March 28, 2019

2019: The Beginning of the End for Mandatory Arbitration?

The Federal Arbitration Act (FAA) provides that agreements to arbitrate claims are valid and enforceable. With the support of federal law, employers regularly craft and rely on broad arbitration agreements, some going so far as to require arbitrators to decide whether a specific claim is subject to arbitration. Look no further than the United States Supreme Court's *Epic Systems Corp. v. Lewis* decision in 2018, a clear victory for employers, holding that class and collective waiver provisions in the context of employment arbitration agreements are enforceable under the FAA, despite challenges under the National Labor Relations Act. As 2019 kicks off, employers using or considering requiring arbitration of employment disputes will need to grapple with new challenges presented not only by courts of law and legislatures, but by the court of public opinion.

Interstate Transportation Workers May Be Exempt From Arbitration Agreements: On January 15, the Supreme Court handed down a new decision, *New Prime Inc. v. Dominic Oliveira*, that employers likely will greet with much less enthusiasm than *Epic Systems*. Oliveira worked as a driver for interstate trucking company New Prime Inc. Contracts between Oliveira and New Prime labeled Oliveira an "independent contractor," and required arbitration of any disputes arising out of their relationship as well as disputes concerning the scope of the arbitrator's authority. Oliveira filed a class action against New Prime in federal court, arguing that New Prime improperly classified him and other drivers as independent contractors and failed to pay all wages due. The trial court declined New Prime's motion to compel arbitration, as did the United States District Court for the District of Massachusetts. The Supreme Court affirmed the decision not to compel arbitration. First, noting that the FAA is not unlimited and contains an exclusion of coverage for "interstate transportation workers," the Court ruled that a trial level court should first decide whether this exclusion applies before deciding to compel arbitration. Second, the Court held that this exclusions applies to all interstate transportation workers, regardless of whether they are employees or independent contractors.

The Court of Public Opinion Is Having Its Own Say on Mandatory Arbitration: Public opinion may have an even bigger impact on mandatory arbitration than the Supreme Court. In the era of #MeToo, many employers are looking inward, changing or eliminating their arbitration policies even without legislation or a court telling them to do so. Instead, employee pressure has spurred these changes. For example, in December 2017, Microsoft announced it had eliminated mandatory arbitration of sexual harassment claims. In November 2018, Google followed suit. Facebook announced its own policy change shortly thereafter. Other employers, ranging from law firms to ride services such as Uber, have also announced the end of mandatory arbitration for sexual harassment claims. But Google took perhaps the biggest step to date, announcing in February that, effective March 21, it would end mandatory arbitration for its workers altogether, not just for those claims involving sexual harassment.

Legislative Attempts to Limit Arbitration: While many employers are choosing to end arbitration now, in some states, there may no longer be a choice at all. In response to pressure brought on by the #MeToo movement, legislatures around the country have drafted new laws that would allow sexual harassment victims to share their experience publicly. Some states have considered the elimination of forced arbitration of sexual harassment claims. In July 2018, for example, New York enacted legislation that prohibits any written contract from including a clause requiring the parties to submit to mandatory

arbitration to resolve any allegation or claim of unlawful sexual harassment. Whether this provision of the law will be enforceable is currently an open question. The law is potentially pre-empted by the FAA, which restricts states from adopting laws that disfavor the enforcement of arbitration provisions involving interstate commerce. Until that question is resolved by a court, New York employers should at the very least be considering carving out sexual harassment claims from their arbitration provisions. New Jersey, which has long prided itself on its historically strong anti-discrimination law, is taking this concept even further. On March 18, Governor Phil Murphy signed into law sweeping changes to employers' ability to keep discrimination claims confidential. Although lawmakers touted the bill as a response to the #MeToo movement, its reach is much broader. With respect to arbitration, the law deems unenforceable any provision in an employment contract that waives any substantive or procedural right or remedy relating to any claim of discrimination, retaliation, or harassment, not just those involving allegations of sexual discrimination, retaliation, or harassment. The law, which you can read more about here, was effective immediately.

The bottom line is that the employment arbitration landscape is rapidly evolving. To make sure their policies remain enforceable, employers must continue to keep a close eye on the courts, legislatures and public opinion.

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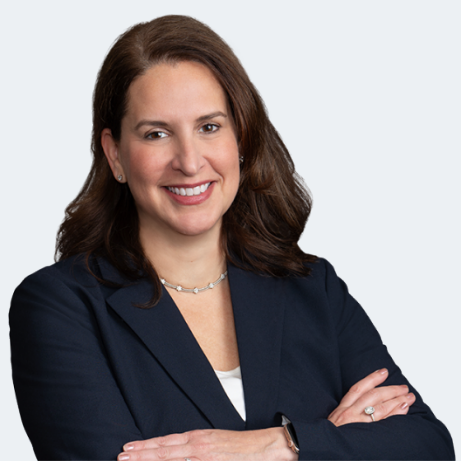

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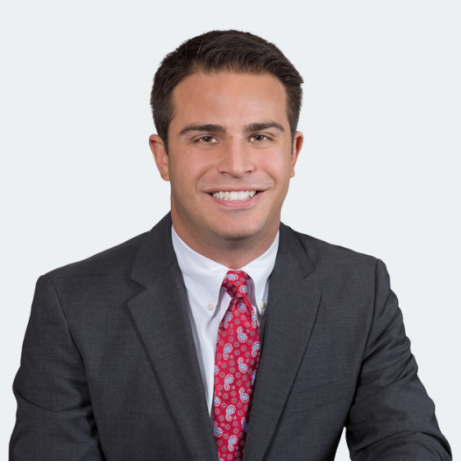

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