id*.
[26] *Id*. at 850 (citing *Swamy v. Title Source, Inc*., No. Civ. A. No. C 17–01175 WHA, 2017 WL 5196780 (N.D. Calif. Nov. 10, 2017); *Thomas v. Kellogg Co*., No. C13–5136RBL, 2017 WL 5256634 at *1 (W.D. Washington Oct. 17, 2017)).

> this district court will not limit the holding in *Bristol–Myers* to mass tort claims or state courts.[27]

The Court, however, qualified its decision and stated that it could not prevent the plaintiffs from filing a collective FLSA action in a Texas district court, which would have general jurisdiction over the defendant-employer.[28]

Most recently, the District Court of Massachusetts in *Chavira v. OS Restaurant Services LLC* decided to follow *Bristol Myers* in an FLSA class action.[29] The *Chavira* court granted the defendant's motion to strike the notices of consent and denied the plaintiff's motion for a conditional certification for a collective action, finding the plaintiffs could not satisfy the "relatedness" requirement of due process for claims of out-of-state employees and, thus, there was no specific personal jurisdiction over the employer.[30] Specifically, the Court followed the precedent set forth in *Bristol Myers*, finding, "there must be an 'affiliation between the forum and the underlying controversy, principally, an activity or occurrence that takes place in the forum State.'"[31]

ii. Dismissal of Claims for Injunctive Relief By Former Employees

While the goal of plaintiffs and their counsel is typically recovery damages and related fees, many class wage and hour claims include a request for injunctive relief. Courts consistently deny former employees the ability to bring claims for injunctive relief on the basis that they lack standing for the remedy sought. Rather, only current employees have standing to seek injunctive or declaratory relief. Thus, employers should consider moving to dismiss such claims involving former employees as they do not stand to receive any benefit from a potential injunction.

As in other contexts, in the class and collective action setting, claims for injunctive or declaratory relief fail when the plaintiff will not be able to benefit from that prospective relief. The United States Supreme Court was explicit in *Walmart Stores, Inc. v. Dukes* when it agreed with the Ninth Circuit's holding that "plaintiffs no longer employed by [their employer] lack standing to seek injunctive or declaratory relief against its employment practices."[32]

Following *Dukes*, courts have continued to dismiss former employees' claims for injunctive relief from which they would never benefit. In *Bayer v. Neiman Marcus Group, Inc*., the court stated: "[a] plaintiff who cannot reasonably be expected to benefit from prospective relief order against the defendant has no claim for an injunction."[33] For decades, the Ninth Circuit has applied the same rationale: "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects."[34] Many

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[27] *Id*. at 850-51.
[28] *Id*. at 850.
[29] *Chavira v. OS Restaurant Services LLC*, No. 18-cv-10029-ADB, 2019 WL 4769101, *6 (D. Mass. Sept. 30, 2019).
[30] *Id*.
[31] *Id*. (quoting *Bristol Myers*, 137 S. Ct. at 1780-81).
[32] *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 364-65, 131 S.Ct. 2541, 180 L. Ed.2d 374 (2011).
[33] *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853, 864 (9th Cir. 2017).
[34] *O'Neal v. City of Seattle*, 66 F.3d 1064, 1066 (9th Cir. 1995) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)).

courts have applied this rationale where a plaintiff seeks prospective relief to enjoin their former employers' practices even though they would never see the benefit of such relief.[35]

iii. Personal Liability For Individuals Under the FLSA's Broad Definition of "Employer"

When a claim is brought under the FLSA, one of the key issues which must be decided with regard to liability is determining who constitutes an "employer" for purposes of the statute. The potential for individual liability is a significant factor employers need to consider when litigating class and collective actions.

Under the FLSA and many state wage and hour laws, an "employer" "includes any person acting directly or indirectly in the interest of an employer in relation to an employee."[36] Consequently, it is possible for corporate officers with operational control to be deemed an "employer" under the FLSA along with the business entity itself. For purposes of evaluating individual liability, control need only relate to operational control of significant aspects of the corporation's day to day functions.[37] Courts in many jurisdictions throughout the country have applied a broad definition of "employer" to impose individual liability on business owners and managers.[38]

In light of the potential for individual liability, the FLSA provides corporate officers with a significant incentive to ensure that the corporation is fully complying with the FLSA, or else the corporate officers could find themselves individually liable for wage and hour violations. The potential for personal liability can also provide a catalyst for settlement.

C. Settlement of Class and Collective Actions

As most actions involving alleged violations of the FLSA resolve prior to trial, it is important that one understand the complexities and current trends that may impact settlement. The FLSA's

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[35] *See Walsh v. Nevada Dep't of Human Res*., 471 F.3d 1033, 1036-37 (9th Cir. 2006) (concluding a plaintiff requesting an injunction requiring her former employer to adopt and enforce lawful policies "lacked standing to sue for injunctive relief from which she would not likely benefit"). Among other courts, the Western District of Washington has also repeatedly denied plaintiffs' request for injunctive relief when they will never receive the benefit. *See Neely v. Boeing Company*, No. C16-1791 RAJ, 2018 WL 2216093 at *6 (W.D. Wash. May 15, 2018) (where the plaintiff's request for injunctive relief was denied when plaintiff argued the claim was derived from past harm for which he is still experiencing adverse effects); *Rosas v. Sarbanand Farms, LLC*, 329 F.R.D. 671, 687-88 (W.D. Wash. 2018) ("Plaintiffs concede that putative class members lack standing to seek injunctive relief as they are no longer employed by defendants."); *Mason v. Washington State*, No. C17-186 MJP, 2017 WL 6026937 at *7 (W.D. Wash. Dec. 5, 2017). *See also Feit v. Ward*, 886 F.2d 848, 856–58 (7th Cir. 1989) (finding former federal employee lacked standing to seek injunctive relief); *Drayton v. Western Auto Supply Co*., 2002 WL 32508918 at *4-5 (11th Cir. Mar. 11, 2002) (finding putative class of former employees lacked standing to seek injunctive relief in a race discrimination case).

[36] 29 U.S.C. § 203(d).

[37] *See, e.g., Boucher v. Shaw*, 572 F.3d 1087, 1094 (9th Cir.2009) ("The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages.") (internal citations omitted).

[38] *MacIntyre v. Moore*, 335 F. Supp. 3d 402, 420 (W.D.N.Y. 2018) (noting that the FLSA's definition of "employer" is "broadly defined."); *Wisniewski v. Town of Columbus*, No. CV-09-28-BLG-CSO, 2009 WL 10701744, at *6 (D. Mont. Nov. 18, 2009) (noting that the Ninth Circuit has acknowledged "the broad nature of the definition of 'employer' in the FLSA."); *Guevara v. Ischia, Inc*., 47 F. Supp. 3d 23, 27 (D.D.C. 2014) ("The FLSA's definition of employer is broad enough to encompass an individual who, though lacking a possessory interest in the 'employer' corporation, effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees.").

provisions are mandatory and generally cannot be negotiated or bargained by an employer.[39] "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate."[40]

Neither FLSA collective action settlements nor state law class action settlements are without procedural challenges. The hurdles associated with approval of such settlements can be significant and must be contemplated when negotiating resolution.

This section details the process and some of the challenges that parties may face when settling wage and hour class and collective actions.

i. FLSA Collective Action Settlement Requirements

In the seminal case of *Lynn's Food Stores*, the Eleventh Circuit held that parties cannot enter into private settlements of FLSA claims without either the approval of the district court or the Department of Labor.[41] There, after the employer unsuccessfully attempted to negotiate a settlement with the Department of Labor, the employer approached the affected employees and offered $1,000 to be divided among them on a pro rata basis in exchange for a release of any other claim under the FLSA. This offer was significantly less than the amount owed. The Eleventh Circuit held that private settlement of back wage claims under the FLSA are not permissible. As the Court stated, "many harms . . . may occur when employers are allowed to 'bargain' with their employees over minimum wages and overtime compensation."[42] Thus, the Court held that such "invidious practices" were prohibited.[43]

The criteria for approval of a FLSA settlement set forth in *Lynn's Food* is as follows: First, under section 216(c), the Secretary of Labor is authorized to supervise payment to employees of unpaid wages owed to them. An employee "who accepts such a payment supervised by the Secretary of Labor thereby waives his right to bring suit for both the unpaid wages and for liquidated damages, provided the employer pays in full the back wages."[44] The only other route for compromise of FLSA claims is provided in the context of suits brought directly by employees against their employer under section 216(b) to recover back wages for FLSA violations. When "employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness."[45] Other courts throughout the country follow a comparable standard.[46]

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[39] *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945).
[40] *Barrentine v. Arkansas-Best Freight Systems*, 450 U.S. 728, 740 (1981).
[41] *Lynn's Food Stores Inc. v. U.S. By & Through U.S. Dep't of Labor, Employment Standards Admin., Wage & Hour Div.*, 679 F.2d 1350, 1352 (11th Cir. 1982).
[42] *Id*. at 1355.
[43] *Id*.
[44] *Id*. at 1353.
[45] *Id*.
[46] *See, e.g., Bettger v. Crossmark, Inc*., No. 1:13-CV-2030, 2015 WL 279754, at *3 (M.D. Pa. Jan. 22, 2015) ("Although the Third Circuit has not addressed whether such § 216(b) actions claiming unpaid wages may be settled privately without first obtaining court approval, district courts within the Third Circuit have followed the majority position and assumed that judicial approval is necessary"); *Duprey v. The Scotts Co., LLC*, 30 F. Supp. 3d 404 (D. Md. 2014) (noting that most judges in the Fourth Circuit follow *Lynn's Food* but "the precedent in this Circuit is unclear as to whether court approval is required in cases subject to dismissal under Fed. R. Civ. P. 41(a)(1)(A)"); *Snook v. Valley OB-GYN Clinic, P.C*., 14-cv-12302, 2014 WL 7369904, at *1-2 (E.D. Mich. Dec. 29, 2014); *Peralta v. Soudview at Glen Cove, Inc*., No. 11-CV-0867, 2013 WL 2147792,

Following *Lynn's Food*, most circuits require approval of FLSA settlements.[47] For example, in *Cheeks v. Freeport Pancake House, Inc*., the Second Circuit held that judicial approval for stipulated dismissals with prejudice was required.[48] While most jurisdictions require court approval of a FLSA settlement, the Fifth Circuit does not.[49]

Most recently, a 2019 decision from the Second Circuit Court of Appeals may indicate a trend to relax the requirement of court approval for FLSA settlements. In *Yu v. Hasaki Restaurant, Inc.*, the plaintiff accepted her employer's FRCP 68(a) offer of judgement to resolve alleged violations of the FLSA. The parties appealed the district court's order directing them to provide the settlement agreement for a fairness review. The Second Circuit agreed with the parties and held that judicial approval is not required in the context of a Rule 68 Judgment, thus carving out an important exception to the requirement of judicial approval.[50]

ii. Class Action Settlement Requirements

Class action settlements across the country are subject to the scrutiny of the courts to approve such settlements to ensure they are fair and reasonable. Considerations are made for absent class members, or others, that are not litigants to ensure they are adequately protected. Further, the settlement process attempts to address concerns that class representatives and class counsel litigating on behalf of absent class members may have incentive to resolve claims without properly protecting the interests of unrepresented parties.

The settlement process for class actions attempts to address these concerns by building in various safeguards. First, class members must be given notice of any proposed settlement and have the opportunity to object to it, or in many cases opt out.[51] Second, the court must approve the settlement, and in undertaking this task, is charged with acting as a fiduciary for the absent class members.[52] Additionally, defendants must provide notice of the class settlement to various government officials pursuant to the Class Action Fairness Act. According to the Federal Rules

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at *1 (E.D.N.Y May 16, 2013) ("It is well settled in [the Second] Circuit that judicial approval of . . . FLSA settlements is required."); *Peterson v. Mortg. Sources Corp*., No. 08-2660-KVH, 2011 WL 3793963, at *4 (D. Kan. Aug. 25, 2011).

[47] *See, e.g., Cheeks v. Freeport Pancake House, Inc*., 796 F.3d 199, 206-07 (2d Cir. 2015) (holding that releases of FLSA claims in private settlements are only enforceable with DOL or court approval); *Tenn. Assoc. Of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559, 565-566 (6th Cir. 2001) (noting that, in the Sixth Circuit, there is a three-step process for approving class action settlements: (1) the court preliminarily approves the proposed settlement; (2) the class members receive notice of the proposed settlement; and (3) after a hearing, the court finally approves the settlement); *Erling v. Am. Grille With Sushi LLC*, No. 2117CV350FTM29MRM, 2019 WL 3867345, at *1 (M.D. Fla. July 30, 2019) (requiring judicial approval of FLSA settlement), *adopting report and recommendation*, 2019 WL 3857978 (M.D. Fla. Aug. 16, 2019); *Razon v. Vyas*, No. 2:16-CV-441-RL-JEM, 2017 WL 3503395, at *1 (N.D. Ind. July 6, 2017) ("The presumption of public access is especially important in FLSA cases where court approval is required to prevent from contracting around laws governing minimum wages and overtime pay."); *Metzger v. Auto Rescue of MKE LLC*, No. 15-CV-967-JPS, 2016 WL 7839154, at *1 (E.D. Wis. July 11, 2016) ("Court approval of FLSA settlements . . . is the norm across most circuits, including the Seventh."); *Archer v. TNT USA, Inc*., 12 F. Supp. 3d 373, 384 (E.D.N.Y. 2014) ("'[i]t is well settled in this Circuit that judicial approval of . . . FLSA settlements is required.").

[48] *Id*.

[49] *Martin v. Spring Break '83 Prods., L.L.C.*, 688 F.3d 247 (5th Cir. 2012); *Bodle v.TXL Mortg. Corp*., 788 F.3d 159, 162-65 (5th Cir. 2015).

[50] *See, Yu v. Hasaki Restaurant, Inc*., 944 F.3d 395 (2d Cir. 2019).

[51] *See*, FRCP 23(e)(1), (e)(4), (e)(5).

[52] FRCP 23(e)(2).

advisory committee notes, courts should also be vigilant of other facts, such as the nature and scope of discovery and whether a neutral mediator was used. As such, each circuit weighs the factors differently and though the standard is homogenous, interpretation varies by circuit and by the nature of the settlement.[53]

Generally, courts will apply Rule 23's class action fairness factors: "(1) whether the settlement was a product of fraud or collusion, (2) the complexity, expense, and likely duration of the litigation, (3) the state of the proceedings and the amount of discovery completed, (4) the factual and legal obstacles to prevailing on the merits, (5) the possible range of recovery and the certainty of damages, and (6) the respective opinions of participants, including class counsel, class representatives, and the absent class members."[54] In terms of fairness of a settlement, the court must assess both procedural and substantive fairness.[55]

a. Preliminary Approval and Notice to the Class

Courts will give preliminary approval of a class action settlement only after an initial evaluation of the fairness of the proposed settlement on the basis of a written submission and an informal presentation by the parties. At this first stage, the Court need find only that there is probable cause to submit the settlement to class members and hold a full-scale hearing as to its fairness.

Within this framework, preliminary approval of a settlement is appropriate if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval."[56] Some courts have also specifically noted that settlements before them for approval prior to class certification are subject to a higher standard of review than those that arise after the class has been reviewed and certified.[57]

Preliminary approval simply allows notice to issue to the class and for class members to submit claims, object to, or opt-out of, the settlement. Such notice should explain to affected class members their rights and how those rights may be affected by the settlement. The notice typically includes a claim form that class members are required to complete to receive settlement funds. The notice usually specifies that if class members do not opt out of the settlement, they waive their claims

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[53] Unlike some other circuits, the Eighth Circuit test weighs only four factors: "In determining the fairness and reasonableness of a settlement, the court must consider '(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement.'["]Also unlike many other circuits, the Eighth Circuit's test explicitly considers "the defendant's financial condition," which has played a central role in recent cases. *Bassett v. Credit Management Services, Inc*., 2019 WL 4262019, at *2 (D. Neb. Aug. 6, 2019) (citing *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 648 (8th Cir. 2012)), *adopting report and recommendation*, 2019 WL 4261728 (D. Neb. Sept. 9, 2019).

[54] *Parker v. Anderson,* 667 F.2d 1204, 1208-09 (5th Cir. 1982); *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 458-60 (9th Cir. 2000); *U.S. v. Alabama*, 271 F. App'x 896, 900 (11th Cir. 2008); *see also Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996) (using very similar factors); *In re NASDAQ Mkt.-Makers Antitrust Litig*., 187 F.R.D. 465, 473 (S.D.N.Y.1998) (Second Circuit) (using very similar factors); *In re Fleet/Norstar Sec. Litig*., 935 F. Supp. 99, 105 (D.R.I. 1996), *supplemented*, 974 F. Supp. 155 (D.R.I. 1997) (First Circuit) (using very similar factors).

[55] *City of Colton v. American Promotional Events, Inc.*, 281 F. Supp. 3d 1009 (C.D. Cal. 2017).

[56] *In re Tableware*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

[57] *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) ("[The court] must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.").

asserted in the action regardless of whether they return a claim form.[58] As such, if a plaintiff who meets the class definition does not affirmatively "opt-out" of the class he or she may be bound by the disposition of the case.

b. Final Approval of Class Action Settlement After a Fairness Hearing

Even when preliminary approval is given, under Rule 23, courts must consider and give final approval of a class claim before disposition. A court may approve a class settlement after it has held a hearing and determined that the settlement is "fair, reasonable, and adequate."[59] The fairness of a class action settlement is most commonly evaluated by consideration of several factors including:

- The complexity, expense, and likely duration of litigation
- The reaction of the class to the settlement
- The state of the proceedings and the amount of discovery completed
- The risks of establishing liability
- The risks of establishing damages
- The risks of maintaining the class action through the trial
- The ability of the defendants to withstand greater judgment
- The range of reasonableness of the settlement fund in light of the best possible recovery
- The range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[60]

Courts balance the judicial economy achieved through settlement of class claims with the need to protect absent class members. "The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."[61] At the same time, district courts function as a "fiduciary who must serve as a guardian of the rights of absent class members" by ensuring that the proposed settlement is fair, reasonable, and adequate.[62]

iii. Additional Factors to Consider in Wage and Hour Settlements

Employers have a wide range of options available to them when reaching a settlement. Prior to certification of the class, a settlement with class representatives may be contemplated. Settlements of this kind usually come at a lower value than those involving a putative class. An employer can obtain the releases of the employees who are most motivated to assert claims – namely the class representative and FLSA opt-ins. However, this approach creates uncertainty and a risk that a putative class member may file his or her own case involving the same or similar class claims.

Regardless, wage and hour settlements face scrutiny by the court, and therefore the above fairness factors, as well as the considerations outlined below, should be kept in mind when entering settlement negotiations.

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[58] *See, Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 614-615 (1997).
[59] FRCP 23(e)(2).
[60] *Girsh v. Jepson,* 521 F.2d 153 (3d Cir. 1975); *City of Detroit v. Grinnell Corp.,* 495 F.2d 448 (2d Cir. 1974).
[61] *In re Gen. Motors Corp., Pick-Up Truck Fuel Tank Prod. Liab. Litig.,* 55 F.3d 768, 784 (3d Cir. 1995).
[62] *Id*. at 785.

a. Adequacy of Notice

The settlement notice serves the purpose of allowing class action members to opt out of the settlement. The parties must submit this notice to the court for approval when they request preliminary approval of the settlement. After the Court grants preliminary approval of the settlement (but before it grants final approval of the settlement), notice issues to all putative class members.

The settlement class notice should explain the basic terms of the settlement, the attorney's fees sought, who falls within the settlement class, the procedures and deadline for submitting a claim form (if applicable), opting out of the settlement, objecting to the settlement, and scope of the release. The notice should clearly explain how each class member's settlement shares are calculated as well as the date and time of the fairness hearing. The notice must explain the consequences of participating, such as a waiver of claims, and the consequences of opting out.

b. Confidentiality Provisions

When settling class claims, employers may desire to protect their interests through a confidential settlement filed under seal. However, the trend among courts is not to permit confidentiality of such settlements. Particularly, in FLSA actions, courts require that these interests be balanced with the interests of the employees and the public in understanding the terms of the agreement. Courts will scrutinize these provisions to avoid overbreadth, so drafting them so that they are narrowly tailored and aimed at protecting the interests of both parties will increase the likelihood of court approval.

There exists the common law presumption that public access attaches to any judicial document that is "relevant to the performance of the judicial function and useful in the judicial process.[63] Private settlement agreements are generally not considered "judicial documents" but public access is generally required for FLSA actions as they are subject to court approval. Thus, some courts refuse to seal the terms of these settlements because they find that employee rights under the FLSA and other federal laws have a "private-public character" and that there is a "general public interest in the content of documents upon which a court's decision is based, including a determination of whether to approve a settlement." In some jurisdictions, the rationale for refusing to enforce confidentiality agreements is that the public has an "independent interest in assuring that employees' wages are fair and thus do not endanger the 'national health and well-being.'" Thus, parties seeking to file their settlement agreements under seal must usually demonstrate how the specific harm they may suffer outweighs the public's common law right to access the judicial record.

Some federal courts have sealed settlement-related documents or reviewed them *in camera* where the parties can provide a reason, such as protecting private information like employment records.[64]

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[63] *Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110, 119 (2d Cir. 2006).

[64] *See Almodova v. City of & Cnty. Of Honolulu,* No. 07-00378, 2010 U.S. Dist. LEXIS 33199 at *13 (D. Hawaii. Mar. 31, 2010)*; Trinh v. J.P. Morgan Chase & Co.,* No. 07-CV-01666-W-WMC- 2009 U.S. Dist. LEXIS 16477 at *1 (S.D. Cal. Mar. 3, 2009).

c. Claims-Made Settlements

Under a claims-made settlement, only a portion of the settlement funds will be paid to class members after attorney's fees, expenses, settlement administration costs, and incentives payments to the class representative are issued. The remaining funds will be only be paid to class members - but only to those that submit claims. Funds that are not distributed will then revert to the defendant or be allocated to a *cy pres* recipient. Claims made settlements differ from common fund settlements in which all money paid by the defendant is paid to class members, with no reversion back to the defendant.

When reviewing class settlements, federal courts are instructed to look for subtle signs that class counsel allowed their pursuit of self-interest to infect negotiations, including when the parties create a reverter that returns unclaimed fees to the defendant.[65] Further, claims-made settlements are usually accompanied by a "clear sailing" arrangement or an arrangement where the defendant will not object to fees requested by class counsel. These arrangements could allow class counsel to receive a disproportionate distribution of the settlement, causing claims-made settlements to be met with scrutiny.[66]

Notwithstanding the concerns addressed above, courts are still approving claims-made settlements as long as certain protections are built in. These protections are generally focused on ensuring that payments to class counsel do not become unduly disproportionate to the recovery of the class. This can include using a floor, so that no matter the level of the response to the settlement by class members, the defendant must pay out a minimum percentage of the settlement fund to class members and any unclaimed funds beyond that percentage are returned to the defendant. Reversionary settlements are also more likely to be approved if they do not include "clear sailing arrangements," which are disfavored by some courts.

d. Attorneys' Fees

It goes without saying that attorneys' fees are a driving factor behind the avalanche of wage and hour litigation in recent years. Typically, there are two approaches for evaluating fee applications in the context of wage and hour settlements: the lodestar approach and the common fund approach.

Courts generally consider several factors in evaluating fee applications under the lodestar approach. These factors include: (1) the time and labor required, (2) the novelty and difficulty of the questions presented by the case, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorneys due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) any time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.[67]

Another approach is the common fund approach, which involves negotiation of fees as a percentage of a common fund, which is a pool of money that is used to distribute to the class and to

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[65] *In re Bluetooth Headseat Products Liability*, 654 F.3d 935, 947 (9th Cir. 2011).
[66] *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015).
[67] *Bailes v. Lineage Logistics, LLC*, 2017 WL 4758927, at *3 (D. Kan. Oct. 20, 2017).

pay attorney's fees. Alternatively, the parties can negotiate or reach an agreement on a specific amount in fees separate from the fund for class members. In any case, the employer should seek cost certainty on the total fees to be paid. The employer, in reaching agreement on the fees amount, typically agrees that, procedurally, the employer will not oppose a fee request for up to that amount (and seek reverter or redistribution to the class). For instance, the Ninth Circuit has established a benchmark of 25% of the common fund for attorneys' fee calculations.[68] In support of an increase above the 25 percent benchmark, Plaintiffs must submit evidence such as billing summaries, declarations and other financial documents from which the court could allow a departure from this figure.[69] Likewise, in common-fund settlements, attorney's fees sought in the Tenth Circuit are evaluated with a hybrid approach of the Lodestar and percentage-fee methods. When applying this hybrid approach, these two methods complement each other: in a common fund case, the Tenth Circuit favors application of the percentage-of-the-fund method, but courts "have discretion to reduce an award of attorneys' fees" if it would be "unreasonable under the lodestar approach."

Generally, attorney's fee awards negotiated after the settlement amount are viewed as more credible by the courts. Recently, courts in the Eleventh Circuit have considered not only the figure of attorney's fees requested, but the timing and process for how that amount was calculated in assessing fairness of approval. For example, when evaluating the fairness of a request for attorney's fees in a FLSA action for over $425,000, the Court noted that the negotiation of fees between the parties through the use of a mediator and after the final settlement amount had been established brought about a presumption of fairness to the figure.[70] The court also noted that setting aside a portion of attorney's fees to be awarded only after the case was completely administered helped to assuage fears that certain Plaintiffs would be left without adequate legal representation if the attorneys were paid in a lump sum immediately.

Attorney's fees provisions in wage and hour settlements are becoming a hotly contested issue that courts have been paying close attention to in recent years. In 2015, a federal judge in the Southern District of New York questioned a class wide settlement that sought the payment of $800,000 in attorney's fees on a $2.4 million settlement. Taking into consideration the facts of the case, the risk of litigation and previous fee awards in the district, the court reduced the fee award to $480,000 (20% of the settlement fund). Noting that "approval of class action settlements and fee applications [in FLSA cases] is precisely where judicial scrutiny, not judicial deference, is most needed."[71]

e. Scope of Release

As a general rule, courts have disfavored sweeping settlement release provisions that extend "beyond the scope of the present litigation."[72] The Court in *Terry* rejected the premature release of claims that had not been asserted and were outside the scope of the putative wage and hour claims brought by the plaintiff. The lack of a tailored release ultimately resulted in the court denying the

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[68] *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) ("We have ... established twenty-five percent of the recovery as a 'benchmark' for attorneys' fees calculations under the percentage-of-recovery approach.").
[69] *See Uschold v. NSMG Shared Servs., LLC*, 2019 WL 4963261, at *13 (N.D. Cal. Oct. 8, 2019) (noting that "[a] district court may depart from the benchmark," but "it must be made clear by the district court how it arrives at the figure ultimately awarded").
[70] *See Thomas v. Port II Seafood & Oyster Bar, Inc.*, 2016 WL 5662032 at 4 (S.D. Ala. Sept. 29, 2016).
[71] *See Fujiwara v. Sushi Yasuda Ltd.,* 58 F. Supp. 3d 424 (S.D.N.Y. 2014).
[72] *Terry v. Hoovestol, Inc*., 2018 WL 4283420, at *5 (N.D. Cal. Sept. 7, 2018).

motion to approve the settlement agreement. The Ninth Circuit also disfavors plaintiffs adding FLSA claims for the purpose of dismissing them as settlement leverage and notes that parties should be prepared to address the scope of the release and the reasoning behind the decision.

f. Service Awards

The employer should consider whether to agree to service payments to the named plaintiffs, which are extra incentive payments to the class representatives for their role in the lawsuit. In exchange for the service payment, the employer should secure a general release that is broader than a class release that covers only claims that have been or could have been asserted in the lawsuit.

However, in some instances, service awards are disfavored when class representatives are already given a greater allocation of the settlement fund because of the greater number of hours worked (i.e. sitting for deposition, executing declarations, producing documents, etc.).[73] As such, parties must be prepared to defend a request for service fees in a class action settlement, even when the parties agree on all aspects of the settlement, due to the court's increased scrutiny.

III. Arbitration as a Means of Avoiding Class and Collective Actions

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. Part A of this Section provides a brief overview of the *Epic Systems* decision. Part B then explores where employers and in-house counsel now stand in light of this decision and also provides drafting tips and strategies for employers seeking to roll out or revise arbitration agreements. Finally, Part C balances the pros and cons of implementing arbitration agreements and provides an overview of recent legislative and judicial advancements in this area of law.[74]

A. The 2018 *Epic Systems* Decision

Epic Systems answers in the affirmative the question of whether employers and employees may agree to individually arbitrate employment-related claims.[75]

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.[76] Rather, the Court held, arbitration agreements are enforceable under the FAA, which requires the enforcement of arbitration agreements according to their terms.[77]

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 or collective claims. 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

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[73] *Id*.
[74] *See* Section IV, *infra* for a discussion regarding arbitration issues in California.
[75] *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).
[76] *Epic Sys*., 138 S. Ct. at 1612.
[77] *Id*.

Labor Standards Act ("FLSA") and corresponding state laws.[78] In each of those three consolidated cases, the plaintiffs argued that, under the NLRA, the class action waivers were unenforceable.[79]

Supreme Court Justice Neil Gorsuch wrote the opinion for the majority and agreed with Epic Systems, 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."[80] 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.[81]

B. 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. While employers fare much better under this decision, this Section also discusses considerations for employers seeking to draft enforceable agreements under *Epic Systems* and state contract law.

i. 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*[82], where the court ultimately ruled that transportation workers, regardless of whether they are classified as employees or independent contractors, are exempt from the FAA.[83] 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

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[78] *Id*.
[79] *Epic Sys*., 138 S. Ct. at 1616.
[80] *Id*. at 1619.
[81] *Id*. at 1616.
[82] 139 S.Ct. 532 (2019).
[83] 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.

independent contractors, many of whom have contracts that could ultimately be invalidated by the outcome of this case, to the extent they are not otherwise enforceable under state contract and arbitration laws.[84]

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 long-standing 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.

ii. 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. If litigation is pending, another consideration is whether a new class action waiver can be applied to the currently pending class or collective action.

a. 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 eighteen (18) years or older, and not by minors or employees with mental infirmities that prevent them from having capacity, such as those with a legal guardian.[85]

b. Mutuality

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[84] *Id*.

[85] *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).

Pre-dispute arbitration agreements require employees to agree to arbitrate any disputes arising out of the employment relationship before any dispute arises. As such, 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 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 case, despite her signing of an arbitration clause, a Jenny Craig 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.[86] 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.[87] 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.

c. 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.[88] For applicants, the employer's consideration of the employee for employment may constitute sufficient consideration with regard to an arbitration provision contained in a job application.[89] Likewise, courts in many states often view the employer's initial offer of employment to the applicant to constitute sufficient consideration for new employees.[90]

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.[91] However, several state courts have held otherwise.

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[86] *Flanzman v. Jenny Craig, Inc*., 456 N.J. Super. 613 (N.J. Super. Ct. App. Div. 2018), *certif. granted*, 237 N.J. 310 (2019).
[87] *See Kleine v. Emeritus at Emerson*, 445 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).
[88] 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://uk.practicallaw.thomsonreuters.com/2-591-4336?__lrTS=20170830220209206&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1&bhhash =1&comp=pluk [hereinafter *Enforceability of Arbitration*].
[89] *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*., 173 N.J. 76, No. A-10-01 (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).
[90] *Koveleskie v. SBC Capital Markets, Inc*., 167 F.3d 361, 368 (7th Cir. 1999).
[91] *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,*

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.[92] Common examples of valid consideration in an employee arbitration agreement beyond continued employment generally include 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.[93]

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

d. 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 scrutiny of employment arbitration agreements remains common."[94] One area that presents potential pitfalls for employers is with regard to electronically-

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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. 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.").

[92] *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*., 450 S.W. 3d 770 (Mo. 2014) (employers cannot enforce employment arbitration agreements that merely promise continued at-will employment and include a unilateral right to modify).

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

[94] Paul Cowie & Kevin Jackson, *Arbitration Agreements and the Use of Electronic Signatures*, 23 L. J. NEWSLETTERS EMP. L. STRATEGIST 2 (2015).

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.[95] 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.[96] There, the employee argued that he did not recall signing the agreement and would have remembered if he had.[97] 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 court did not find a sufficient explanation as to how such an electronic signature could only be placed by the employee at issue.[98]

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.[99] 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.[100]

Courts across the country continue to reach mixed results.[101] 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 sending the agreement electronically, include "I agree" check-boxes throughout an electronic agreement to ensure the ability to 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.[102] Employers should also avoid

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[95] *Id*.
[96] *Ruiz v. Moss Bros. Auto Group, Inc*., No. E057529, 2014 WL 7335221 (Cal. Ct. App. Dec. 23, 2014).
[97] *Id*. at *785.
[98] *Id*. at *791.
[99] *Shimkus v. O'Charley's Inc*., No. 1:11CV122TLS, 2011 WL 3585996 (N.D. Ind. Aug. 16, 2011).
[100] *Bell v. Hollywood Entertainment Corp.*, No. 87210, 2006 WL 2192053 (Ohio Ct. App. Aug. 3, 2006).
[101] *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).
[102] *Skuse v. Pfizer, Inc*., 457 N.J. Super. 539 (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

"browsewrap" agreements in electronic arbitration agreements, where the terms are only accessible through a hyperlink as opposed to an 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 employee can demonstrate assent.

e. 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 or (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 procedural unconscionability. Rather, procedural unconscionability may involve a number of factors such as a "take it or leave it" clause in the arbitration agreement, or terms buried in the middle of the agreement in small font. 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 employee's signature is unfair, a court or arbitrator 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.[103] There, the court noted that the agreements were gathered in a "blitzkrieg fashion" through "back-room" meetings that were "interrogation-like."[104] 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.[105] 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.[106] 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.[107]

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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).

[103] *Billingsley v. Citi Trends, Inc*., 560 F. App'x 914, 924 (11th Cir. 2014).

[104] *Id*. at 919.

[105] *Id*.

[106] *Id*. at 921.

[107] *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.[108] 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 thirty (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
- 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)[109]
- Controlling who the arbitrator will be and not allowing any input by the employee
- 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.[110]

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[108] *See e.g., Varon v. Uber Technologies Inc*., No. MJG-15-3650, 2016 WL 1752835, at *1 (D. Md. May 3, 2016); *Suarez v. Uber Technologies Inc*., No. 8:16-cv-166-T-30MAP, 2016 WL 2348706, at *1 (M.D. Fla. May 4, 2016) *aff'd*, 688 F. App'x 777 (11th Cir. 2017).

[109] *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).

[110] *See Ramos v. The Superior Court of the State of California for the County of San Francisco*, No. CGC-17-561025, 28 Cal. App. 5th 1042 (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

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 must 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. Employers should also choose a local arbitrator as some states prohibit arbitration agreements that require employees to travel out-of-state for arbitration.[111] If not provided under the rules of the applicable arbitration association, employers should consider whether to include the use of an appellate arbitrator or panel.

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.

f. Class Action Waiver

In *Lamps Plus*[112], 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. Many states have contract interpretation rules providing that an ambiguity in a contract can be held against the drafter. In other words, if a court finds that there is an ambiguity as to whether the parties intended an arbitration agreement drafted by the employer to include class claims, courts could compel class arbitration. The Supreme Court in *Lamps Plus* effectively cut off this argument for employees seeking to compel arbitration of class claims, holding that a state-law contract interpretation rule to resolve ambiguous provisions against the drafter cannot be applied to impose class arbitration in the absence of the parties' consent.

g. 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.[113] For example, when a defendant filed a

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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), *cert. denied*, 140 S. Ct. 108 (2019).

[111] Steven Gallagher, *Arbitration Agreements: Tips for Enforceability*, LEXOLOGY (Dec. 11, 2018), https://www.lexology.com/library/detail.aspx?g=a3309b72-c475-4e96-8837-eaf82926c60f.

[112] *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

[113] *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).

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.[114] On the other hand, participating in a lawsuit without seeking arbitration or withdrawing a motion to compel has been found to demonstrate waiver.[115] Similarly, an employer seeking to gain a strategic advantage from formal discovery before filing a motion to compel demonstrates waiver. Several 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.[116]

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.[117] 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.[118]

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.

h. Non-Waivable Claims

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 agreement is upheld.[119] 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.[120] 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.

i. Governing Body Over Disputes and Arbitrability

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[114] *Id*.
[115] 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/.
[116] *Id*.
[117] *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).
[118] *See, e.g., In re Cox*, 790 F.3d at 1119.
[119] *Id*.
[120] *See 14 Penn Plaza, LLC v Pyett*, 556 U.S. 247 (2009). However, note that the investigating agency may still bring litigation.

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. 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.[121] 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.[122] 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.

C. 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.

i. Pros and Cons of Arbitration Agreements

In the right circumstances, arbitration presents many advantages: quicker results, simpler procedures, less costs for employers and lawyers (sometimes), lower risk of "sky high" damage awards, and more confidentiality. On the other hand, despite its advantages, arbitration does present several negatives and companies should certainly not view the process as a one-size-fits-all approach.

In terms of pros, 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, some (but not all) 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 litigating class action claims. From an exposure standpoint, arbitration also reduces the risk of incurring large consequential and punitive damages. Some employers also believe there is increased predictability with arbitration, where trained legal professionals (often retired judges) dictate the results of employment disputes rather than a jury. 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

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[121] 139 S. Ct. 524 (2019).

[122] 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.

the risk of damage to the company's brand as well as a reduction in the possibility of copycat plaintiffs. In light of the above, employers operating without an arbitration agreement should consider whether the benefits outweigh the cons it could ultimately be exposed to if operating in the traditional legal system.

In terms of cons, notably, arbitration presents several challenges for employers. Arbitration proceedings typically require a hearing and are less likely to be decided by a dispositive motion than court proceedings. In addition, 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 the employer's 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 are 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.

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.[123] As a result, the employer is on the hook for expensive arbitrator fees in many different cases.[124] This "death by a thousand cuts" strategy can be costly and, ultimately, it allows plaintiffs' attorneys to gain leverage for a settlement. 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 LGBTQ context to the implementation of Artificial Intelligence in the workplace and the growing gig economy.[125] If it is determined that imposing a company-wide arbitration or class action waiver requirement may be negatively received, the company should consider when, or even whether, to implement.

ii. Current Legislation and Judicial Advancements at the State and Federal Levels Regarding Mandatory Arbitration Agreements in Employment Contracts

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.

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. Challenges are expected assuming these state laws are preempted by the Federal Arbitration Act.

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[123] Darcey Groden, *Workplace Law Predictions for 2019*, Fisher & Phillips LLP, https://www.fisherphillips.com/resources-newsletters-article-workplace-law-predictions-for-2019?click_source=sitepilot06%214222%21bXdlaW5nYXJkZW5AbXctbGF3eWVycy5jb20%3D.

[124] *Bigger v. Facebook, Inc.*, No. 19-01944 (7th Cir. Jan. 24, 2020).

[125] 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.

On the federal side of the equation, a unanimous block of attorneys general from all 50 states and the District of Columbia have also asked federal lawmakers to prohibit the use of mandatory arbitration agreements when it comes to claims of sexual harassment.[126] 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" surrounding these claims.[127] If Congress decides to take the lead on this issue, agreements will need to be updated accordingly.

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.

IV. California Class Action Considerations

When a complaint is filed in the California Superior Court, employers face several initial decisions that will have a substantial impact on the lifecycle of the case. These include (1) whether the employer can compel the case to individualized binding arbitration; (2) whether the case can or should be removed to the U.S. District Court; and (3) how to deal with complications under the Private Attorneys General Act ("PAGA").

A. Arbitration Agreements[128]

Employers have long viewed arbitration as an advantageous alternative forum to resolve employment related disputes. A report by The Consumer Financial Protection Bureau found that 53.9 percent of nonunion private sector employers have mandatory arbitration agreements.[129] However, the enforceability of mandatory arbitration agreements in California has remained uncertain over the past several years.

On August 25, 2000, the California Supreme Court issued a landmark decision in *Armendariz v. Foundation Health Psychcare Services, Inc*. in which the Court upheld the right of employers to require employees to sign mandatory arbitration agreements as a condition of their employment. [130] In *Armendariz*, two former employees, who had signed arbitration agreements, brought wrongful termination claims against their employer. The employer filed a motion to compel the employees' claims to arbitration. The trial court denied the motion to compel and invalidated the arbitration agreement, holding that the mandatory arbitration agreements were "one-sided" and unconscionable.[131] In particular, the agreement required arbitration of only the employees' claims, but not the employer's claims. The agreement also limited damages and restricted discovery. The Court of Appeals reversed, concluding that the arbitration agreement should be enforced under the principals of the California Arbitration Act ("CAA").

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[126] 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.
[127] *Id*.
[128] *See* Section III, *supra*, for a discussion of arbitration outside of California.
[129] Alexander J.S. Colvin, *The Growing use of Mandatory Arbitration* (Apr. 6, 2018), available at https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.
[130] 24 Cal. 4th 83 (2000).
[131] *Id*. at 92.

In the California Supreme Court's opinion, the Court reiterated the proposition that California law "favors enforcement of valid arbitration agreements."[132] The Court established a two-part framework for analyzing whether an arbitration agreement is valid and enforceable. An agreement is unconscionable if (1) it is procedurally unfair due to unequal bargaining power, or (2) it is substantively unfair in so far as the provisions are one-sided. Applying the framework to the case at bar, the Court found that the employer's arbitration agreement was unconscionable because it lacked the mutuality of terms and prevented full recovery for the employee. The Court also handed down four requirements that all arbitration agreements must contain: (1) neutral arbitrators, (2) provide for all remedies allowed under law, (3) adequate discovery procedures, and (4) the employer must pay all costs for the arbitration proceedings.

Further in September 2019, the California Supreme Court in *OTO, LLC v. Kho*[133] reviewed a case involving an employer who sought to compel an appeal from the adverse decision before the California Labor Commission to arbitration based upon an arbitration agreement. The primary issue in the case was whether claims that started with the California Labor Commission and were appealed to the California Superior Court are subject to arbitration. In ruling that they were not, the Court also struct down the arbitration agreement based on the content and dissemination of the agreement. The Court took particular issue with the form of the arbitration agreement. The agreement appeared in a single paragraph containing 51 lines of text in either 7 point or 8.5 point font. To add to the complexity, the agreement contained unexplained references, legal jargon, and long sentences (one sentence was 12 lines long). Additionally, the employee was not given any time to read, review, or ask questions about the agreement. As to the substance of the agreement itself, it was not clear who would pay for the arbitrator or how an employee was to proceed to initiate arbitration. This altogether supported the Court's determination that the arbitration agreement was the product of oppression as well as that it was procedurally and substantively unconscionable.

In light of the prior two decisions, employers should make their arbitration agreements a stand-alone document that does not contain legalese. The agreement should be easily readable and understandable by employees. When presenting arbitration agreements to employees, employers should give employees time to read over the agreement before signing it. If the employee cannot read English, an arbitration agreement should be provided in their language. *Armendariz* and *OTO* are still the law of the land when it comes to assessing the validity of arbitration agreements, whether the employer offers the arbitration agreement on a mandatory or voluntary basis. Much of the current uncertainty surrounds whether an employer may even offer or enter into mandatory arbitration agreements with their employees.

Most recently, Governor Newsom signed AB 51 into law on October 10, 2019.[134] Beginning January 1, 2020, AB 51 prohibits employers from offering and entering into mandatory arbitration agreements with their employees to waive any right, forum, or procedure for a violation under the Fair Employment and Housing Act ("FEHA") or California Labor Code.[135] This remains the case even if the arbitration agreement contains an opt-out provision. AB 51 also contains a retaliation provision that prohibits employers from retaliating against applicants or employees who refuse to enter into the

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[132] *Id*. at 97.
[133] 8 Cal. 5th 111 (2019), *petition for cert. filed*, No. 19-875 (S. Ct. Jan. 15, 2020).
[134] A.B. 51, 2019-2020 Reg. Sess. (Cal. 2019).
[135] *Id*.

banned mandatory arbitration agreement. If an employer offers or enters into a mandatory arbitration agreement, they could face criminal penalties.[136]

Only a few weeks before AB 51 was set to take effect, on December 6, 2019, a coalition of businesses led by the California Chamber of Commerce filed a lawsuit in the United States District Court for the Eastern District of California to block the enforcement of AB 51.[137] The plaintiffs argued that AB 51 is preempted by the Federal Arbitration Act ("FAA").[138] Specifically, section 2 of the FAA states, a "written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, … shall be valid, irrevocable, and enforceable."[139] The plaintiffs argue that section 2 requires the enforcement of arbitration agreements unless they are unconscionable. Additionally, the plaintiffs contend that AB 51 runs afoul to a long line of U.S. Supreme Court cases holding that states may not interfere with the arbitration process. On December 30, 2019, the District Court issued a last minute Temporary Restraining Order ("TRO") to enjoin the enforcement on AB 51.[140] The hearing for a preliminary injunction was set for January 10, 2020. At the hearing, U.S. District Court Judge Kimberly Mueller ordered that the TRO remain in place and requested the parties submit supplemental briefing on the issues of standing and severability due January 17, 2020, and January 24, 2020, respectively.
AB 51 is not the first time that the legislature has attempted to prohibit mandatory arbitration provisions. In 2014, Governor Brown signed into law AB 2617, which banned mandatory arbitration agreements for goods and services. However, in March 2018, the California Court of Appeal concluded AB 2617 was preempted by the FAA in *Saheli v. White Memorial Medical Center*.[141] The court reasoned that the bill's "restrictions discourage arbitration by invalidating otherwise valid arbitration agreements. It is precisely this sort of hostility to arbitration that the FAA prohibits."[142]

Further, on May 21, 2018, the Supreme Court of the United States in *Epic Systems Corporation v. Lewis*[143] upheld the enforceability of class action waivers in arbitration agreements. In doing so, the Court held that the FAA mandates the enforcement of arbitration agreements according to their terms – including terms that provide for individualized proceedings. Additionally, the Court determined that class action waivers contained in arbitration agreements do not violate the National Labor Relations Act ("NLRA").

The last attempt to prohibit mandatory arbitration agreements occurred on August 27, 2018, when the legislature passed AB 3080, which contained provisions almost identical to AB 51. However, Governor Brown vetoed the bill as preempted by federal law.[144] In Governor Brown's veto message, he made clear that state laws which unduly impeded arbitration are preempted by the FAA. Governor Brown rejected the argument that the FAA only governs the enforcement of arbitration agreements and not the formation, and instead stated that the "Supreme Court has made it explicit

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[136] Cal. Labor Code § 433.
[137] Complaint for Declaratory and Injunctive Relief, *Chamber of Commerce of the U.S., et al. v. Becerra, et al.,* Case No. 2:19-at-01142 (E.D. Cal. 2019).
[138] 9 U.S.C §§ 1-16.
[139] *Id*. at § 2.
[140] Temporary Restraining Order, *Chamber of Commerce of the U.S., et al. v. Becerra, et al.,* Case No. 2:19-at-01142 (E.D. Cal. 2019).
[141] 21 Cal. App. 5th 308 (2018).
[142] *Id*. at 326.
[143] 138 S. Ct. 1612 (2018).
[144] Governor's Veto Message, Ab 3080 (Sept. 30, 2018), available at http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB3080.

this approach is impermissible." The veto message explicitly quoted *Kindred Nursing Centers, Ltd. Partnership v. Clark*,[145] which states "[b]y its terms, … the Act cares not only about the "enforce[ment]" of arbitration agreements, but also about their initial "valid[ity]"-that is, about what it takes to enter into them."

Mandatory arbitration agreements are the most common and preferable way for employers to resolve employment disputes. Arbitration is favorable because arbitrators are less likely than juries to be swayed by emotion and are more flexible at a procedural level. Typically, arbitration is also quicker and generates a lower settlement. Nevertheless, there are a few disadvantages to arbitration including that there are no appeal rights and the employer must pay the arbitration fees. With the unpredictability of how the District Court will rule on the preemption of AB 51, employers should evaluate if they are going to offer only voluntary arbitration agreements, or if they are going to maintain their standard process of offering mandatory arbitration agreements while the TRO is in place. If the latter option is chosen, employers should pay keen attention to the updates in the *Chamber of Commerce of the U.S., et al. v. Becerra, et al*. case.

Another significant piece of legislation passed by Governor Newsom in 2019 is SB 707.[146] SB 707 provides that any drafting party that fails to pay the fees necessary to commence or continue arbitration within 30 days after such fees are due is held to have materially breached the agreement. This bill was intended to provide redress for employees when companies stall or obstruct the arbitration process.[147] Over the past years, a trend has developed where employers refuse to pay their required arbitration fees to effectively preclude employees from asserting their legal rights. For example, of the 12,500 arbitration demands filed by Uber drivers, the company only paid the arbitration fees in 296 cases. The nonpayment of fees resulted in employees abandoning their claims. Thus, SB 707 was enacted to rectify that precise scenario. The untimely payment of arbitration fees could result in the case being forced back to court or, in the alternative, the employee could seek a court order compelling the payment of fees, mandatory monetary sanction, and additional evidentiary, terminating, or contempt sanctions. The stakes for nonpayment of fees are too high for employers not to pay attention.

B. PAGA Complications

Further, PAGA adds another layer of complexity to compelling arbitration. PAGA, or the Labor Code Private Attorneys General Act of 2004, is a series of statutes codified in Sections 2698 through 2699.6 of the California Labor Code. PAGA authorized aggrieved employees to file a lawsuit to recover civil penalties on behalf of themselves, other employees, and the State of California. PAGA is limited to a one-year statute of limitations. Before filing a PAGA Action, an employee must exhaust their administrative remedies by filing a written notice online with the Labor & Workforce Development Agency ("LWDA") and by certified mail to the employer.[148] The LWDA has 60 days to review the PAGA notice, and 65 days to notify the plaintiff and employer of its intent to investigate the case. If the LWDA declines to do so, a plaintiff may, at the conclusion of the 65 days, commence a civil action in court.

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[145] 137 S. Ct. 1421, 1428 (2017).
[146] S.B. 707, 2019-2020 Reg. Sess. (Cal. 2019).
[147] Sen. Com. on Judiciary, Rep. on Sen. Bill No. 707 (2019-2020 Reg. Sess.) Apr. 11, 2019, pp. 6-8.
[148] Cal. Labor Code § 2699.3(a)(1)(A).

Once a PAGA action is filed, the employer may wish to compel the case to arbitration. However, in a recent case, *Correia v. NB Baker Electric, Inc.*,[149] the California Court of Appeal held that employers cannot require employees to arbitrate their representative claims under PAGA. In *Correia*, two employees sued their employer alleging wage and hour violations and seeking civil penalties under PAGA. The defendants sought to compel arbitration pursuant to the parties' arbitration agreements. The agreement provided that arbitration would be the exclusive forum for "any class action or representative action."[150] The trial court ordered arbitration on all of the employees' claims except for the PAGA claims, noting that *Iskanian*[151] made unenforceable arbitration agreements that contained a waiver of rights to bring a PAGA action. On appeal, the employer argued that *Iskanian* was not binding because of the U.S. Supreme Court decision in *Epic Systems*[152] which favored the enforceability of arbitration agreements to their precise terms. However, the Court of Appeal held that *Epic Systems* did not address civil penalties brought under a PAGA representative action, and thus followed *Iskanian*. Ultimately, the Court held that PAGA representative actions cannot be compelled to arbitration.[153]

A common practice in wage and hour cases is for plaintiffs to file a class action complaint with the court and a PAGA notice with the LWDA. At the end of the 65-day tolling period, the plaintiffs will amend their complaint to add the PAGA claims. In this scenario, once the employer is served with the complaint, the employer can move to compel the employee's individual claims to arbitration while the PAGA action will remain in court. This results in the PAGA action being stayed pending the conclusion of arbitration.

When employers receive a PAGA notice there are several steps that should be taken to ensure the company is as well-positioned as possible to minimize liability. For a PAGA notice that contains an alleged violation for inaccurate wage statements, employers should review wage statements going back one year from the date of the PAGA notice for compliance with the requirements under Labor Code section 226(a). Any errors found should be corrected in future wage statements. Additionally, the Labor Code allows for an employer to "cure" two types of wage statement violations: (1) failure to include either the state or end date of the pay period,[154] and (2) failure to provide the name and address of the employing legal entity.[155] The process of curing the violation is no small feat. The employer will need to re-issue fully compliant wage statements and file a notice with the LWDA that includes a description of the action taken.

Employers should also conduct a review of their timekeeping and payroll practices. Counsel should be retained to conduct an audit that will flag potentially troublesome practices. Employers should also gather information from employees about wage and hour practices within the organization. An employer should consult their labor and employment attorneys for how to best proceed with the process of collecting information.

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[149] 32 Cal. App. 5th 602 (Ct. App. 2019).
[150] *Id*. at 610.
[151] *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014).
[152] *See Epic Systems,* 138 S. Ct. 1612.
[153] *Id*. at 625.
[154] Labor Code § 226(a)(6).
[155] *Id*. at § 226(a)(8).

C. Removal

When a complaint is filed in the California Superior Court, it is crucial that employers assess the removability of the case at the outset. A defendant may generally remove a case based on federal question jurisdiction or diversity jurisdiction by filing a notice of removal in the federal district court within 30 days from being served with the complaint.[156] The advantages of litigating in federal court include that federal judges are typically willing to decide motions on the papers, which decreases the cost of paying for counsel to appear in court. Additionally, federal judges are more likely to grant motions to dismiss and motions for summary judgment. When it comes to discovery, the federal court has mandatory disclosures, which can help parties gather information more cost-effectively.
Class actions can be removed to federal court under the Class Action Fairness Act ("CAFA").[157] Under the CAFA, federal courts have original jurisdiction over class actions where the aggregate amount in controversy exceeds $5,000,000, if the putative class size exceeds 100 persons, and if there is "minimal diversity" between the state citizenship of a member of the plaintiff and state citizenship of a defendant.

PAGA claims are not removable under the CAFA. The court in *Baumann v. Chase Inv. Servs. Corp.*[158] held that a PAGA action is not substantially similar to the requirements of a class action under the Federal Rules of Civil Procedure ("FRCP") rule 23 and thus, CAFA cannot serve as a basis for jurisdiction. Instead, PAGA claims may be removed, if at all, only through diversity jurisdiction.[159] Even this, however, is exceedingly difficult because of the amount in controversy requirement that the individual's potential recovery must be more than $75,000.[160] Penalties recoverable on behalf of all aggrieved employees may not be aggregated together to meet the jurisdictional requirement.

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[156] 28 U.S.C. § 1446. It may be possible to remove after the 30-day window, though this is generally more difficult, and highly situational.
[157] 28 U.S.C. §1332(d)(2)(A), (d)(5)(B).
[158] 747 F.3d 1117 (9th Cir. 2014).
[159] *Urbino v. Orkin Servs. of California, Inc*., 726 F.3d 1118 (9th Cir. 2013).
[160] *Id*.