

NEXT CHALLENGE. NEXT LEVEL.

# NEXSEN | PRUET

## Arbitration: Key Developments Impacting Labor and Employment Law

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Employment Law Seminar  
MyLawCLE | Federal Bar Association

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# Arbitration: Existing Law and Principles

## WHAT IS ARBITRATION?

- A form of “Alternative Dispute Resolution” (ADR) to resolve a dispute between parties without using the court system
- Generally favored by state and federal governments and policies
- Essentially “private trials” where arbitrator(s) decides the outcome of a dispute
- Parties must agree to arbitrate versus resolve in court system



# Arbitration: Existing Law and Principles

## WHEN IS AN AGREEMENT TO ARBITRATE ENFORCEABLE?

- If the agreement meets basic due process requirements (e.g., it is not too one-sided) and exists in a *stand-alone agreement*
  - Important caveat for employment law: even if there is a valid and enforceable arbitration agreement, the employee can still go to a government agency to file a charge/complaint



# Arbitration:

## Why Arbitrate an Employment Dispute?

### PROS:

- Non-jury
- Non-public forum – potential for confidentiality/public relations
- Likely quicker and potentially more efficient
- Potentially less costly
- Opposing counsel (and/or the Plaintiff) may lose interest
  - Can agree/contract re: who pays fees/costs in certain situations
  - Can agree/contract re: class action/waivers in certain situations



# Arbitration:

## Why Arbitrate an Employment Dispute?

### CONS:

- Difficulty in obtaining summary dismissal
- Arbitrators sometimes “split the baby”
- No/limited appeal available
- Employee relations issues in implementation
- Employer generally responsible for most of fees and costs
- Possibility of challenge to the enforceability, etc. which can delay



# Arbitration:

## Federal Arbitration Act

- **Generally requires that courts enforce valid arbitration agreements**
  - **Exception: “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”**
- **Generally trumps other laws regarding arbitration**
  - **Unless agreement specifies a state’s arbitration law applies**
  - **... or an alternative procedure applies**

# **Arbitration in Employment Context: *Epic Systems v. Lewis* (U.S. May 21, 2018)**

- **Class action waivers in employment arbitration agreements are enforceable under FAA and do not conflict with Section 7 of NLRA**
  - **Section 7 protects employees who engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection”**
- **5-4 majority: In FAA “Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings”**
- **So employers can require workers to arbitrate legal claims on individual basis, in effect prohibiting class/collective actions**

# ALREADY A BUSY 2022

## Latest Developments re: Arbitration



- **Supreme Court: *Morgan v. Sundance* and *Saxon v. Southwest***
- **Fourth Circuit: *Coady v. Nationwide Motor Sales Corp.***
- **Congress: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act**

## *Morgan v. Sundance* (U.S. May 23, 2022)

- Taco Bell employee brought putative nationwide class action against franchise/employer for violations of the FLSA
- Employees signed arbitration agreement to arbitrate “any employment dispute” when they applied for work
- Franchisee/employer initially defended lawsuit without any mention of arbitration agreement, including filing an (unsuccessful) motion to dismiss and engaging in mediation with Plaintiffs





## *Morgan v. Sundance* (U.S. May 23, 2022)

- Eight months into litigation, franchisee/employer raised the arbitration agreement and moved to compel
- ISSUE: Did franchisee/employer waive their right to arbitrate the dispute by not previously raising the issue?
- Under Eighth Circuit precedent, there was a different/higher “waiver” standard for arbitration
  - Required showing of “prejudice”
  - Circuit split on this issue of heightened waiver





## *Morgan v. Sundance* (U.S. May 23, 2022)

**Vacated and  
Remanded  
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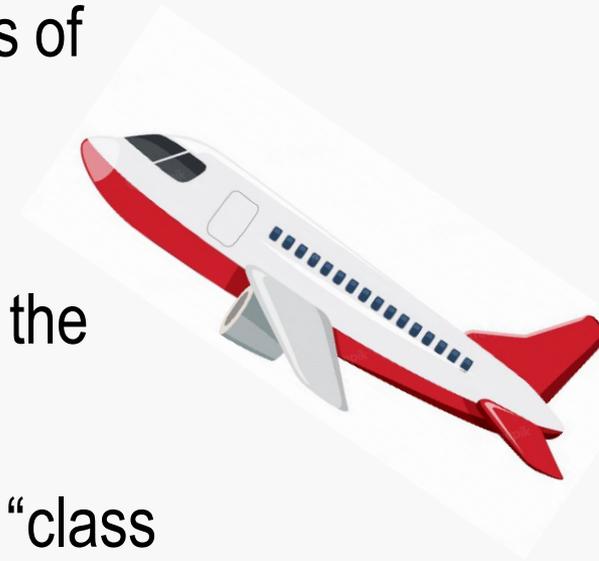
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“waiver”

## *Southwest Airlines Co. v. Saxon* (U.S. June 6, 2022)

- Ramp supervisor brought putative class action against her employer, Southwest, for violations of the FLSA
- Southwest moved to enforce its arbitration agreement with the employees and to dismiss the case
- HELD: Saxon and class members belong to a “class of workers engaged in foreign or interstate commerce” to which FAA § 1’s exemption applies



# Southwest Airlines Co. v. Saxon (U.S. June 6, 2022)

- Ramp supervisor brought putative class action against her

emp

**Motion to Compel  
Arbitration DENIED  
based on FAA  
exemption**

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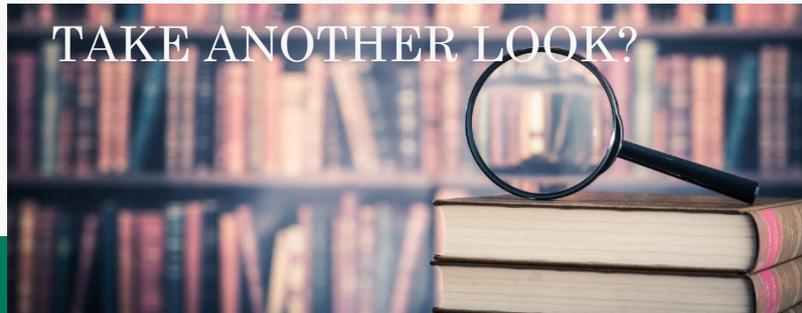
## *Southwest Airlines Co. v. Saxon (U.S. June 6, 2022)*

- **CAUTION:** Even if there is a valid arbitration agreement, the FAA includes exemptions for certain classes of workers who cannot be forced to arbitrate employment disputes
- Such Section 1 exemptions are rare—usually involves those classes of workers who perform a direct or necessary role in the flow of goods involving interstate or foreign commerce



## EFFECTS OF NEW ARBITRATION DEVELOPMENTS AND SUPREME COURT DECISIONS

- After *Saxon* (FAA exemption), Plaintiffs filed Petition for rehearing *en banc* in *Bissonnette v. LePage Bakeries*
- Second Circuit decided appeal following *Saxon* (U.S. Jun. 2022)
- Second Circuit panel (not *en banc*) considered argument already but the ultimate judgment remained the same
- Plaintiffs argue that *Saxon* changes the outcome of the case

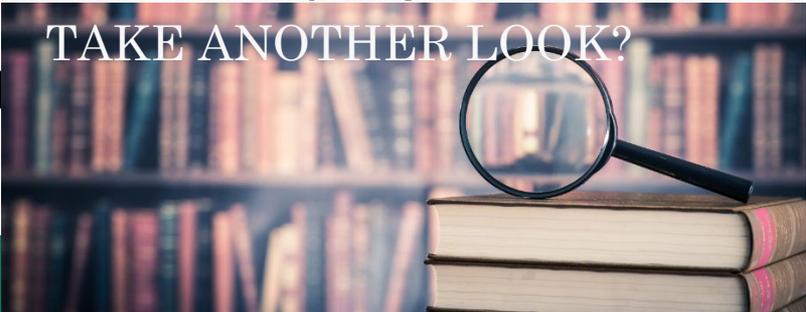


# EFFECTS OF NEW ARBITRATION DEVELOPMENTS AND SUPREME COURT DECISIONS

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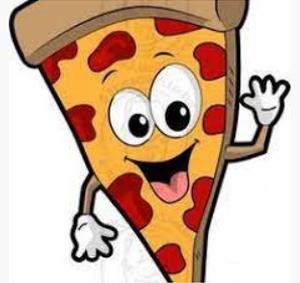
**Petition still pending**

- Second Circuit panel (not *en banc*) considered argument already but the ultimate judgment remained the same
- Plaintiffs argue outcome of the case



## ANOTHER RECENT DEVELOPMENT...

- Supreme Court granted certiorari to ***Dominos Pizza LLC*** to decide whether drivers who transport items from a distribution center to customers in the same state count as a “class of workers” engaged in interstate commerce (thus qualifying for exemption under FAA section 1)
- If yes, the FAA says no arbitration for such workers
- SCOTUS Justices remanded to Ninth Circuit for further consideration in light of its decision in *Saxon* (the ramp supervisor/airline case)



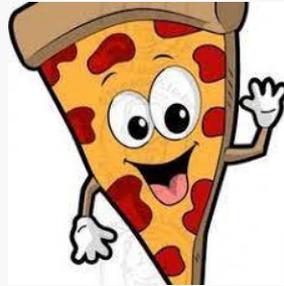
## ANOTHER RECENT DEVELOPMENT...

- Supreme Court granted certiorari to *Dominos Pizza LLC* to

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**SCOTUS sent back to  
Ninth Circuit Court of  
Appeals to reevaluate  
in light of *Saxon***

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- If yes

- SCOTU

consideration in light of its decision in *Saxon* (the ramp supervisor/airline case)

## ***COADY V. NATIONWIDE MOTOR SALES CORP. (4TH CIR. APR. 25, 2022)***

- **Arbitration agreement presented to employees as part of employee handbook and not as separately signed contract was not enforceable**
- **Because acknowledgement of receipt for handbook stated employer retained right to unilaterally modify its contents, making arbitration agreement illusory**
- **Takeaway: Make sure arbitration agreement is enforceable under state contract law**

## ***COADY V. NATIONWIDE MOTOR SALES CORP. (4TH CIR. APR. 25, 2022)***

- **Former employees brought action in federal court in MD alleging wage payment claims**
- **Employer moved to compel arbitration because employees had signed for receipt of employee handbook, which contained section requiring arbitration claims**
- **But acknowledgement of receipt for handbook said employer had “the right, from time to time, to ... change, abolish or modify existing policies ... with or without notice”**



**COADY V. NATIONWIDE MOTOR SALES CORP. (4TH CIR. APR. 25, 2022)**

- Former employees brought action in U.S. District Court for District of MD
- Emp sign requ
- But right polic

**Motion to Compel Arbitration DENIED and Affirmed by Fourth Circuit**

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## ***COADY V. NATIONWIDE MOTOR SALES CORP. (4TH CIR. APR. 25, 2022)***

- **District Court sided with employees and held modification clause applied to arbitration agreement, making it illusory**
- **Fourth Circuit agreed, analyzing issue as matter of contract interpretation and applying MD contract law**



# ***COADY V. NATIONWIDE MOTOR SALES CORP. (4TH CIR. APR. 25, 2022)***

- **Fourth Circuit:**
  - **Presumption favoring arbitration as set out in FAA does not apply to preliminary question of whether arbitration agreement is valid under state contract law**
  - **Under MD law promise to arbitrate is illusory and unenforceable if employer reserves right to modify agreement at any time without notice**
  - **So arbitration agreement was not enforceable and employer stuck litigating in court**





# PRACTICE POINTS

## REVIEW STATE LAW FOR SPECIFIC REQUIREMENTS

- **Is Arbitration Agreement included as part of employee handbook?**
- **Consider setting it out in separately signed document that is clear and definite**
- **Does it meet state law requirements for enforceable agreement?**
  - **Offer, acceptance, and consideration (not illusory)**
  - **Not obtained by fraud, duress, or undue influence**

# SEXUAL HARASSMENT/ASSAULT CLAIMS

- **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act**
- **Signed into law on March 3, 2022**
- **Amends FAA:**

[A]t the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

NEXSEN | PRUET NEWS  
Changes Coming for Employers Seeking to  
Enforce Arbitration Clauses Covering Sexual  
Assault and Harassment Claims

# SEXUAL HARASSMENT/SEXUAL ASSAULT CLAIMS

- Carve out for sexual harassment and sexual assault claims
- Applies to claims that arise or accrue after March 3, 2022
- What about claims based on conduct before enactment but brought after?
- Arbitration still remains an option if the employee wishes to arbitrate



## SEXUAL HARASSMENT/ASSAULT CLAIMS

- Future litigation is anticipated over scope and interpretation of new law
- For example, does “sexual harassment dispute” as used in the law include alleged sex discrimination claim?
- Also, sexual harassment claims are often brought alongside other claims; for example, retaliation, FLSA, FMLA, etc.
  - Would other claims be arbitrated?





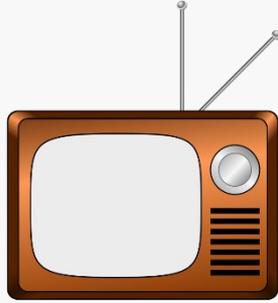
# **PRACTICE POINTS**

## **REVIEW ARBITRATION AGREEMENTS**

- **Insert carve out?**
- **Does agreement mention sexual harassment/sexual assault claims?**
- **How about arbitration provision in employment agreement?**

# *TANTAROS V. FOX NEWS NETWORK, LLC ET AL. (S.D.N.Y.)*

- For example...Order and Opinion issued on Sept. 30, 2022
- Former Fox News host brought sexual harassment and other claims against Fox News, among others in 2019
- Fox News/Defendants relied on mandatory arbitration agreement to compel arbitration of employment dispute
- After passage of the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,” Plaintiff filed “Notice of Supplemental Authority” arguing, in part, that the claims are no longer subject to mandatory arbitration based on the new law



# *TANTAROS V. FOX NEWS NETWORK, LLC ETAL. (S.D.N.Y.)*

- For example, Order and Opinion issued on Sept. 20, 2022
- Formerly subject to a gag order against the defendant
- Fox News compelled to disclose confidential sources
- After passage of the Sexual Harassment Litigation Reform Act, the court's authority to mandate gag orders is limited

**Defendants' Motion to Dismiss GRANTED - Case Subject to ARBITRATION (law not retroactive)**

# PRACTICE POINTS

- ✓ Separate stand-alone agreement
- ✓ Reviewed and met state court requirements for enforceability
- ✓ Excluded sexual harassment and sexual assault claims from the pre-dispute arbitration agreement
- Include specific provisions to address “who decides” questions of arbitrability....



# ARBITRABILITY

- **WHO DECIDES** the threshold *issue of arbitrability*?
- Who decides if agreement is enforceable and/or if specific claims are within an agreement's scope?
  - Are these issues that are for the arbitrator to decide or for the court to first decide?
- Even if an arbitration agreement is otherwise enforceable, resolution can get tied up in court proceedings dealing with these types of issues, which may delay the arbitration process
  - **PRACTICE POINT**: Be sure that your arbitration agreement makes clear and unambiguous who decides what (arbitrator or court)



# ARBITRABILITY

- **General Rule**: Arbitrability is generally an issue for the court to decide
- This is the rule that a court would generally apply in the absence of a different choice that is clear from the written agreement
- **NOTE**: This general rule can be set aside by contracting around it – the arbitration agreement must specifically address the issue of who decides arbitrability, and the agreement should be clear and unmistakable about the parties' agreement on the issue



# ARBITRABILITY

- Again, if you want the arbitrator to decide the threshold issue of arbitrability rather than a court,

**MAKE THIS CLEAR AND UNMISTAKABLE** through a *specific* provision of the arbitration agreement!

*For example....*

## ***LYNCH ET AL. V. TESLA, INC. (W.D. TEX. OCT. 13, 2022)***

- 500 laid-off factory in Nevada and California filed a lawsuit in federal court on behalf of themselves and others as a putative class
- Alleged violations of the WARN Act related to layoffs
- Tesla moved to Compel Arbitration of all of the claims
- Plaintiffs argued that the issue of whether the claims were covered by each individual's arbitration agreement was an issue for the Court to decide rather than an arbitrators Tesla's Motion to Compel Arbitration  
GRANTED



# *LYNCH ET AL. V. TESLA, INC. (W.D. TEX. OCT. 13, 2022)*

- 500 laid-off factory workers in Nevada and California filed a lawsuit in federal court on 10/13/22
  - Alleged violation of National Labor Relations Act
  - Tesla motion to compel arbitration
  - Plaintiffs seek to have each individual claim decided by a federal judge
- GRANTED**

**Motion to Compel  
Arbitration GRANTED  
and Federal Case  
DISMISSED  
(not stayed)**



# *LYNCH ET AL. V. TESLA, INC. (W.D. TEX. OCT. 13, 2022)*

The Court:

PRINCIPLE: arbitration agreements can contract as to the issue of who decides arbitrability of claims despite the general rule that a court decides

## **STANDARD: Clear and Unmistakable Evidence**

- The Tesla-employee arbitration agreements incorporated the JAMS rules, which state:

Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.<sup>9</sup>

- “The express adoption of this rule ‘presents **clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.**”

# COSTLY CONSEQUENCES

Unenforceable agreements can be expensive and time-consuming!



- Why arbitration? Think about why you favor use of arbitration agreements for employment disputes in the first instance
- If agreement is unenforceable or otherwise results in lengthy and costly litigation, the advantages and benefits of opting for arbitration are likely lost

***\* Focus on creating clear, unambiguous and enforceable arbitration agreements to prevent defeating the purpose of choosing arbitration***

# KEEP IN MIND – ARBITRATION...

## RENEWED FOCUS AND ATTENTION



- Be aware of changing law
- Supreme Court and Circuit Courts have issued significant arbitration-related decisions already this year (and Congress has passed legislation)
- Review existing arbitration agreements to ensure compliance

# PRACTICE POINTS

## TERMS TO CONSIDER FOR AGREEMENTS

- How to start arbitration process
- Time limit
- Covered claims (anything arising out of employment and/or termination)
- No class or collective claim as plaintiff or class member
- Excluded claims



# PRACTICE POINTS

## TERMS TO CONSIDER FOR AGREEMENTS

- Procedural rules (AAA, JAMS, AHLA, etc.—but not necessarily by them)
- Written award and specific findings of fact
- Costs (consider paid by employer less filing fee employee would have paid if claim filed in court; share court reporter fees; etc.)
- No change to at-will status



**QUESTIONS?**



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