PROGRAM MATERIALS
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Mandatory Arbitration for Employment Claims and The Looming Showdown Between Federal And State Policy

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Mandatory Arbitration For Employment Claims

A Looming Showdown Between Federal And State Policy

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Agenda

- Basics Of Arbitration
- Historic Hostility Toward Arbitration And The Federal Arbitration Act
- How Arbitration Has Impacted Employment Law Claims
- Arbitration In The #metoo Era And Related Constitutional Tensions
- Some Crystal Ball Gazing
- Practice Considerations

Just A Little About Me

- Background
  - National practice with significant wage and hour class action experience
  - Admitted in California and Illinois
- Extensive experience litigating arbitration issues, advising employers on arbitration, and writing/speaking on the topic
  - https://www.foley.com/en/insights/publications/2019/10/preemption-battles-arbitration-agreements-loom
  - https://www.tlnt.com/whatever-the-court-decides-it-wont-end-the-debate-over-class-action-vs-individual-arbitration/
  - https://www.foley.com/en/insights/publications/2018/05/supreme-court-ends-the-debate-and-upholds-class-ac

Arbitration: What Is It?

- Contracted-for "private" alternative dispute resolution mechanism for legal claims
  - Can come in a variety of shapes and sizes
  - Eliminates right to court/jury trial
  - Vests decisional power with arbitrator(s) whose conclusions are largely shielded from court interference
- Common in labor disputes arising out of collective bargaining agreements
  - Historically less common with "civil rights"-based claims

Arbitration Pros And Cons

- Common arguments for arbitration
  - More efficient than court proceedings
  - Greater predictability of outcomes through reliance on “expert” decision-makers
  - Potentially more leeway for “fair” outcomes
  - Parties *theoretically* negotiate for it
- Common arguments against arbitration
  - One-sided implementation
  - Arbitrary decision-making largely unreviewable
  - Looser enforcement of “The Law”

Historic Hostility To Arbitration

- "Private" dispute resolution is nothing new
  - Nor are concerns that contracts for "forced" private dispute resolution are one-sided/unfair
- 1925: Congress enacts Federal Arbitration Act ("FAA"), creating judicial mechanism to enforce arbitration provisions
  - Has not stopped the policy or legal debate about propriety and fairness of arbitration

A Pro-Arbitration Federal Policy

- Federal courts not initially strong enforcers of FAA and underlying policy
  - Initial Supreme Court decisions expressed skepticism over procedures and fairness
- Beginning in mid-70s, policy view at Supreme Court begins to change
  - *Southland Corp. v. Keating*, 465 U.S. 1 (1984): essential purpose of the FAA is to overcome judicial hostility toward arbitration

A Pro-Arbitration Federal Policy

- Since *Keating*, SCOTUS has interpreted FAA broadly and rejected state and federal arguments seeking to restrict mandatory arbitration
  - *Moses H. Cohn Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983): FAA applies to and binds state courts
  - *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006): if agreement to arbitrate is itself valid, validity of underlying contract is irrelevant
  - *Hall Assocs., LLC v. Mattell*, 552 U.S. 576 (2008): limiting court ability to review and upset arbitration awards
  - *Rent-A-Center, West v. Jackson*, 561 U.S. 63 (2010): arbitrators, not courts, decide questions of arbitrability

Key Recent SCOTUS Decisions

- Recent SCOTUS cases have clarified potential usefulness of arbitration to protect against class action risk
  - *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011): waiver of class action right in arbitration agreement is enforceable
  - *Epic Sys. Corp. v. Lewis*, 584 U.S. ___ (2018): class action waivers do not violate employee rights to engage in "protected concerted activity"

Employment Law Battles

- Arbitration and "standard" employment law claims (such as discrimination)
  - Some battles over this, but largely concentrated to California
  - California's *Armendariz* Test adopted in 2000 arguably still applies
- *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001): FAA exemptions are narrow and general employment contracts subject to arbitration
- *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009): union employees bound by CBA language covering discrimination claims

Key FAA Principles

- The FAA represents a strong federal policy favoring private resolution of legal claims
  - State law efforts to interfere with this policy are therefore preempted by the Supremacy Clause unless valid under the FAA itself
- FAA contains a "Savings Clause" that preserves "traditional" contract-based defenses to arbitration
  - Generally sound in arguments of unconscionability

Wage And Hour Class Actions

- *AT&T Mobility v. Concepcion* created a potential tidal wall against wave of Fair Labor Standards Act and other wage and hour class action litigation
  - Employers began increasing use of mandatory arbitration agreements
- Pushback Argument: class action waivers violate employee protections to engage in "concerted activity" under National Labor Relations Act

Wage And Hour Class Actions

- *Epic Systems Corp. v. Lewis* resolved circuit split and found NLRA's protections are primarily directed toward collective bargaining and do not override the FAA
- In California, *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014) reached same conclusion for class actions but not with respect to state PAGA claims
  - Efforts to secure SCOTUS review of *Iskanian* rule vis-à-vis PAGA so far unsuccessful

Where Are We Now(ish)?

- Traditional Employment Law Claims:
  - If arbitration agreement exists, difficult to get around it absent glaring contract defects
  - In California*, Armendariz* arguably still applies but anecdotally resistance has lessened
  - Has not been a "spotlight" concern (but note the use of past tense there…)
- Wage and Hour Claims:
  - Outside California, class action waivers a serious protection/impediment
  - California: PAGA is the battleground and we're not likely to hear the end of it for a while

Enter The #metoo Era…

- #metoo as much about challenging efforts by "people in power" to silence harassment victims as it is about exposing harassment by those "people in power"
  - Themes of "shining the light" on harassment and establishing strength in numbers
- As legal momentum started to follow the social momentum, an old foe emerged: "private" arbitration

Policy Response To #metoo

- The traction and attention #metoo has garnered necessitated a political and legislative reaction
  - Companies (and law firms) have eliminated forced arbitration policies
- Forced Arbitration Injustice Repeal Act (FAIR Act) of 2019 introduced by House and Senate Democrats
  - No federal policy changes likely in near future

State Law Response

- Arbitration opponents have had more success at state law level
  - Maryland, New Jersey, Vermont and Washington have recently enacted laws banning mandatory arbitration for harassment claims
- California statute forbids mandatory arbitration for *all* claims arising under Fair Employment & Housing Act and Labor Code
  - Criminalizes employer use of such agreements

The Looming Constitutional Showdown

- Seemingly obvious conflict between recent state laws and SCOTUS-defined FAA principles
  - Categorical prohibition of mandatory arbitration with respect to certain types of claims interferes with purpose of FAA
  - Not based on contract-like defenses – prohibitions arise from the nature of the claim itself
- Potential argument that arbitration is inherently unfair for certain types of claims and contracting for it is itself unconscionable
  - But remember *Buckeye Check Cashing*

The California Statute

- California legislators recognized obvious conflict between FAA and recent law
  - Gov. Jerry Brown vetoed similar bills in 2015 and 2017 because he asserted that they violated the FAA
  - Statute claims nothing "is intended to invalidate a written arbitration agreement … otherwise enforceable under the FAA"
  - Seems like statute either has no teeth or can only apply if federal policy is not preemptive

The California Statute

- Federal court in California has pumped the brakes on statute's validity
- *Chamber of Commerce of U.S. v. Becerra* in Eastern District of CA
  - Declaratory relief action filed late December 2019
  - Judge entered a TRO and set oral argument for January 10, 2020
  - Following argument, Judge preserved TRO, and more briefing submitted on January 17 and January 24, 2020
  - Decision on validity of law *should* be any day

Some Crystal Ball Gazing

- District Court in California will strike down California statute as preempted by FAA
  - Will get appealed, Ninth Circuit less predictable but it will still be a federal supremacy issue
  - If Ninth Circuit overturns, likely Supreme Court review
- Challenges in other states are likely brewing but California is the key battle

Some Crystal Ball Gazing

- Federal court assertion of FAA supremacy not likely to stifle existing tension
  - We've gone 100 years, so no reason to change that now…
  - There definitely is an inherent fairness argument
- How will 2020 elections impact Congressional/executive policy?
- Could #metoo vs. arbitration spurn a new organized labor rallying cry?

Considerations For Both Sides

- Arbitration is not a panacea solution to employment law risks
  - Definite pros and drawbacks
  - If you currently use arbitration agreements, knee jerk reactions unnecessary but thoughtful examination potentially wise
- Arbitration is not as employer-/one-sided as its reputation suggests
  - Can create leverage opportunities in certain circumstances

Questions?

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