Epic Changes? Arbitration and Class/Collective Action Waivers… What's Next?

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The Class/Collective Action Explosion

- More and more of employers' employment law spend is on class and wage and hour collective actions
  - Fueled mainly by:
    - Rise of the collective action under the FLSA
      - 4.5x increase since 2000
      - In 2017, FLSA collective actions were filed more frequently than all other types of workplace class actions
    - State-law Rule-23 class actions asserting wage-hour claims – many times with longer statutes of limitations.
  - Lenient Certification standards
    - FLSA: Conditional Certification: "modest showing," "low burden"
    - Rule 23: more rigorous, but test can be difficult to apply and time consuming and expensive to determine.
  - Even non-meritorious class and collective actions exert pressure for settlement.

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The NLRB's Challenge to Class Waivers, *cont*.

In 2016, the NLRB's theory began to gain Circuit court support:

- *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016)
- *Morris v. E&Y*, 834 F.3d 975 (9th Cir. 2016) – a change in course from prior decisions in the Circuit, citing the *Epic* decision
- *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017)

In January 2017, SCOTUS granted *cert* to resolve the split

- SCOTUS consolidated three cases: *Epic*, *Morris*, and *Murphy Oil*
- Oral argument held on the first day of the term, October 2, 2017
- Solicitor General switched sides:
  - At *cert*, Obama administration backed the NLRB
  - By oral argument, Trump administration backed the employers
- The NLRB Office of General Counsel backed the agency throughout, placing government on both sides of issue at oral argument

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Supreme Court Firmly Embraces Arbitration. Again

***Epic Systems Corp. v. Lewis*, 584 U.S. ____ (May 21, 2018)**

- Majority opinion authored by Gorsuch, joined by Roberts, Kennedy, Thomas, and Alito
- FAA mandates that courts enforce arbitration agreements
  - The FAA's Savings Clause applies only to "generally" applicable contract defenses – fraud, duress, unconscionability
- NLRA does not create a right to bring class or collective action
  - Section 7 is focused on the right to organize unions and bargain collectively
  - Section 7's catch-all provision only protects activities similar to those explicitly listed, and thus reaches only to "things employees do for themselves in the course of exercising their right to free association *in the workplace*" (emphasis added)
  - Section 7 thus does not create a right to pursue a class or collective action in court or arbitral forum

Supreme Court Firmly Embraces Arbitration. Again

***Epic Systems Corp. v. Lewis*, 584 U.S. ____ (May 21, 2018)**

- Some other observations by the majority:
  - Class and collective action procedures were "hardly known" in 1935 when the NLRA was passed
  - The NLRA imposes a strict regulatory regime in certain areas, but provides no rules on class or collective action
  - Collective action procedures under the FLSA are just like the collective action procedures under the ADEA, which the Supreme Court previously held does not prohibit mandatory individual arbitration
  - The Court has rejected every prior effort to find a conflict between the FAA and other federal statutes
  - No *Chevron* deference can be afforded, since the NLRB is interpreting a statute (the FAA) outside its charge and only recently came to its *D.R. Horton* position; also, the Executive branch contradicts itself
- Key takeaways:
  - Broader than expected victory for employers
  - Another full-throated statement favoring the FAA's commands that arbitration agreements be enforced according to their terms
  - There may be no Section 7 right to pursue a class or collective action in the first place

Arbitration/Class Waiver Pros and Cons

Pros	Cons
Leverage to slow or derail class actions	No waiver of EEOC/DOL lawsuits
No jury trials	No waiver of administrative charges
Confidentiality of proceedings	Likely not effective or desired for ERISA class actions
Possible limitations on scope of discovery	Harder to FOIA EEOC charge files
Lower average settlements and/or awards	Arbitrators often less predictable than judges
Shorter cycle time (Sometimes)	Easier to initiate arbitration than lawsuit
Lower total fees through hearing v. (Questionable)	Much Higher arbitration and administrate fees
	Additional fees incurred to compel arbitration
	Possible mass-individual-arbitration filings and re-litigation of the same issue over and over
	Possible confidentiality and res judicata issues
	Narrow right of appeal
	Program implementation costs
	Summary judgment less likely
	Higher fees per-matter average?
	Arbitrator has a financial incentive to keep cases alive

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The Pros and Cons: A Case Illustration
Federal Court v. Class Action Waiver Arbitration

Assumptions:

- State/Federal Wage and Hour Claims
- Class: 100 current and former employees

	Federal Court (One Case)	Arbitration (100 Individual Cases)
Filing Administrative Fee	$400	$3,000 x 100 cases = $300,000
Judge/Arbitration Fees	$0	$30,000 - $50,000 x 100 cases = $3 – $5 Million
Well-Defined Discovery Rules	YES	Maybe
Well-Defined E-Discovery Rules	Maybe	Maybe
Contractual Limitations on Discovery	NO	YES
Well-Defined Standard to Certify and Decertify Class/Collective Actions	YES	Maybe
Summary Judgment Available	YES	NO (usually)
Incentive to Grant Summary Judgment	YES	NO
Right to Appeal After Trial	YES	Narrow Right
Confidentiality of Litigation and Result	NO	Yes, but with caveats and limitations
Res Judicata Issues	NO	Maybe
Range of Remedies/Damages	Same	Same
Legal Fees	Expensive	Expensive

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Chapter 6

Class and Collective Actions

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III. MANAGEMENT OF CLASS ACTIONS IN ARBITRATION

A. What Rules Govern?

Because Section 4 of the FAA requires that agreements to arbitrate disputes be enforced according to their terms, most well-drafted arbitration agreements will expressly set forth some procedural rules that will apply to the arbitration. However, as a practical matter, instead of expressly addressing all of the procedural rules that will apply, most arbitration agreements incorporate by reference the procedural rules established by a third-party alternative dispute resolution (ADR) organization such as the American Arbitration Association (AAA) or JAMS (originally Judicial Arbitration and Mediation Services, Inc.).

Indeed, both AAA and JAMS have their own class action procedural rules that were enacted following *Green Tree Financial Corp. v. Bazzle*,[157] where a plurality of the U.S. Supreme Court concluded that if an arbitration agreement is silent on the permissibility of class arbitration, the arbitrator (not the court) must decide if the agreement forbids class arbitration. These rules are intended to supplement the arbitration rules that would otherwise be applicable to the underlying dispute.

The class action procedural rules adopted by both AAA and JAMS divide the resolution of class arbitration issues into three phases: (1) construction of the arbitration clause determining whether the matter should proceed in arbitration; (2) class certification; and (3) final award or settlement.

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[156]Guida v. Home Sav. of Am., Inc., 793 F. Supp. 2d 611, 619 (E.D.N.Y. 2011).

[157]539 U.S. 444, 91 FEP Cases 1832 (2003). For a discussion of the *Bazzle* decision, *see* section II.B.3.

B. Phase One: Should the Matter Proceed in Arbitration?

In the first phase, the arbitrator must determine "as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."[158] This "clause construction award" is published on the AAA's website and the parties have 30 days after the determination of whether the arbitration provision allows for class arbitration to move a court of competent jurisdiction to confirm or vacate the clause construction award.

The AAA Rules also provide that "[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis."[159] This provision serves to ensure employers that they will not be deemed to have consented to class arbitration merely because they refer to or incorporate other AAA rules. In other words, a party cannot insist on class arbitration by arguing that it must have been intended because the AAA has rules that apply to class arbitrations.

Only after the parties inform the arbitrator that they do not intend to seek judicial review of the clause construction award, or after the time to seek judicial review expires, does the arbitration then turn to the actual process of certification.

C. Phase Two: Class Certification

1. Differences Between Class Actions and Collective Actions

Rule 23 of the Federal Rules of Civil Procedure governs class actions in federal court. Specifically, a class action may proceed only where the plaintiffs have satisfied all of the requirements of Rule 23(a), including: numerosity, commonality, typicality, and adequate representation, and the requirements of one of the three subparts of Rule 23(b).[160] In a class action

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[158]AAA, Supplementary Rules for Class Arbitrations, Rule 3 (effective Oct. 8, 2003).

[159]*Id.*

[160]Fed. R. Civ. P. 23(a).

brought under Rule 23, putative class members are generally bound by any judgment or settlement unless they expressly opt out of the class.[161] Cases brought under the FLSA, the ADEA, or the Equal Pay Act (EPA) may not be brought as class actions; rather, they must be brought as collective actions.

There are some key distinctions between collective actions and class actions. First, and most importantly, an employee who seeks to become a member of a collective action must expressly *opt in* to the class by filing a written consent.[162] This requirement is in contrast to Rule 23 class actions, where the putative class members are generally bound by any judgment or settlement in the class action, unless they expressly *opt out* of the class. Even where a defendant has offered a plaintiff the full amount of potential recovery, some courts have been unwilling to dismiss collective actions where at least one other person has agreed to opt in.[163] Next, discovery may be broader in collective actions because they require class members to expressly opt in and, depending on the court in which the case is pending, this can have the potential to lead to more depositions and written discovery directed at each individual plaintiff. Finally, most courts have held that the Rule 23 certification requirements do not apply to collective actions.[164] This is so because the requirements of Rule 23 are designed to protect the due process rights

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[161]Fed. R. Civ. P. 23.

[162]29 U.S.C. §216(b).

[163]Yeboah v. Central Parking Sys., No. 06 CV 0128, 2007 U.S. Dist. LEXIS 81256, at *8–9 (E.D.N.Y. Oct. 31, 2007) (Rule 68 offer does not moot underlying FLSA collective action where employees other than named plaintiff have opted in). *But see* Genesis Healthcare v. Symczyk, 20 WH Cases 2d 801 (2013) (holding that "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied"; because respondent's claim was mooted before any other employees had opted into action, she had no "personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness").

[164]*See*, *e.g.*, Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977); La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288, 10 FEP Cases 1010 (5th Cir. 1975) ("[t]here is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b)"); Schmidt v. Fuller Brush Co., 527 F.2d 532, 536 (8th Cir. 1975) (same); Morisky v. Public Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 496–99, 8 WH Cases 2d 568 (D.N.J. 2000) (applying Rule 23 to state law claims, but §216(b) to FLSA claim); *see also* Kelley v. SBC, Inc., No. 97-CV-2729, 1998 U.S. Dist. LEXIS 18643, at *38, 5 WH Cases 2d 16 (N.D. Cal. Nov. 13, 1998) (holding that although Rule 23 class actions may be improper under FLSA, "opt-in

of the absent class members, whereas in a collective action, there are no absent class members to protect.[165] Although most courts have held that the Rule 23 requirements do not govern FLSA collective actions, some courts have looked to Rule 23 for guidance in deciding whether to certify an FLSA class.[166]

Courts have generally held that there is no bar to maintaining both a class and collective action in the same case.[167] Even so, there are many practical issues that may dissuade plaintiffs from attempting to combine these claims. For example, in some states, the law provides more attractive penalties, making FLSA actions less appealing—although plaintiffs may still, at least initially, bring both class and collective action claims. If class certification cannot be obtained after trying, a plaintiff may still be able to pursue collective action claims under the FLSA, assuming that the statute of limitations has not run.

2. Communications With Potential Class Members (Pre- and Post-Certification)

Class action suits often present concerns regarding whether it is proper for attorneys (whether they represent the plaintiff or the defendant) to communicate directly with unrepresented potential class members and when such ex parte communications are permissible. Lawyers seeking to communicate with

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provisions of the FLSA do not act as a complete bar to class certification under Rule 23 where pendent State law claims are involved").

[165]*See* Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 263, 4 WH Cases 2d 335 (S.D.N.Y. 1997).

[166]*See, e.g.*, Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 772 (7th Cir. 2013) ("[D]espite the difference between a collective action and a class action and the absence from the collective-action section of the Fair Labor Standards Act of the kind of detailed procedural provisions found in Rule 23 . . . there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences."); Chase v. Aimco Props., LP, 374 F. Supp. 2d 196, 200, 10 WH Cases 2d 1399 (D.D.C. 2005) ("it may simply be that what is 'similarly situated' enough for collective action treatment under the FLSA is a matter for the sound discretion of trial courts, guided mostly by Rule 23(b)(3)—like considerations of manageability and efficiency").

[167]*See, e.g.*, Busk v. Integrity Staffing Solutions, Inc., 713 F.3d 525, 20 WH Cases 2d 937 (9th Cir. 2013); Knepper v. Rite-Aid Corp., 675 F.3d 249, 18 WH Cases 2d 1648 (3d Cir. 2012); Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 17 WH Cases 2d 97 (7th Cir. 2011).

putative class members must be aware of the Rules of Professional Conduct and Code of Professional Responsibility (and state bar variants) that affect communications in class actions.[168]

Courts have shown a willingness to allow attorneys to communicate directly with potential clients in class actions, although they often place limits and controls on such communication.[169] A majority of courts have expressly held that communications between defense counsel and putative class members are improper only after a class has been certified.[170] Courts, however, are especially critical of communications by defense counsel (or those acting at their behest) that seek to encourage putative class members not to participate in the action.[171]

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[168]*See e.g.*, American Bar Association, Model Rules of Professional Conduct, Rule 7.3 (1983) (regarding solicitations).

[169]Gulf Oil Co. v. Bernard, 452 U.S. 89, 25 FEP Cases 1377 (1981) (involving Title VII class action, Court showed great deference to right of class counsel in Rule 23 class actions to communicate with potential class members for purpose of notification and information, even prior to class certification); EEOC v. Morgan Stanley & Co., 206 F. Supp. 2d 559, 89 FEP Cases 245 (S.D.N.Y. 2002) (holding that employer was permitted to contact potential class members, but had to provide written notice to employees, on court-approved form, which contained specific information concerning lawsuit and employees' rights).

[170]*See, e.g.*, Resnick v. American Dental Ass'n, 95 F.R.D. 372, 376, 31 FEP Cases 1359 (N.D. Ill. 1982) ("once the class has been certified, [unnamed class members] are 'represented by' the class counsel"); Van Gemert v. Boeing Co., 590 F.2d 433, 440 n.15 (2d Cir. 1978), *aff'd*, 444 U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980) (until certification, class members are not technically represented). *But see* Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1206–07 (11th Cir. 1985) ("defense counsel had an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification, if not sooner"); Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662 (E.D. Pa. 2001), *on reconsideration*, CIV. A. 00-1966, 2001 WL 516635 (E.D. Pa. May 16, 2001) (defense counsel not permitted to contact or interview putative class members pre-certification); Haffer v. Temple Univ., 115 F.R.D. 506, 512 (E.D. Pa. 1987) (pre-certification communications to potential class members by defense counsel and university official acting at request of defense counsel, where potential class members were encouraged not to meet with class counsel, were improper).

[171]*See, e.g.*, *Kleiner*, 751 F.2d at 1210–11 (disqualifying and fining defense counsel who advised defendant to conduct covert telephone campaign aimed at soliciting opt outs from potential class members); *Haffer*, 115 F.R.D. at 512 (awarding class costs and attorneys' fees to plaintiff for defendants' "improper communication and thwarting of discovery" through "false and misleading" memorandum and statement to potential class members); Tedesco v. Mishkin, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986) (imposing sanctions on an attorney who sent "unauthorized, misleading, and inherently coercive" letter to class members, attacking class counsel and discouraging participation in suit);

Once the matter has been certified, defense counsel is prohibited from contacting putative class members as they are all then deemed represented by plaintiffs' counsel (unless they have expressly opted out and are not represented by other counsel). There is nothing in either the AAA or JAMS class procedural rules relating to contact with potential class members. As such, this is a matter that will be left to the discretion of the arbitrator, who should be guided by the law of the jurisdiction that is to be applied in the underlying action.

3. Discovery

a. Scope: What Discovery Will Be Permitted?

Neither the AAA nor JAMS class action procedural rules contain any provisions relating to discovery. As such, the general discovery rules applicable to arbitrations of employment matters will likewise apply in class arbitration. These rules permit written discovery, including interrogatories and document requests, and depositions.

b. Written Discovery and Depositions

The AAA Employment Rules provide that "[t]he arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."[172] The parties are required to have an arbitration management conference "[a]s promptly as practicable after the selection of the arbitrator(s), but not later than 60 days thereafter" where, inter alia, "the resolution of outstanding discovery issues and establishment of discovery parameters"

Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky. 1981) (requiring corrective notice and injunction after representatives of corporate defendant, acting with "full knowledge of counsel," telephoned potential class members to influence them to opt out of action); Bullock v. Automobile Club of S. Cal., No. SA CV 01-731-GLT (ANX), 2002 U.S. Dist. LEXIS 7692, at *11–14 (C.D. Cal. Jan. 28, 2002) (ordering corrective notice because of defendant's communication that tended to discourage putative class members from opting in to FLSA action).

[172]AAA, Employment Arbitration Rules and Mediation Procedures, Rule 9 (Rules amended and effective Nov. 1, 2009).

will be addressed.[173] Accordingly, under the AAA Employment Rules, the arbitrator will determine the bounds of discovery, including the number of depositions that may be taken and the parameters surrounding written discovery (e.g., the scope of discovery requests and number of interrogatories that may be propounded).

The JAMS Employment Rules are more extensive, and provide:

> (a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, names of individuals whom they may call as witnesses at the Arbitration Hearing, and names of all experts who may be called to testify at the Arbitration Hearing, together with each expert's report that may be introduced at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.
>
> (b) Each Party may take at least one deposition of an opposing Party or an individual under the control of the opposing Party. The Parties shall attempt to agree on the number, time, location, and duration of the deposition(s). Absent agreement, the Arbitrator shall determine these issues including whether to grant a request for additional depositions, based upon the reasonable need for the requested information, the availability of other discovery, and the burdensomeness of the request on the opposing Parties and witness.
>
> (c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the

[173] *Id.* at Rule 8.

Hearing, unless agreed by the Parties or upon a showing of good cause.[174]

The key differences between the AAA Employment Rules on discovery and the JAMS Employment Rules on discovery is that the JAMS Rules specifically provide that the parties shall informally exchange all relevant information, including ESI, the names of witnesses and experts, and copies of expert reports.[175] Otherwise, discovery will generally proceed in a similar fashion.

c. Certification Versus Merits Discovery and Bifurcation

At the certification stage, the main issue to be determined is whether the plaintiff will be able to prove the underlying claims by common evidence. Pre-certification discovery is complicated because the issue to be determined by the arbitrator is whether certification is appropriate, not whether the underlying claims have merit. For this reason, defense counsel will often argue that discovery should be bifurcated (split) between class certification and merits issues. Plaintiffs' counsel, on the other hand, typically argues that full discovery regarding all issues should begin pre-certification and that discovery should not be bifurcated. The common practice is for discovery to be bifurcated and pre-certification discovery to be limited to class certification issues. The arbitrator has the discretion to determine whether to bifurcate.

Even when discovery is bifurcated, the line between certification and merits discovery is not always clear and some merits discovery is usually necessary for the plaintiff to develop the issues. One common issue that arises during pre-certification discovery is the extent to which plaintiffs' counsel can obtain the names and contact information of unnamed class members. For example, in California, individuals have a constitutionally protected right of privacy, which includes personal contact information.[176] Employers, in turn, have a well-established legal

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[174]JAMS, Employment Arbitration Rules & Procedures, Rule 17 (effective July 1, 2014).

[175]*Id.* at Rule 17(a).

[176]CAL. CONST. art. 1, §1. *See also* Belaire W. Landscape, Inc. v. Superior Court, 149 Cal. App. 4th 554, 561, 57 Cal. Rptr. 3d 197 (2007) ("The contact information for [employer's] current and former employees deserves privacy protection.").

obligation to protect this information.[177] Accordingly, when the plaintiffs seek the disclosure of putative class members' contact information, courts must carefully balance the privacy interests against the need for the information.[178] The extent to which the names and contact information of putative class members will be available to plaintiffs' counsel pre-certification is a matter that will be left to the discretion of the arbitrator.

d. Discovery Disputes

In the event that a discovery dispute arises, both AAA and JAMS provide a mechanism for resolution of the issue. "The AAA does not require notice of discovery-related matters and communications unless a dispute arises. At that time, the parties should notify the AAA of the dispute so that it may be presented to the arbitrator for determination."[179] The JAMS Employment Rules in turn provide:

> The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.[180]

Accordingly, discovery disputes in arbitrations will be resolved much as they are in litigated matters—by submitting the dispute to the arbitrator for resolution.

4. Class Certification

a. Certifying the Class

At the class certification stage, the arbitrator must determine whether the matter should proceed as a class arbitration. In so ruling, the arbitrator is largely guided by the criteria set

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[177]*See* Pioneer Electronics (USA), Inc. v. Superior Court, 40 Cal. 4th 360, 368, 150 P.3d 198 (2007) (custodian of identifying information has standing to assert privacy interests of persons providing information).

[178]*See, e.g.*, *id*. at 370; Valley Bank of Nev. v. Superior Court, 15 Cal. 3d 652, 657 (1975).

[179]AAA, Employment Arbitration Rules and Mediation Procedures, Rule 9.

[180]JAMS, Employment Arbitration Rules & Procedures, Rule 17(d).

forth in the Federal Rules of Civil Procedure, Rule 23(a) (i.e., numerosity, commonality, typicality, and adequacy) and Rule 23(b)—although the requirements are not identical.[181] An arbitrator will certify a class only if the following conditions are met:

1. the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;
2. there are questions of law or fact common to the class; . . . and
6. each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.[182]

Moreover, the class may be certified only if the arbitrator finds that the named plaintiffs and their counsel are suitable to represent the class. In that regard, the claims of the named plaintiffs must be typical of the class and the arbitrator must find that the named plaintiffs and their counsel "will fairly and adequately protect the interests of the class."[183]

Finally, the AAA requires that:

> the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;
> (2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

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[181]JAMS, Class Action Procedures, Rule 3(b) (effective May 1, 2009); *see also* AAA, Supplementary Rules for Class Arbitration, Rule 4(a)–(b) (which tracks Federal Rule of Civil Procedure 23(a) and 23(b)(3)).

[182]AAA, Supplementary Rules for Class Arbitration, Rule 4(a).

[183]*Id.*; *see also* JAMS, Class Action Procedures, Rule 3(a) ("The Arbitrator also shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The Arbitrator shall permit a class member to serve as a representative only if the conditions set forth in Federal Rules of Civil Procedure, Rule 23(a) are met.").

(3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and
(4) the difficulties likely to be encountered in the management of a class arbitration.[184]

At all times, the burden of demonstrating that all the prerequisites to class certification have been met remains with the plaintiff.[185]

The AAA and JAMS class procedural rules do not address certification in a collective action. Because the procedure for certification in a collective action is different from that of a Rule 23 class action, it is likely that an arbitrator will follow the law relating to certification of collective actions.

b. Class Determination Award

Once the arbitrator has determined that the matter should proceed as a class arbitration, that determination "shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in [AAA Supplementary Rules for Class Arbitration] Rule 4."[186] The Class Determination Award shall "define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses"[187] and "state when and how members of the class may be excluded from the class arbitration."[188] A copy of the proposed Notice of Class Determination, which specifies the intended mode of delivery of the Notice to all class members, must be attached to the Award.[189] This decision is subject to immediate judicial review by a court of competent jurisdiction.[190] Finally, "[a] Class Determination Award may be altered or amended by the arbitrator before a final award is rendered."[191] Accordingly, a defendant could file a motion to decertify the class following certification.

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[184]AAA, Supplementary Rules for Class Arbitrations, Rule 4.
[185]Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).
[186]AAA, Supplementary Rules for Class Arbitrations, Rule 5(a); *see also* JAMS, Class Action Procedures, Rule 3(c).
[187]AAA, Supplementary Rules for Class Arbitrations, Rule 5(b).
[188]*Id.* at Rule 5(c).
[189]*Id.* at Rule 5(b).
[190]*Id.* at Rule 5(d); JAMS, Class Action Procedures, Rule 3(c).
[191]AAA, Supplementary Rules for Class Arbitrations, Rule 5.

c. Notice

Once a class has been certified, notice must be provided to all class members who "can be identified through reasonable effort."[192]

The Notice of Class Determination must concisely and clearly state in plain, easily understood language:

1. the nature of the action;
2. the definition of the class certified;
3. the class claims, issues, or defenses;
4. that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;
5. that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded;
6. the binding effect of a class judgment on class members;
7. the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and
8. how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket (see Rule 9).[193]

D. Phase Three: Final Award or Class Settlement

1. Final Award

Final awards must be reasoned (regardless of whether favorable or unfavorable to the class). Final awards must also define the class with specificity. Additionally, final awards must "specify or describe those to whom the notice provided in Rule 6 was directed, those the arbitrator finds to be members of the class, and those who have elected to opt out of the class."[194]

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[192]*Id.* at Rule 6; JAMS, Class Action Procedures, Rule 4.

[193]*Id.*

[194]AAA, Supplementary Rules for Class Arbitrations, Rule 7; JAMS, Class Action Procedures, Rule 5.

2. Settlement, Voluntary Dismissal, or Compromise

Similar to the court approval that is required of litigated class actions, under the AAA Rules, "[a]ny settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of an arbitration filed as a class arbitration shall not be effective unless approved by the arbitrator."[195] The arbitrator must also direct that notice of the settlement be provided to all class members.[196] Additionally, like the procedure of preliminary approval required under the federal Rules, "[t]he arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."[197]

An arbitrator "may" refuse to approve a settlement that does not afford absent class members another opportunity to opt out of the class and reject participation in the settlement.[198] Absent class members may also object to the proposed settlement, and the arbitrator must withdraw those objections.[199]

E. Key Distinctions Between the AAA and JAMS Class Arbitration Rules

As outlined earlier, the JAMS Class Action Procedures are very similar to the AAA Supplementary Rules for Class Arbitrations and also divide class arbitration into the same three phases and allow for intermediate review by a court after each stage. A previous version of the JAMS Procedures did not require the arbitrator to give an opportunity for court review of the clause construction award, but, since 2009, the JAMS Procedures are identical to the AAA Rules on that point as well.

One significant difference between the JAMS Procedures and the AAA Rules is that under the AAA Rules "at least one

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[195]AAA, Supplementary Rules for Class Arbitrations, Rule 8(a)(1); JAMS, Class Action Procedures, Rule 6(a)(3).

[196]AAA, Supplementary Rules for Class Arbitrations, Rule 8(a)(2); JAMS, Class Action Procedures, Rule 6(a)(1).

[197]AAA, Supplementary Rules for Class Arbitrations, Rule 8(a)(3); JAMS, Class Action Procedures, Rule 6(a)(2).

[198]AAA, Supplementary Rules for Class Arbitrations, Rule 8(c); JAMS, Class Action Procedures, Rule 6(c).

[199]AAA, Supplementary Rules for Class Arbitrations, Rule 8(d); JAMS, Class Action Procedures, Rule 6(d).

of the arbitrators shall be appointed from the AAA's national roster of class arbitration arbitrators,"[200] while the JAMS Procedures have no equivalent rule. Parties may prefer the assurance provided by the AAA Rules that in the event of a class arbitration, the arbitrator selected will have had some class action experience.

Another difference pertains to confidentiality. JAMS general rules provide that arbitration proceedings shall be confidential except as necessary in connection with a judicial challenge to the enforcement of an award, or unless otherwise required by law or judicial decision.[201] The arbitrator also has the discretion to exclude nonparties from the arbitration hearing.[202] The AAA Rules, by contrast, provide that "[t]he presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances."[203] Also, the AAA maintains a website with a class arbitration docket that provides certain information about class arbitrations to the public.[204] This difference may lead counsel to choose the JAMS Procedures over the AAA Rules for those with reason to be concerned about the confidentiality or privacy of any class arbitration proceedings.

F. FINRA Arbitration

The Financial Industry Regulatory Authority (FINRA) is a self-regulatory organization that performs financial regulation of member brokerage firms and exchange markets. FINRA enforces its own rules, including rules regarding mandatory arbitration provisions that apply to disputes between customers and FINRA member firms, between competing firms, or between firms and certain covered persons, including employees. Thus, for employers and employees covered by FINRA, the FINRA arbitration rules may provide another important means of dispute resolution.

The FINRA Rules expressly preclude class actions from being brought in FINRA arbitration; therefore, there is no risk

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[200]AAA, Supplementary Rules for Class Arbitrations, Rule 2(a).
[201]JAMS, Employment Arbitration Rules & Procedures, Rule 26.
[202]*Id.*
[203]AAA, Supplementary Rules for Class Arbitrations, Rule 9(a).
[204]*Id.* at Rule 9(b).

to employers that they will ever be faced with a class arbitration in a FINRA proceeding.[205] However, the FINRA Rules also at least implicitly contemplate that claims can be brought as class claims in court.[206] Additionally, the FINRA Rules do allow for the joinder of claims in arbitration.[207] Unlike class claims, however, to be joined in arbitration, claims must "arise out of the same transaction or occurrence, or series of transactions or occurrences."[208]

A FINRA hearing panel recently addressed whether parties can avoid class litigation and compel individual arbitration under the FINRA Rules. In *Department of Enforcement v. Charles Schwab & Co. (CRD No. 5393)*,[209] the FINRA Office of Hearing Officers held that the FAA applied to allow Charles Schwab to include a mandatory class action waiver, which FINRA had no authority to contradict. However, the FINRA Board of Governors recently reviewed the hearing panel's decision and determined that the FAA does not preempt application of FINRA rules. Specifically, the Board of Governors found that the Securities and Exchange Commission (SEC) has received authority from Congress to approve FINRA rules that govern arbitration in FINRA's forum and, thus, Congress has provided a "congressional command" that overcomes the FAA's general preemptive effect. Thus, the SEC (through FINRA's Rules) has the authority to exempt certain claims from arbitration—including class claims. As a result of the decision, Charles Schwab agreed to pay the $500,000 fine imposed by the hearing panel; there will be no further appeal. Because the dispute and the FINRA Board of Governors' decision expressly addressed only customer agreements, the import of this decision in the employment arena remains to be seen, but it is an important development that employers covered by FINRA will be watching closely.[210]

Another possible wrinkle for employers covered by FINRA is that the FINRA Rules provide that statutory discrimination claims are not required to be arbitrated, and that such claims

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[205]FINRA Code of Arbitration Procedure for Industry Disputes (FINRA), Rule 12204(a).

[206]*Id.* at Rule 12204(c), (d).

[207]*Id.* at Rule 12312.

[208]*Id.*

[209]No. 2011029760201, 2013 WL 1463100 (NASDR Feb. 21, 2013).

[210]No. 2011029760201, 2014 WL 1665738 (NASDR Apr. 24, 2014).

will be not be arbitrated unless the parties agreed to it either before or after the dispute arose.[211] Therefore, in a lawsuit covered by FINRA, where only the arbitration rules of FINRA are relied on, an employee might be compelled to arbitrate only some of his or her claims. An employer desiring to have all potential claims submitted to FINRA arbitration should have a separate arbitration agreement that expressly covers even statutory discrimination claims.

IV. COMPARISON TO LITIGATED CLASS ACTIONS[212]

Arbitration is designed to be more efficient and cost effective than litigation. However, it is unavoidable that the complexities of most class actions will diminish this efficiency. As the U.S. Supreme Court has observed, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[213] Ideally, the "procedural morass" remains less in arbitration than it would be in court, but procedures remain and often arbitration proceedings end up no less complex than court proceedings. Parties faced with the prospect of class arbitration ought to become familiar with the general procedural rules and devices of arbitration, especially given the higher stakes of a class action.

A. Pre-Hearing Procedure

Although it is possible for many arbitrations to be decided without a hearing—on the basis of stipulated facts, written briefs, and declarations—this is much more unlikely in a class arbitration. Nonetheless, as in court where much of a case can be resolved prior to trial, the pre-hearing procedures in arbitration can be critical to achieving a favorable result.

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[211]FINRA Rule 13201(a).

[212]This section highlights some of the procedures applicable to arbitrated class actions. For a more complete discussion of arbitration procedures, see Chapter 9.

[213]AT&T Mobility LLC v. Concepcion, 563 U.S. 321, 131 S. Ct. 1740, 1751 (2011).

As a general matter, the arbitration and pre-hearing procedures are subject to the control of the arbitrator and the rules of procedure adopted or agreed to by the parties. As a result, if there are certain procedures that either side desires, those should be incorporated into the agreement itself to ensure their enforcement.

1. Ability to Select Arbitrator and Define Scope of Authority

One significant advantage that the parties possess in arbitration that they do not in court is the ability to select the arbitrator. In some state courts, litigants may have the (limited) ability to avoid a judge they dislike, but in federal court, litigants have no ability to "select" the judge assigned to their case.

One method of initiating arbitration is a submission, stipulation, or agreement to arbitrate, whereby the parties jointly ask for arbitration to be commenced. This submission, signed by both parties, can ask for the appointment of a specific arbitrator—which will be followed, provided that the selected arbitrator meets standards of impartiality and independence.[214]

The arbitration submission is also an effective tool for the parties to select other procedures that will apply to the arbitration, to the extent that they can agree. For example, the parties can specify any limitations on the arbitrator's authority and define the scope of the issues to be arbitrated.[215] Thus, the arbitration submission presents the parties with an opportunity to control the conduct and scope of arbitration in a manner not possible in court—again, subject to the important caveat that the parties must agree on those controls.

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[214]*See, e.g.*, AAA, Employment Arbitration Rules and Mediation Procedures, Rule 13.

[215]Ottley v. Schwartzberg, 819 F.2d 373, 376 (2d Cir. 1987) ("[T]he scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission. Such an agreement or submission serves not only to define, but to circumscribe, the authority of arbitrators.... Because there is no indication that the parties agreed to submit the issue of compliance to the arbitrator, we think it clear that the arbitrator was without authority to rule on that issue.") (quotation omitted).

2. Pre-Hearing Conference and Submissions

Usually, the parties and the arbitrator hold a pre-hearing conference to settle any issues regarding hearing procedures or to refine the scope of the issues if necessary. To a certain degree this is similar to a litigated case where parties participate in scheduling and pre-trial conferences. However, in arbitration, as explained earlier, the parties have a much greater ability to determine for themselves the procedural rules that will govern because of arbitration's informality.

During the pre-hearing phase, much like in a litigated matter, the arbitrator will be responsible for ruling on issues related to class notice, including sampling of the potential class, the mailing of notices to potential class members, opt-in procedures (if it is an FLSA collective action), and opt-out procedures (if it is a class action). However, unlike in a litigated matter where the parties are bound by the court's rules, the parties have greater flexibility.

The AAA Employment Arbitration Rules and Mediation Procedures require an "Arbitration Management Conference" within 60 days of selection of the arbitrator.[216] The enumerated topics to be covered at the conference show that most matters are up for discussion, whereas in court the parties would be bound by the applicable rules. For example, topics include, among other things, "the law, standards, rules of evidence and burdens of proof that are to apply to the proceeding."[217]

3. Dispositive Motions

Although the arbitration rules do not provide for "summary judgment" motions as a matter of course, arbitrators do have authority to decide dispositive motions in certain circumstances. For example, the AAA Rules provide that the arbitrator may allow a dispositive motion if the moving party shows "substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."[218] Similarly the JAMS Employment Arbitration Rules & Procedures provide that the arbitrator "may

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[216]*See* AAA, Employment Arbitration Rules and Mediation Procedures, Rule 8.

[217]*Id.*

[218]*See, e.g.*, AAA, Employment Arbitration Rules and Mediation Procedures, Rule 27.

permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the motion."[219]

B. Hearing Procedures

1. Structure of the Hearing

In the class context, an arbitration hearing will proceed in a manner similar to a litigated class action, with both sides having an opportunity to present their cases. The arbitrator, however, does have discretion in how the hearing will be conducted and "shall conduct the proceedings with a view toward expediting the resolution of the dispute."[220] In that regard, the arbitrator "may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."[221] In addition to bifurcating proceedings (whereby the arbitration is split into two phases: liability and damages), an arbitration may also be trifurcated (whereby the arbitration is split into three phases: liability, damages, and allocations of arbitration costs).

"The arbitrator shall have the authority to exclude witnesses, other than a party, from the hearing during the testimony of any other witness. The arbitrator shall also have the authority to decide whether any person who is not a witness may attend the hearing."[222] Although a court may exclude witnesses from attending the hearing during other witnesses' testimony in a litigated matter, the employer typically has no control over the attendance of nonwitnesses at the trial. At the close of the hearing, the arbitrator will inquire as to whether the parties have any additional witnesses to be heard or proofs to offer. Once the arbitrator is satisfied that the record is complete, the hearing will be closed, unless the parties will be submitting post-hearing briefs.[223]

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[219]JAMS, Employment Arbitration Rules & Procedures, Rule 18.

[220]AAA, Employment Arbitration Rules and Mediation Procedures, Rule 28.

[221]*Id.*

[222]*Id.* at Rule 22.

[223]*Id.* at Rule 33.

2. Procedural and Evidentiary Rules

As discussed earlier, hearing rules will vary depending on the terms of the arbitration agreement, the arbitration rules, the arbitrator's preferences, and the needs of the parties as discussed at the pre-hearing conference. Although arbitration is more informal than a court proceeding, the parties generally have the same burdens of proof and production as would apply had their claims been brought in court.[224] Otherwise, "the arbitrator has the authority to set the rules for the conduct of the proceedings and shall exercise that authority to afford a full and equal opportunity to all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute."[225]

Although an arbitrator "may be guided" by the Federal Rules of Evidence or any other applicable evidentiary rules, rarely will those rules of evidence apply.[226] As with a litigated action, the arbitrator decides the relevance and materiality of the evidence; however, unlike a litigated action, in arbitration "conformity to legal rules of evidence shall not be necessary."[227] Because the evidence rules are more relaxed, it is more difficult to get evidence excluded. For example, hearsay evidence is normally admissible, unless the parties have agreed otherwise.

Arbitrators must consider relevant deposition testimony, by transcript or video, provided that all other parties had the opportunity to attend and cross-examine the deponent.[228] Arbitrators may also accept "witness affidavits or other recorded testimony" in lieu of live testimony.[229] This can be particularly useful in class arbitration, where the parties may wish to submit affidavits from class members, co-workers, or supervisors regarding their experiences while working for the employer. Because the affiants are not subject to cross-examination, and the affidavits are likely drafted by counsel, the arbitrator may not give the affidavits as much weight as witnesses who testify

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[224]*Id.* at Rule 28.

[225]*Id.*

[226]JAMS, Employment Arbitration Rules & Procedures, Rule 22(d) ("[s]trict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product").

[227]AAA, Employment Arbitration Rules and Mediation Procedures, Rule 30.

[228]JAMS, Employment Arbitration Rules & Procedures, Rule 22(e).

[229]*Id.*

live. Even so, the submission of affidavits can be very helpful for both sides.

Finally, unlike in a litigated matter where all evidence must be admitted prior to the close of the case, in an arbitration, the arbitrator may accept documents or other evidence after the hearing.[230]

3. Decision

A major difference between litigated actions and arbitrations is that an arbitrator is required to issue a decision in writing, which includes the reasons for the award, unless the parties have otherwise agreed.[231] The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court, including awards of attorneys' fees and costs.[232] The arbitrator's award is final and binding.[233] Unlike a litigated action where a party may move for reconsideration of the trial court's decision, the arbitrator has no power to review a prior decision.[234] Even so, upon timely application, the arbitrator may correct "any clerical, typographical, technical, or computational errors in the award."[235] Finally, JAMS general rules provide that arbitration proceedings shall be confidential except as necessary in connection with a judicial challenge to the enforcement of an award, or unless otherwise required by law or judicial decision.[236] In litigated matters and matters proceeding according to the AAA Rules, by contrast, there is no presumption of confidentiality (although an arbitrator may determine that certain information is confidential).[237]

C. Scope of Judicial Review[238]

Arbitration is intended to be final and binding. For that reason, the scope of judicial review of an arbitrator's decision

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[230]AAA, Employment Arbitration Rules and Mediation Procedures, Rule 30.

[231]*Id.* at Rule 39(c).

[232]*Id.* at Rule 39(d).

[233]*Id.* at Rule 39(g).

[234]*Id.* at Rule 40.

[235]*Id.*

[236]JAMS, Employment Arbitration Rules & Procedures, Rule 26.

[237]AAA, Supplementary Rules for Class Arbitrations, Rule 9(a).

[238]For a more detailed discussion of the availability of review of arbitration awards, see Chapter 13, section II.

is limited. The FAA or the applicable state arbitration law will provide the standard by which a court may review an arbitrator's decision. Whether the FAA or state arbitration law applies is determined by the nature of the underlying action and the terms of the arbitration agreement.[239] Judicial review under the FAA is extremely limited.[240] The FAA does not permit a merits review of an arbitral decision. Awards may be set aside under only limited circumstances: where the award was obtained by fraud, corruption, or undue means; or where the arbitrator engaged in misconduct, was not impartial, or exceeded his or her authority.[241] Similarly, courts may correct arbitration awards only where there is a showing of an evident material miscalculation, or material mistake, or where the arbitrator's award is imperfect in form.[242] Parties that seek to expand the scope of judicial review should consider whether the applicable state arbitration law would permit expanded judicial review. For example, although the FAA does not permit the parties to agree to expand the scope of judicial review, the California Arbitration Act does permit parties to contractually agree to expanded judicial review.[243]

The arbitration rules themselves also provide for limited review of an arbitrator's decision.

D. Appellate Arbitration

Both the AAA and JAMS have adopted rules that provide a procedure for parties to pursue appeals within the arbitration process. The rules provide for the same general appeal rights when they are specifically incorporated into the parties' agreement. In other words, an award can be appealed only where the parties have agreed to permit appeals.[244] During the pendency of the appeal, the underlying award is not considered final and the time period for commencement of judicial proceedings

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[239]*See* 9 U.S.C. §2 (FAA applies to all written arbitration agreements involving interstate commerce).

[240]9 U.S.C. §§10–11.

[241]*Id.* at §10(a)(1)–(4).

[242]*Id.* at §11.

[243]Biller v. Toyota Motor Corp., 668 F.3d 655 (9th Cir. 2012); *see also* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 128 S. Ct. 1396 (2008) (holding that parties cannot contractually expand grounds for vacating arbitrator's award under FAA).

[244]AAA, Optional Appellate Arbitration Rules, Rule A-1 (effective Nov. 1, 2013); JAMS, Employment Arbitration Rules & Procedures, Rule 34.

is tolled.[245] The AAA provides that a party may appeal on the grounds that the award is based upon: "(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous."[246] The AAA further provides that a party may appeal only issues or evidence that were raised during the arbitration hearing.[247] The parties submit briefs outlining the issues for appeal; the appeal panel reviews the record of the hearing, including all exhibits, affidavits, etc., that were accepted into the record at the hearing; and conducts an oral argument, if necessary.[248] Under the AAA, the appeal tribunal may adopt the original award, substitute its own award, or request additional information.[249] Likewise, the JAMS Rules provide that an appeal tribunal "will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision," and although it may not remand to the original arbitrator, the appeal panel may reopen the record to review evidence that was improperly excluded by the original arbitrator or that the panel otherwise deems necessary.[250] Under both AAA and JAMS appellate rules, the appeal tribunal's decision shall become the final award.[251]

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[245]AAA, Optional Appellate Arbitration Rules, Rule A-2(a); JAMS, Optional Arbitration Appeal Procedure, Rule (C) (effective June 2003).

[246]AAA, Optional Appellate Arbitration Rules, Rule A-10.

[247]*Id.* at Rule A-16.

[248]AAA, Optional Appellate Arbitration Rules, Rule A-15; JAMS, Optional Arbitration Appeal Procedure, Rule (B).

[249]AAA, Optional Appellate Arbitration Rules, Rule A-19(a).

[250]JAMS, Optional Arbitration Appeal Procedure, Rule (D).

[251]AAA, Optional Appellate Arbitration Rules, Rule A-20; JAMS Optional Arbitration Appeal Procedure, Rule (F).

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Chapter 6

Class and Collective Actions

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III. MANAGEMENT OF CLASS ACTIONS IN ARBITRATION

B. Phase One: Should the Matter Proceed in Arbitration?

[158]**[On page 263 of the Main Volume, at the end of the footnote, add the following.]**

; *see also* JAMS Class Action Procedures, Rule 2 (effective May 1, 2009).

[On page 263 of the Main Volume, at the end of the second full paragraph, add the following new footnote.]

[42]Using identical language, Rule 2 of the JAMS Class Action Procedures provides the same assurance to employers.

C. Phase Two: Class Certification

3. Discovery

b. Written Discovery and Depositions

[On page 269 of the Main Volume, in the first full sentence, after "informally", add "and voluntarily".]

d. Discovery Disputes

[On page 270 of the Main Volume, replace the first two sentences with the following.]

Except where a dispute arises, "[t]he AAA does not require notice of discovery related matters and communications . . .

[On page 270 of the Main Volume, after the sentence ending with footnote 179, add the following.]

In the event of such a dispute, both AAA and JAMS provide a mechanism for resolution of the issue.

4. Class Certification

a. Certifying the Class

[On page 270 of the Main Volume, replace the second sentence with the following.]

In so ruling, the arbitrator is largely guided by the same criteria as are set forth in the Federal Rules of Civil Procedure, Rule 23(a) (i.e., numerosity, commonality, typicality, and adequacy) and Rule 23(b)—although the requirements under arbitration rules are not identical.[43a]

[On page 271 of the Main Volume, in "2" in the enumerated list, delete "… and" and add to the list the following.]

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class;
5. counsel selected to represent the class will fairly and adequately protect the interests of the class; and

[On page 271 of the Main Volume, in the second full paragraph, replace the first sentence before the colon with the following.]

Finally, in addition to the prerequisites above, the AAA rules permit maintenance of an action as a class arbitration only where:

[184]**[On page 272 of the Main Volume, replace "Rule 4" with "Rule 4(b)".]**

[43a]JAMS, Class Action Procedures, Rule 3(b) (effective May 1, 2009) (incorporating Fed. R. Civ. P. 23(a)–(b) by reference); *see also* AAA, Supplementary Rules for Class Arbitration, Rule 4(a)–(b) (which tracks Fed. R. Civ. P. 23(a) and 23(b)(3)).

[185]**[On page 272 of the Main Volume, replace the S. Ct. and L. Ed. citations with "564 U.S. 338, 349".]**

b. Class Determination Award

[On page 272 of the Main Volume, replace the third sentence with the following.]

A "copy of the proposed Notice of Class Determination . . . specifying the intended mode of delivery of the Notice to the class members, shall be attached to the award."[44]

[191]**[On page 272 of the Main Volume, replace "Rule 5" with "Rule 5(e)".]**

c. Notice

[On page 273 of the Main Volume, in the second paragraph, insert open quotation marks before "concisely" and closed quotation marks after "(see Rule 9).".]

[On page 273 of the Main Volume, replace footnotes 192 and 193 with the following.]

[192]*Id.* at Rule 6(a); JAMS, Class Action Procedures, Rule 4.

[193]AAA, Supplementary Rules for Class Arbitrations, Rule 6(a); JAMS, Class Action Procedures Rule 4 (note that the JAMS counterpart to the rule omits item number 8 from the above-cited list).

[194]**[On page 273 of the Main Volume, replace with the following.]**

Id. at Rule 6(a); JAMS, Class Action Procedures Rule 4 (note that the JAMS counterpart to the rule omits item number 8 from the above-cited list).

D. Phase Three: Final Award or Class Settlement

1. Final Award

[On page 273 of the Main Volume, in the third sentence, after "Rule 6", add "(AAA) and Rule 4 (JAMS)".]

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[44]*Id.* at Rule 5(b).

2. Settlement, Voluntary Dismissal, or Compromise

[197]**[On page 274 of the Main Volume, add to the end of the footnote the following.]**

(identical to the AAA rule, except for a single word variation—"a finding" versus the AAA rule's "on finding").

E. Key Distinctions Between the AAA and JAMS Class Arbitration Rules

[On page 274 of the Main Volume, delete the second sentence.]

[201]**[On page 275 of the Main Volume, replace "Rule 26" with "Rule 26(a)".]**

[202]**[On page 275 of the Main Volume, at the end of the footnote, add "at Rule 26(c)."]**

Class Action Prevention: Arbitration Agreements With Class Action Waivers

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ARBITRATION AGREEMENTS WITH CLASS ACTION WAIVERS

I. The Federal Arbitration Act

A. History of the Act

1. Codified at 9 U.S.C. § 1, *et seq*.

2. First enacted in 1925 as the United States Arbitration Act, and reenacted in 1947 as the Federal Arbitration Act ("FAA").

B. The FAA reflects a strong federal policy in favor of arbitration.

1. The FAA states:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
> 9 U.S.C. § 2 (emphasis added).

2. An arbitration agreement may only be held invalid, revocable, or unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

3. In other words, the Act permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

4. "Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Id.* (emphasis in original).

C. Requirements of the FAA

1. There must be a contract. 9 U.S.C. § 2.

2. The contract must be in writing. 9 U.S.C. § 2.

3. The contract must involve "commerce," *i.e.*, interstate commerce. 9 U.S.C. §§ 1, 2.

    a. That is generally not a difficult hurdle. The Supreme Court has interpreted the FAA as "implementing Congress' intent 'to exercise [its] commerce power to the full.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (alteration in original) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)).

    b. Even if interstate commerce is not involved, state law may provide for similar enforcement of arbitration agreements. *See* N.Y. C.P.L.R. § 7501, et seq.

D. If the FAA's requirements are satisfied, a lawsuit can be stayed until arbitration has been had.

1. The FAA states:

    "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3 (emphasis added).

2. The FAA's mandate to enforce arbitration agreements applies in both federal and state courts. *See*, *e.g.*, *Vaden v. Discovery Bank*, 556 U.S. 49, 71 (2009) ("Under the FAA, state courts as well as federal courts are obliged to honor and enforce agreements to arbitrate."); *GAF Corp. v. Werner*, 66 N.Y.2d 97, 102 (1985) ("The right which the Act grants to enforce an arbitration provision is not dependent upon the forum – Federal or State – in which it is asserted. . . .").

3. A court's role when faced with a motion to compel arbitration under the FAA is limited to deciding certain gateway "'question[s] of arbitrability,'" such as "'whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of

controversy.'" *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) (citation omitted).

4. If those limited gateway questions are answered in the affirmative, all other matters are generally for the arbitrator to decide.

E. The arbitration agreement can specify a particular arbitrator, but it does not have to do so.

1. The FAA states:

> "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator." 9 U.S.C. § 5 (emphasis added).

2. *See Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 792-93 (7th Cir. 2013) (explaining that when an arbitration clause is "detail-free," Section 5 of the FAA "allows judges to supply details in order to make arbitration work").

F. Following the arbitration, the court can enter judgment upon the arbitrator's award, if the arbitration agreement calls for it.

1. The FAA states:

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected . . . . If no court is specified in the agreement of the parties, then such application may be made

to the United States court in and for the district within which such award was made. . . ." 9 U.S.C. § 9.

G. A court's power to vacate an arbitrator's award under the FAA is limited.

1. Following the arbitration, the arbitrator's decision can only be overturned under extraordinary circumstances, *e.g.*, if the arbitrator's award was procured by corruption or fraud, or if the arbitrator exceeded his powers, *i.e.*, if the arbitrator took some action that the parties' arbitration agreement did not empower him to take. *See* 9 U.S.C. § 10.

H. The FAA does not apply to transportation workers' employment contracts, but other employment contracts are covered.

1. The Act excludes from its scope "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

2. "[W]orkers engaged in . . . interstate commerce" could cover almost anyone, but the Supreme Court has held that this exemption is limited to transportation workers, under the principle of *ejusdem generis*. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).

II. The Supreme Court's Recent Support for Arbitration Agreements with Class Action Waivers

A. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)

1. The U.S. Supreme Court enforced an arbitration agreement with a class action waiver in a putative class action involving state law claims.

2. Question Presented: "[W]hether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1744.

3. Facts:

a. The Concepcions were consumers who purchased AT&T wireless service, which was advertised as including the provision of free phones; they were not charged for the

phones, but they were charged $30.22 in sales tax based on the phones' retail value.

b. The Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

c. AT&T's wireless service agreement contained an arbitration clause in its standard terms and conditions.

d. AT&T's arbitration clause provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'" *Id.* at 1744.

e. The contract's arbitration provision further stated that "'the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.'" *Id.* at 1744 n.2.

f. AT&T's arbitration clause contained several pro-consumer provisions. *Id.* at 1744.

   i. The agreement specified that, in the event the parties proceeded to arbitration, AT&T must pay all costs for nonfrivolous claims.

   ii. The agreement specified that arbitration must take place in the county in which the customer is billed.

   iii. The agreement specified that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions.

   iv. The agreement specified that either party may bring a claim in small claims court in lieu of arbitration.

v. The agreement specified that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages.

vi. The agreement denied AT&T any ability to seek reimbursement of its attorney's fees.

vii. In the event a customer received an arbitration award greater than AT&T's last written settlement offer, the agreement required AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

viii. By the time the case was heard by the Supreme Court, AT&T had increased that guaranteed minimum recovery to $10,000.

4. Procedural History:

a. AT&T moved to compel arbitration under the terms of its contract with the Concepcions.

b. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures.

c. The District Court denied AT&T's motion to compel arbitration.

d. Relying on California law, the District Court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.

e. The Ninth Circuit affirmed, agreeing with the District Court that AT&T's arbitration clause was unconscionable under California law.

f. The Ninth Circuit based its decision on the California Supreme Court's prior decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005).

i. In *Discover Bank*, the California Supreme Court had struck down a provision in Discover's credit

cardholder agreement that required arbitration but prohibited classwide arbitration. 113 P.3d at 1103.

ii. The California Supreme Court had held in *Discover Bank* that "at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." *Id.*

5. Decision of the Court:

a. The Supreme Court's analysis started with an affirmation that the Federal Arbitration Act reflects both "'a liberal federal policy favoring arbitration,'" and the "'fundamental principle that arbitration is a matter of contract.'" 131 S. Ct. at 1745 (citations omitted).

b. It follows, explained the Court, that "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id.* at 1745 (citations omitted).

c. Thus, as the Court explained, the Federal Arbitration Act "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746 (citations omitted).

d. The Court rejected the plaintiffs' argument that the California Supreme Court's decision in *Discover* was merely applying a generally applicable contract defense – unconscionability – and not a defense that applies only to arbitration agreements.

e. The Court explained: "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748.

f. Thus, the Court concluded, California's *Discover Bank* rule, whereby courts would refuse to enforce class-arbitration waivers as unconscionable, impermissibly "interferes with arbitration" in violation of the Federal Arbitration Act. *Id.* at 1750.

g. The Court rejected the argument that California's *Discover Bank* rule was limited to adhesion contracts, finding that "the times in which consumer contracts were anything other than adhesive are long past." *Id.* at 1750.

h. In a footnote, however, the Court allowed that "[o]f course States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1750 n.6.

i. The Court did not base its decision on the pro-consumer provisions afforded to claimants under AT&T's contract, but those pro-consumer provisions did not go unnoticed. As the Court stated near the conclusion of its opinion:

> "As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which 'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.'"

Id. at 1753 (citations omitted).

B. *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)

1. The U.S. Supreme Court enforced an arbitration clause with a class action waiver in a putative class action involving federal statutory claims.

2. Question Presented: "[W]hether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery." 133 S. Ct. at 2307.

3. Facts:

    a. The plaintiffs were merchants who accept American Express cards.

    b. They brought a class action in the Southern District of New York against American Express for violations of the federal antitrust laws, alleging that "American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards." *Id.* at 2308.

    c. The parties' contract contained an arbitration clause that required all disputes to be resolved by arbitration, and further provided that "'[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.'" *Id.* at 2308 (alteration in original).

4. Procedural History (abridged):

    a. American Express moved to compel individual arbitration under the FAA.

    b. The District Court granted American Express' motion to compel individual arbitration.

    c. The Second Circuit reversed and remanded for further proceedings.

    d. The Second Circuit's decision was based on plaintiffs' expert evidence that the cost necessary to prove their antitrust claims would be "'at least several hundred thousand dollars, and might exceed $1 million,'" while the

maximum recovery for an individual plaintiff would be less than $40,000. *Id.* at 2308.

e. The Second Circuit held that because respondents had established that "'they would incur prohibitive costs if compelled to arbitrate under the class action waiver,'" the waiver was unenforceable and the arbitration could not proceed. *Id.* at 2308 (citation omitted).

f. The Supreme Court granted certiorari to consider the question "'[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.'" *Id.* at 2308 (alteration in original).

5. Decision of the Court:

a. The Supreme Court rejected the plaintiffs' arguments that requiring them to arbitrate their claims individually, as they contracted to do, would contravene the policies of the antitrust laws or the congressional approval of class actions reflected in the Federal Rules of Civil Procedure. *Id.* at 2309-10.

b. The Court held that the FAA's mandate to enforce arbitration agreements according to their terms can only be "'overridden by a contrary congressional command,'" and it found no such "command" in the Sherman Act or the Federal Rules of Civil Procedure. *Id.* at 2309-10 (citation omitted).

c. The Court also rejected the plaintiffs' invocation of the so-called "effective vindication" doctrine, which, they argued, allowed courts to invalidate arbitration agreements that prevent the "effective vindication" of a federal statutory right. *Id.* at 2310.

d. The Court stated that an "effective vindication" exception to the FAA, assuming one existed, "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.* at 2310.

e. The Court also allowed that an "effective vindication" exception "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310-11.

f. But neither of those circumstances were before the Court in *Italian Colors*, and the Court refused to apply an "effective vindication" exception on the basis that plaintiffs' costs to prove their claims would outweigh any individual award. *Id.* at 2310-11.

g. As the Court explained, "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* at 2311 (emphasis in original).

h. In a concluding footnote, the Court put it very simply: "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims." *Id.* at 2312 n.5.

C. *Epic Sys. Court v. Lewis*, 138 S. Ct. 1612 (2018)

1. The U.S. Supreme Court enforced arbitration clauses requiring individual arbitrations.

2. Question Presented: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?" 138 S. Ct. at 1619.

3. Facts:

   a. The Court provided the factual details of one of the three cases on appeal, *Ernst & Young v. Morris*, on appeal from Ninth Circuit. Junior account signed agreement requiring individualized arbitration, then brought a putative class and collection action claim in federal court in California. *Id.* at 1619-20.

4. Procedural History (abridged):

   a. Ernst & Young moved to compel individual arbitration under the FAA.

   b. The District Court granted the motion to compel individual arbitration.

c. The Ninth Circuit reversed, holding that the "savings clause" of the FAA violated the National Labor Relations Act, as class actions are protected "concerted activity." *Id.*

5. Decision of the Court:

a. The Supreme Court rejected the plaintiffs' arguments that the "savings clause" of the FAA or the NLRA trumped the terms of the arbitration agreements.

b. The Court found that the "savings clause" "recognizes only defenses that apply to 'any' contract. In this way the clause establishes a sort of 'equal-treatment' rule for arbitration contracts." *Id.* at 1622.

c. The Court went on to cite *Concepcion* and its logic: the savings clause "'permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.' *Concepcion*, 563 U. S., at 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742. At the same time, the clause offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration."' *Id.* Thus, the Court found that the FAA requires arbitration agreements to be enforced as written, like any contract, and subject to the defenses afforded any contract.

d. The Court went on to analyze whether the NLRA provided a right to collective actions, and found it did not for a number of reasons: Section 7 does not mention arbitrations or prohibit them; class actions were a rarity when the NLRA was adopted; the NLRA should be read to be in concert and not in conflict with other laws when possible; and the NLRB was not entitled to *Chevron* deference as it has no power to administer or interpret the FAA. *Id.* at 1624-30.

III. Does Your Arbitration Agreement Really Prohibit Classwide Arbitration?

A. It does if it says it does.

1. Under *Concepcion*, an express prohibition on classwide arbitration should generally be enforced according to its terms.

B. What if your arbitration agreement is silent?

1. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), the Supreme Court held that an arbitration panel had exceeded its powers, in violation of the Federal Arbitration Act, by imposing class arbitration on a defendant whose arbitration clauses were "silent" on that issue. *Id.* at 672.

    a. The parties in *Stolt-Nielsen* "agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration." *Id.* at 673.

    b. In light of that stipulation, the Court held "there can be only one possible outcome." *Id.* at 677.

    c. "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684 (emphasis in original).

    d. Thus, the arbitration panel's decision to allow classwide arbitration, despite the parties' agreement that they had not reached any agreement on the issue of class arbitration, was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.* at 684.

    e. As the Court went on to explain, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 685.

    f. Thus, the Court stated, "[w]e think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 687.

    g. As the Court concluded, "we see the question as being whether the parties *agreed to authorize* class arbitration.

> Here, where the parties stipulated that there was 'no agreement' on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration." *Id.* at 687 (emphasis in original).

C. Is your arbitration agreement really silent?

1. The Court in *Stolt-Nielsen* did *not* hold that an arbitration agreement can only be construed as allowing classwide arbitration when class arbitration is *expressly* permitted by its terms.

2. The Court left the door open for lower courts and arbitrators to *imply* that parties have acquiesced to classwide arbitration, if the circumstances of their agreement warrant such an inference.

3. As the Court stated in *Stolt-Nielsen*: "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." *Id.* at 687 n.10.

4. Since *Stolt-Nielsen* was decided, some lower courts, including the Second Circuit, have held that an agreement to arbitrate on a classwide basis can be implied.

    a. In *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert denied*, 132 S. Ct. 1742 (2012), the Second Circuit found that "*Stolt-Nielsen* does not foreclose the possibility that parties may reach an implicit – rather than express – agreement to authorize class-action arbitration." *Id.* at 123 (citation and internal quotation marks omitted).

    b. Based on that reading of *Stolt-Nielsen*, the Second Circuit refused to vacate an arbitrator's award that permitted employees to proceed with classwide arbitration against their employer, even though the parties' arbitration agreement made "no mention of class claims." *Id.* at 117.

5. The Supreme Court took up the issue again in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

    a. In *Oxford*, the Court began by reconfirming the fundamental principle of *Stolt-Nielsen*:

"Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them." 133 S. Ct. at 2066.

b. But the Court in *Oxford* went on to uphold an arbitrator's decision to conduct classwide arbitration under an arbitration provision that made no mention whatsoever of class arbitration.

c. Facts:

   i. The plaintiff in *Oxford*, Dr. John Sutter, was a New Jersey pediatrician who entered into a provider agreement with Oxford Health Plans, a health insurance company.

   ii. Sutter commenced a putative class action lawsuit against Oxford in New Jersey Superior Court, on behalf of himself and a proposed class of other New Jersey physicians under contract with Oxford, alleging that Oxford had failed to make full and prompt payment to the doctors, in violation of their agreements and various state laws.

   iii. Sutter's provider agreement with Oxford contained an arbitration clause.

   iv. The arbitration agreement stated:

   "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator." *Id.* at 2067.

d. Procedural History (abridged):

   i. Oxford moved to compel arbitration, and the state court granted Oxford's motion, thus referring the suit to arbitration.

   ii. The parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he determined that it did.

iii. Oxford filed a motion in federal court to vacate the arbitrator's decision on the ground that he had "exceeded his powers" under § 10(a)(4) of the FAA.

iv. The District Court denied the motion.

v. The Third Circuit affirmed.

e. Decision of the Court:

i. Noting that "[u]nder the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances,'" the Supreme Court ruled that the arbitrator's decision to permit classwide arbitration under the parties' agreement had to be upheld. *Id.* at 2068 (citations omitted).

ii. The Court plainly thought the arbitrator got it wrong, but that was not the question before it.

iii. As the Court explained: "Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." *Id.* at 2068 (citations omitted).

iv. The arbitrator had reasoned that the clause sent to arbitration "'the same universal class of disputes'" that it barred the parties from bringing "'as civil actions'" in court. *Id.* at 2067.

v. According to the arbitrator's reading of the parties' agreement, the "'intent of the clause'" was "'to vest in the arbitration process everything that is prohibited from the court process.'" *Id.*

vi. And a class action, the arbitrator continued, "'is plainly one of the possible forms of civil action that could be brought in a court'" absent the agreement. *Id.*

vii. Accordingly, the arbitrator concluded that "'on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained.'" *Id.* at 2067.

viii. Right or wrong, that was enough for the Supreme Court, because "the arbitrator did what the parties had asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that the arbitrator did not exceed[ ] [his] powers." *Id.* at 2069 (alterations in original) (internal quotation marks omitted) (citing 9 U.S.C. § 10(a)(4)).

ix. Oxford protested that its contract contained merely "a garden-variety arbitration clause, lacking any of the terms or features that would indicate an agreement to use class procedures," and the Court did not disagree. *Id.* at 2070.

x. In fact, the Court went out of its way to emphasize that "[n]othing we say in this opinion should be taken to reflect an agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading." *Id.* at 2070.

xi. As the Court explained, however, the FAA "permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed the task poorly." *Id.* at 2070.

xii. The Court distinguished its previous decision in *Stolt-Nielsen* this way: "The parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration." *Id.* "In that circumstance, we noted, the panel's decision was not – indeed, could not have been – 'based on a determination regarding the parties' intent.'" *Id.* at 2069 (citation omitted).

f. Question Left Open:

i. Despite its deference to the arbitrator's decision, the Supreme Court expressly declined to decide in *Oxford* whether the availability of classwide arbitration had been a question properly decided by the arbitrator (rather than the trial court) in the first place. *Id.* at 2068 n. 2.

ii. The Court observed that "this Court has not yet decided whether the availability of class arbitration is a question of arbitrability," *i.e.*, one of the "gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy" that "are presumptively for courts to decide." *Id.* at 2068-69 n. 2 (citations and internal quotation marks omitted).

iii. The question was not before the Court in *Oxford*, "because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures." *Id.*

iv. The question remains unsettled, but at least two U.S. Courts of Appeals have now held that the availability of class arbitration is a gateway question of arbitrability, to be decided by a court before it refers a matter to arbitration, unless the parties' arbitration agreement clearly reserves the question for the arbitrator. *Opalinski v. Robert Half Int'l*, 761 F.3d 326, 335 (3d Cir. 2014) ("the District Court had to decide whether the arbitration agreements permitted classwide arbitration"); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) ("whether an arbitration agreement permits classwide arbitration is a gateway matter" that is presumptively "for judicial determination[.]").

IV. Federal Law Restricts Mandatory Arbitration Agreements in Certain Contexts

A. Federal statutes limit the use of mandatory pre-dispute arbitration clauses in certain types of contracts.

1. Residential mortgage loans (15 U.S.C. § 1639c(e))

2. Open end consumer credit plans secured by the principal dwelling of the consumer (15 U.S.C. § 1639c(e))

3. Motor vehicle franchise contracts (15 U.S.C. § 1226(a)(2))

4. Livestock and poultry contracts (7 U.S.C. § 197c)

5. Consumer credit agreements with military members or their dependents (10 U.S.C. § 987(e)(3), (f)(4))

B. Federal statutes also limit the enforcement of mandatory pre-dispute arbitration agreements with respect to certain types of claims.

1. Whistleblower retaliation claims under the Sarbanes-Oxley Act of 2002, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") (18 U.S.C. § 1514A(e)).

a. 18 U.S.C. § 1514A(e)(2) suggests that an arbitration agreement may be wholly unenforceable for <u>any</u> purpose unless it expressly carves out whistleblower retaliation claims: "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." *Id.*

b. However, at least two U.S. Courts of Appeals have held that the Dodd-Frank Act's anti-arbitration provisions do not prohibit arbitration of non-whistleblower claims simply because an arbitration agreement fails to carve out Dodd-Frank whistleblower claims. *See Santoro v. Accenture Federal Services, LLC*, 748 F.3d 217 (4th Cir. 2014) (age discrimination plaintiff could not invalidate the arbitration clause in his employment agreement with Accenture on the basis that it failed to carve out whistleblower claims under the Dodd-Frank Act; Dodd-Frank does not prohibit arbitration of non-whistleblower claims simply because an arbitration agreement does not carve out Dodd-Frank whistleblower claims); *Holmes v. Air Liquide Indus. US LP*, 498 Fed. Appx. 405 (5th Cir. 2012) (former employee suing under the ADA, Title VII and the FMLA could not invalidate her arbitration agreement based on its failure to carve out Dodd-Frank whistleblower claims).

2. Whistleblower retaliation claims under the Commodity Exchange Act, as amended by the Dodd-Frank Act (7 U.S.C. § 26(n))

a. Here, too, the statute suggests that an arbitration agreement may be wholly unenforceable for <u>any</u> purpose unless it expressly carves out whistleblower retaliation claims: "No predispute arbitration agreement shall be

valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 7 U.S.C. § 26(n)(2).

b. *But see Santoro* and *Holmes, supra.*

3. Whistleblower retaliation claims under the Consumer Financial Protection Act of 2010, also enacted as part of the Dodd-Frank Act (12 U.S.C. § 5567(d))

a. 12 U.S.C. § 5567(d)(2) states, in pertinent part, "no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section."

b. Contains a limited exception for collective bargaining agreements. (12 U.S.C. § 5567(d)(3)).

C. Arbitration Agreements and the EEOC

1. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Supreme Court held that an arbitration agreement between an employee and his employer did not prevent the Equal Employment Opportunity Commission ("EEOC") from pursuing a federal lawsuit against the employer to recover reinstatement, back pay and damages for discrimination on behalf of the employee.

2. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court stated that "[a]n individual . . . claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." *Id.* at 28.

V. Some of The Things to Consider When Drafting An Arbitration Agreement with Class Action Waiver

A. The drafting of an effective arbitration agreement will depend on a number of factors specific to your situation.

1. The drafting of an effective arbitration agreement depends on a host of issues specific to the nature of the relationship(s) and dispute(s) to be covered by the agreement, and the jurisdiction(s) in which the agreement will be used. This section provides a non-exhaustive list of things to consider.

B. Be clear about what claims and rights are covered by the arbitration agreement.

    1. Consider whether to expressly carve-out any types of claims or charges.

C. Be clear about your intent with respect to class, collective, or other representative proceedings.

    1. There should be a clear and express waiver of the right to commence or participate in class, collective, or other representative proceedings in court or arbitration, if that is what you intend.

        a. The Second Circuit recently held that a waiver of the right to bring class or collective claims in court is conceptually distinct from a waiver of class and collective arbitration. *Cohen v. UBS Fin. Servs.*, 2015 U.S. App. LEXIS 11184, at *7 n.4 (2d Cir. June 30, 2015); *see also Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 272 n.7 (2d Cir. 2015).

    2. If you intend to restrict the parties to individual arbitration, make it explicit that the arbitrator shall not be allowed to conduct arbitration on a class, collective, or other representative basis, and that the arbitrator shall not be allowed to consolidate arbitration demands filed by others.

    3. The lesson of *Oxford Health* is that your arbitration agreement should leave no room for an arbitrator or a court to infer that classwide arbitration is permitted, if that is not your intent.

    4. Consider whether to include language to the effect that if the waiver of class proceedings is deemed unenforceable, then any class claims must be brought in court, not in arbitration.

D. Know your arbitrators, know their rules.

    1. Incorporating a particular arbitrator's rules into your arbitration agreement can have unintended consequences.

        a. Example: In *Mork v. Loram Maintenance of Way, Inc.*, 844 F. Supp. 2d 950, 955-56 (D. Minn. 2012), the court found that the parties' arbitration agreement allowed for classwide arbitration because it stated that any arbitration would be conducted in accordance with the

rules of the American Arbitration Association ("AAA"), and the AAA rules in effect at the time allowed for class arbitration under the circumstances.

b. Example: In *Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 272-73 (2d Cir. 2015), the Second Circuit held that Chase had no right to compel arbitration in a putative class and collective action brought by a group of its financial advisors for alleged violations of state and federal wage and hour laws; Chase's arbitration agreement expressly called for "individual arbitration," but it also expressly incorporated FINRA's arbitration rules, and those rules prohibited individual arbitration of claims that were the subject of a pending putative class or collective action.

2. Stay informed of any amendments to your arbitrator's rules.

a. In *Lloyd v. J.P. Morgan Chase, supra*, Chase's motion to compel arbitration was sunk, in part, by amendments to the FINRA arbitration rules that were enacted *after* Chase incorporated FINRA's arbitration rules into its arbitration agreement. *Id.* at 273.

b. The Second Circuit's position was buyer beware: "A party that agrees to arbitrate before a particular forum according to the rules of that forum assumes the risk that the forum's rules might change." *Id.*

E. Consider whether and how to use a severability clause.

1. In particular, consider whether any provisions of your arbitration agreement should be deemed non-severable, in the event they are found to be illegal or unenforceable.

F. Know the laws of the jurisdiction(s) in which your arbitration agreement will be used and enforced.

1. The FAA notwithstanding, state law still has a significant role to play in this arena.

2. The scope of FAA preemption is evolving; not all state regulation of arbitration agreements may be preempted.

3. In addition, general state contract law principles concerning the validity, revocability, and enforceability of contracts are not

preempted by the FAA. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

a. Thus, fundamentally, "[t]he question whether the parties agreed to arbitrate is governed by state law principles regarding contract formation." *Patterson v. Raymours Furniture Co.*, 2015 U.S. Dist. LEXIS 40162, at *7 (S.D.N.Y. Mar. 27, 2015) (citing *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1924 (1995)).

b. For example, what constitutes a sufficient offer and acceptance, or adequate consideration, to make a binding contract may vary from state to state, and affect the validity of your arbitration agreement.

The Post-*Epic* Fight for Employees' Rights in Individual Arbitration

By: Marijana Matura, Esq.

The Supreme Court's 5 to 4 decision in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), ruled that class and collective action waivers in employment agreements are enforceable. The ruling has left plaintiff attorneys with the feeling that the glass is half empty. So what, if anything, can plaintiff's attorneys do now? It is up to plaintiffs' bar to change course from only pursuing class or collective action claims to taking on the challenge of multiple individual arbitrations. Through mass individual arbitrations, class-action waivers and mandatory arbitration may prove to be a path less taken by employers. As this shift in course has already begun, so have the debates between employer and employee attorneys in arbitration – with costs being the driving element.

I. The *Epic* Decision.

In *Epic Sys. Corp. v. Lewis*, the Supreme Court ruled that arbitration clauses that require individual proceedings for employees are enforceable under the Federal Arbitration Act ("FAA"). *Epic* arose from three consolidated FLSA cases involving employer-employee agreements that required arbitration. *Epic Systems* came from the U.S. Court of Appeals for the Seventh Circuit; *Ernst & Young v. Morris*, from the Ninth Circuit; and *National Labor Relations Board v. Murphy Oil USA*, from the Fifth Circuit. In all three of these cases, the employee entered into an agreement with their employer that required individual arbitration, and in *Murphy Oil* the agreement specifically waived the right to pursue class and collective actions.

1. The Employee's Argument.

The employees in *Epic* argued that the class and collective waiver was unenforceable because the savings clause of the FAA, a statute which otherwise requires the strict enforcement of arbitration agreements, permits courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract, § 2-recognizes only generally applicable contract defenses, such as fraud, duress, or unconscionability." *Epic Sys.*, 138 S. Ct. at 1616 (quotation and citation omitted). The employees also argued that if the Court were to find a conflict between the FAA and the National Labor Relations Act ("NLRA"), the NLRA would control, and thus hold any agreements that contain class action waivers to be unlawful through § 7 of the NLRA which guarantees employees "the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

This trio of cases raised a conflict between the NLRA, enacted in 1935, and the FAA, enacted in 1925. Under conflict of law principles, in the event of a conflict between co-equal statutes, the later-enacted statute controls. In this case, the NLRA should have controlled and provided a win for the employees. Specifically, the employees argued that class and collective actions were protected "concerted activities" under § 7 of the NLRA. *See* 29 U.S.C. § 157. However, the Supreme Court failed to see a conflict between the FAA and the NLRA.

2. The Employer's Argument.

The employer's argued that the FAA requires enforcement of the arbitration agreements, and that there was no conflict between the FAA and the NLRA as the NLRA's protection for

"concerted activities" only concerned providing employee's access to a forum in which to raise their grievances with their employers – and not a right to a class or collective litigation.

3. The Court's Decision.

The Court sided with employers, ruling that the class waivers were lawful and did not fall within the scope of the FAA's savings clause. Second, the majority opinion found no conflict between the FAA and the NLRA, reasoning that the NLRA does not explicitly mention or mandate the availability of class or collective actions, as:

> [ ] it does not express approval or disapproval of arbitration. It does not mention class or collective action procedure. It does not even hint at a wish to displace the Arbitration Act – let alone accomplish that much clearly and manifestly, as our precedents demand.

138 S. Ct. at 1624.

The Court's dissent disagrees with this interpretation of the NLRA and argues that:

> In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of § 7. None of the Court's reasons for diminishing § 7 should carry the day.

Id. at 1638.

II. Considerations for Plaintiff's Attorneys Post-*Epic*.

1. The Cost of *Epic* on Employers and Employees.

The trickle-down effect of the Supreme Court's May 2018 decision in *Epic* is still manifesting itself, but an increase in employers' use of class-action waivers and arbitration provisions is anticipated and a decrease in class action lawsuit. This is not a new concept, and is in fact a trend has been on the rise for the last few decades, but in the post-*Epic* era the inclusion

of arbitration clauses is expected to grow exponentially. *See, e.g.* Economic Policy Institute (EPI), A. Colvin, The Growing Use of Mandatory Arbitration 1-2, 4 (Sept. 27, 2017), available at http://www.epi.org/publication/the-growing-use-of-mandatory -arbitration/ (data indicates that only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today) (last visited September 10, 2018). It is estimated that over 60 million American workers are subject to mandatory employment arbitration procedures. *Id.* Prior to *Epic*, it was the general consensus that attorneys were less likely to take a claim where a mandatory arbitration provision was present due to the smaller damages awards available in individual arbitration as opposed to class litigation. However, as more individual arbitration provisions become more prevalent, plaintiff attorneys must adjust their perspective.

The decision in *Epic* to require individual arbitration does not alter the ubiquitous manner in which employers violate the law in the workplace. Where a single employee brings a claim for a wage and hour violation or discrimination, the violation is historically the result of a systematically unlawful policy or culture in the workplace. Thus, if there is one employee whose rights are being violated, there are likely a larger group of other individuals whose rights are also being violated. It is now time for plaintiff attorneys to roll up their sleeves and use traditional methods to collect other employees with similar violations and file multiple arbitrations against a single employer. Solicitations, word of mouth, and co-counseling mass arbitrations on a nation-wide basis are becoming the new tools plaintiff attorneys must utilize in order to fight for employee's rights. As multiple individual arbitrations vamp up in the wake of *Epic*, so will employers' costs of administering individual employment arbitrations.

So what does arbitration cost for the employee? The initial filing fee for the employee is between approximately $75 to $400. *See* NAM, Employment Dispute Fees Individual

(www.namadr.com/wp-content/uploads/2016/07/Employment-Fees-7.1.18.pdf); JAMS, Arbitration Schedule of Fees and Costs (www.jamsadr.com/arbitration-fees). Administrative agencies like the AAA or NAM will typically require the employee to only pay the initial filing fee and that the employer is responsible for paying ***both*** the costs of arbitration ***and*** the arbitrator's compensation. *See* American Arbitration Association ("AAA") Employment Rules, p. 33; *see al*so National Arbitration and Mediation Employment Rules, Rule No. 5. Employers are costs in an individual arbitration that can range from approximately $35,000 to over $100,000 per arbitration, depending on the hourly rates of the arbitrator selected which may be between $300 to above $1,500 per hour. *See* Dispute Resolution Magazine, Deborah Rothman, *Trends in Arbitrator Compensation*, Spring 2017 (www.americanbar.org/content/dam/aba/publications/dispute_resultion_magazine/spring2017/3_rothman_trends_in_arbitrator.authcheckdam.pdf). These costs are frequently more than the value of the employee's underlying claim, particularly with FLSA claims where low wage workers are traditionally seeking unpaid wages. *See Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011) (finding that the employee using the prescribed arbitration program would likely have to spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent amount in liquidated damages).

Large employers may not be dismayed by these costs for one arbitration, but these costs become significant after 100+ individual arbitrations are filed. Each arbitration provides plaintiff attorneys with additional leverage for settlement – ironically, a class settlement may not be off the table in these situations depending on the size of the putative class and the projected costs of future arbitrations. Class litigation may prove to be a cheaper alternative for employers as

plaintiff attorneys begin to mobilize and vendors begin to develop products geared toward mass individual arbitration.

i. **How to Avoid Costs at the AAA**.

The AAA administers approximately 50% of mandatory employment arbitration cases. *See* EPI, A. Colvin, The Growing Use of Mandatory Arbitration, 5. The rules permit the AAA to make an initial determination that governs who is responsible for the costs of the arbitration. Specifically:

> When the arbitration is filed, the AAA makes an initial administrative determination as to whether the dispute arises from an employer plan or an individually-negotiated employment agreement or contract. This determination is made by reviewing the documentation provided to the AAA by the parties, including, but not limited to, the demand for arbitration, the parties' arbitration program or agreement, and any employment agreements or contracts between the parties. . . the AAA's review is focused on two primary issues. The first . . . whether the arbitration program and/or agreement. . . is one in which it appears that the employer has drafted a standardized arbitration clause with its employees. The second aspect of the review focuses on the ability of the parties to negotiate the terms and conditions of the parties' agreement.

If the dispute arises from an employer plan, then the AAA will hold the employer responsible for the costs of the arbitration. However, if the AAA determines that the dispute is based on an individually-negotiated agreement, than the AAA may assess costs against the employee.

Thus, employees must be specific in their demands for arbitration, particularly with the AAA, and specifically set forth if: (1) if it was the employer promulgated arbitration clause; and; (2) whether the employee had the ability to negotiate the arbitration clause. These allegations will permit the AAA to easily make the initial determination.

Plaintiff attorneys must beware that in instances where the employee is claiming he was misclassified as an independent contractor, the AAA will be administered the arbitration pursuant to the AAA's Employment Arbitration Rules and Mediation Procedures. *See* AAA Commercial Rules, R-1 (Providing that "a dispute arising out of an employer-promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures."). This permits employees to avoid the Commercial Arbitration Rules which tend to have higher administrative costs.

2. Consolidation of Arbitrations

In the absence of a confidentiality provision and where the availability of a large amount of individual arbitrations is not likely, plaintiff attorneys may attempt to consolidate individual arbitrations in an effort to decrease the cost of litigation and save time. Arbitration clauses often fail to set forth procedures to be applied in arbitration, or they are silent with regard to consolidation. Nonetheless, consolidation of discovery, depositions, and motion practice will save money and time for attorneys on both sides of the bar. The issue of when to request consolidation is a case by case determination, and may not be useful in all cases.

3. NY Bans Mandatory Arbitration for Sexual Harassment Claims

The recent #MeToo movement has motivated New York to enact laws which prohibit mandatory arbitration of sexual harassment cases in the workplace, thereby providing victims of workplace sexual harassment a voice and the ability for their claims to be known and heard. The law applies to all contracts entered into on or after July 11, 2018, and declares "null and void" "any cause or provision in any contract which requires . . . the parties submit to mandatory arbitration to resolve any allegation or claim of. . . sexual harassment." N.Y.C.P.L.R §

7515(a)(2), 7515(a)(4)(b)(i)-(iii). This law does not affect the arbitrability of claims unrelated to sexual harassment nor does it apply to collective bargaining agreements. Washington, Maryland, South Carolina, and California are all either following suit with New York or considering similar legislation. However, the issue to look for post-*Epic*, are cases that claim the FAA preempts these state laws. The FAA could likely invalidate this state legislation which already acknowledges that the NY Statute applies "except where inconsistent with federal law." N.Y.C.P.L.R. 7515(a)(4)(b)(i).

4. Call on Congress

The only path left for employee's to reverse what the dissent refers to as the Court's "egregiously wrong" decision in *Epic*, is to listen to Justice Ginsberg's call for: "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order." 138 S. Ct. at 1633. From a policy perspective, mandatory arbitration is bad for workers and forced individual arbitration are the new yellow dog contracts of our time. Employees typically have no other option but to sign an arbitration agreement that will now typically contain class and collective waivers – these are conditions of employment that employees have no ability to bargain around. Thus, it is up to Congress to confirm workers' rights – specifically, the right to participate in class and collective actions.

Since the Supreme Court has treated the FAA to mean that courts must "rigorously [] enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted," it will also be up to Congress to resolve any issues between the FAA preempting state laws that prohibit mandatory arbitration of sexual harassment claims. *Epic*, 138 S. Ct. at 1621.

III. What Grounds Remain to Challenge Arbitration Provisions Post-*Epic*.

1. Vague Language is Sufficient to Compel Arbitration.

An arbitration clause in a contract between the employee and the employer does not need to be specific to require arbitration. *See Ryan, Beck & Co., LLC v. Fakih*, 268 F. Supp. 2d 210, 221 (E.D.N.Y. 2003) (language requiring arbitration of "all disputes" is sufficient to compel arbitration). This also true if details about the arbitration procedure are omitted. *See, e.g.*, *Hudson Specialty Ins. Co. v. New Jersey Transit Corp.*, No. 15 Civ. 89, 2015 WL 3542548, at *7 (S.D.N.Y. June 5, 2015); *Hojnowski v. Buffalo Bills, Inc.*, 995 F. Supp. 2d 232, 237 (W.D.N.Y. 2014) (failure to provide worker with rules of arbitration did not preclude forming of agreement to arbitrate where the worker was (1) fully aware of the duty to arbitrate "any dispute," and (2) the rules for resolving the dispute were accessible to the employee).[1] But, there must be a meeting of the minds regarding whether arbitration is mandatory. *See ISC Holding AG v. Nobel Biocare Invs. N.V.*, 351 F. App'x 480, 481-82 (2d Cir. 2009) (summary order) (arbitration not mandatory where the agreement allowed disputes to be arbitrated *or* brought in court).

2. Standard Contract Defenses.

The FAA provides for the enforcement of arbitration agreements, "save upon ground as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. As discussed *supra*, this exception is known as the "saving clause" and permits courts to invalidate arbitration agreements based on contract defenses, such as "fraud, duress, or unconscionability[.]" *AT&T Mobility LLC*

[1] Note that an agreement in employee handbook may be unlawful and unenforceable if the provision is so broad that a reasonable worker would believe it prohibits them from filing with the NLRB. *See Countrywide Fin. Corp.*, 362 NLRB No. 165, slip op. at 2 (Aug. 14, 2015); *but see Bloomingdale's, Inc.*, Case No. 31-CA-071281, slip op. at 4-5, 9 (NLRB Div. of Judges, June 25, 2013) (NLRA not violated where the employees were granted the option to, and repeatedly advised of their ability to, opt-out of the arbitration policy and still work for Bloomingdale's); *accord Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014).

v. Concepcion, 563 U.S. 33, 229 (2011) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)); *see, e.g., O'Connor v. Uber Techs., Inc.*, No. 13 Civ. 3826, 2015 WL 8587879 (N.D. Cal. Dec. 10, 2015) (Uber's carve out for intellectual property claims, confidentiality clause, and unilateral modification were substantially unconscionable, rendering the arbitration agreement unenforceable).

3. Was there ever an agreement to arbitrate?

Likewise, a court may not compel arbitration unless it has established that the arbitration agreement exists. *See Specht v. Netscape Comm. Corp.*, 306 F.3d 17, 26 (2d Cir. 2002); *see also JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 171 (2d Cir. 2004) ("[A]rbitration is a matter of contract, and therefore a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit.") (internal citations omitted). This benefits the employee seeking to avoid arbitration, because a court must evaluate a motion to compel under the same standard as a summary judgment motion. *See Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003). Thus, when "a motion to compel arbitration is opposed on the ground that no agreement to arbitrate has been made between the parties, a district court should give the opposing party the benefit of all reasonable doubts and inferences that may arise." *Dreyfuss v. eTelecare Global Solutions-US, Inc.*, No. 08 Civ. 1115, 2008 WL 4974864, at *3 (S.D.N.Y. Nov. 19, 2008), *aff'd*, 349 F. App'x 551 (2d Cir. 2009) (citation and internal quotes omitted). A trial on the issue may even be required. 9 U.S.C. § 4 ("If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."); *Benckiser Consumer Prods., Inc. v. Kasday*, No. 97 Civ. 5389, 1998 WL 677631, at *3 (S.D.N.Y. Sept. 30, 1998) (ordering a trial and denying motion to compel where there were disputed issues of fact as to whether an agreement to arbitrate existed).

4. Did the agreement to arbitrate expire?

Courts presume that the obligation to arbitrate survives the termination of a larger contract. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 204 (1991). But the survival presumption can be "negated expressly or by clear implication." *Id.*

5. Did the employee receive the Arbitration Notice?

In *Schmell v. Morgan Stanely*, a motion to compel arbitration was denied where a question of fact existed regarding whether the employee received an email that contained the employer's revised arbitration policy. *See Schmell v. Morgan Stanely*, No. 17 Civ. 13080, 2018 WL 1128502, at *4 (D.N.J. Mar. 1, 2018). The employee provided certified statements to the court that he had "no recollection of receiving, viewing, or opening the . . . email." *Id.* 2018 WL 1128502, at *3. The employer provided documentary evidence that the email containing the arbitration agreement was delivered to the employee and argued that continued employment constitutes notice and assent to the arbitration agreement. *Id.* Thus in situations where the employee does not recall receiving an arbitration agreement and/or the employer cannot provide proof of receipt of the arbitration agreement, *Schmell* provides a basis for denying a motion to compel arbitration.

6. Claims Exempt from Arbitration under the FAA.

The FAA exempts "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This exemption tends to become an issue in cases involving delivery drivers. In this regard, the Supreme Court has interpreted "any other class or workers" to mean "transportation workers." *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); *see also Adams v. Suozzi*, 433 F.3d 220, 226 (2d

Cir. 2005) (FAA's Section 1 exemption applies to "workers involved in the transportation industries." (internal quotations omitted)).

When a court is faced with a motion to compel arbitration of transportation workers' claims, the court is to apply the standard as if the FAA "had never been enacted." *Palcko v. Ariborne Express Inc.*, 372 F.3d 588, 596 (3d Cir. 2004). If the agreement is also governed by state law, the court may compel arbitration under the law of that state. *See, e.g.*, *Davis v. EGL Eagle Global Logistics LP*, 243 F. App'x 39, 43-44 (5th Cir. 2007) (compelling arbitration under state law because the agreement provided for the application of state law, even though arbitration could not be compelled under the FAA); *Cilluffo v. C. Refrigerated Servs., Inc.*, No. 12 Civ. 886, 2012 WL 8523507 (C.D. Cal. Sept. 24, 2012) (same), order clarified, 2012 WL 8523474 (C.D. Cal. Nov. 8, 2012).