The Shifting Arbitration Landscape and What it Means for Businesses

March 10, 2022

* Although we will be providing legal information during this webinar, we will not be providing legal advice.

AGENDA

Arbitration Introduction and Basics

New Federal Limits on Arbitration Agreements

State Limits on Arbitration Agreements

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Arbitration Agreements: What are they?

- Arbitration: Resolution of a dispute outside of court with a neutral third party.
- Arbitration Agreements are contracts made between parties that disputes will be arbitrated and not taken to court.
- Pre-Dispute Agreements are made at the outset of a contractual relationship-they’re prospective.
- Post-Dispute Agreements are made after a dispute has already occurred.

Arbitration

Why we use it.

Choice 

Parties can choose their arbitrator. This is helpful with complex issues.

Speed 

Arbitration is generally finished more quickly than litigation.

Privacy 

Arbitrations are non-public, unlike court records.

Expense 

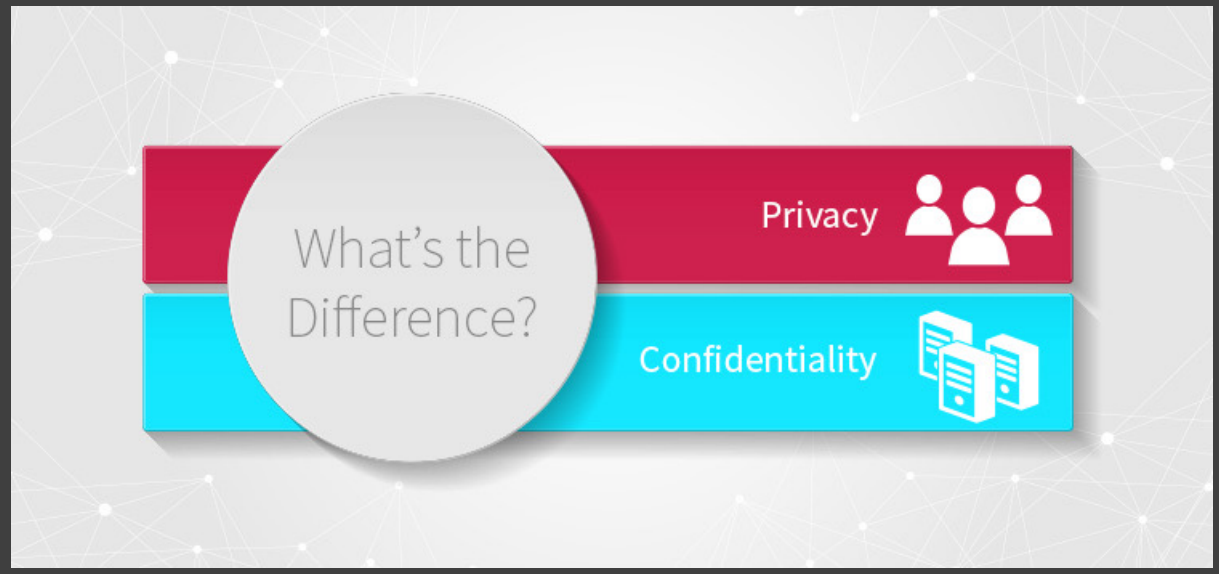
Speed and efficiency in arbitration lead to lower costs.

Federal Arbitration Act

- Permits legally binding effect of arbitration awards.
- Very pro-enforcement of arbitration agreements.
- Preempts conflicting State laws.
- Applies to all contracts involving commerce.
- Exception for employees who are “engaged in foreign or interstate commerce” (railroad workers, seamen, etc.).
  - Uber? Lyft?
- Recent developments.

Confidentiality

- Privacy does not equal confidentiality.
- Arbitrations are not public record, like court proceedings, but that does not mean they are confidential.
- Arbitrators may exclude people from proceedings.
- What duties do the parties owe?
- What do the state laws say?
- Can an NDA help?



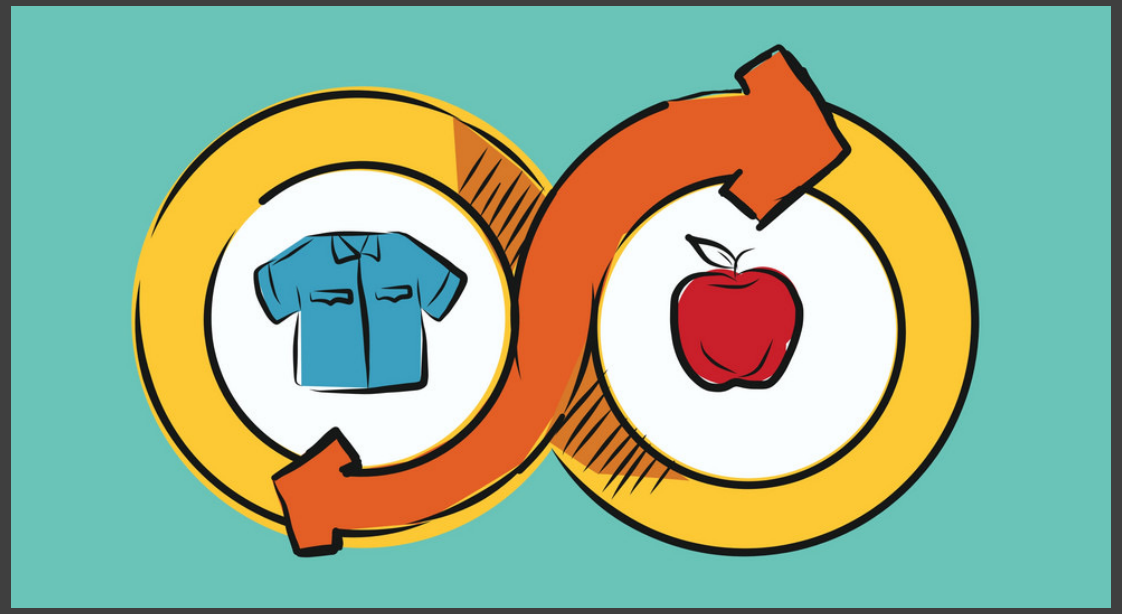
Non-Disclosure Agreements

- If it was confidential before, it should stay that way.
- Some employers use NDAs to prohibit disclosure of facts related to the arbitration.
- States have begun limiting NDA use.
- States with restrictions: California, Illinois, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Virginia, and Washington

POLL # 1

Formation Issues

- Consideration
  - Employment Agreement
  - Standalone Contract
  - Employee Handbook
- Cost Allocation
- Delegation Clauses



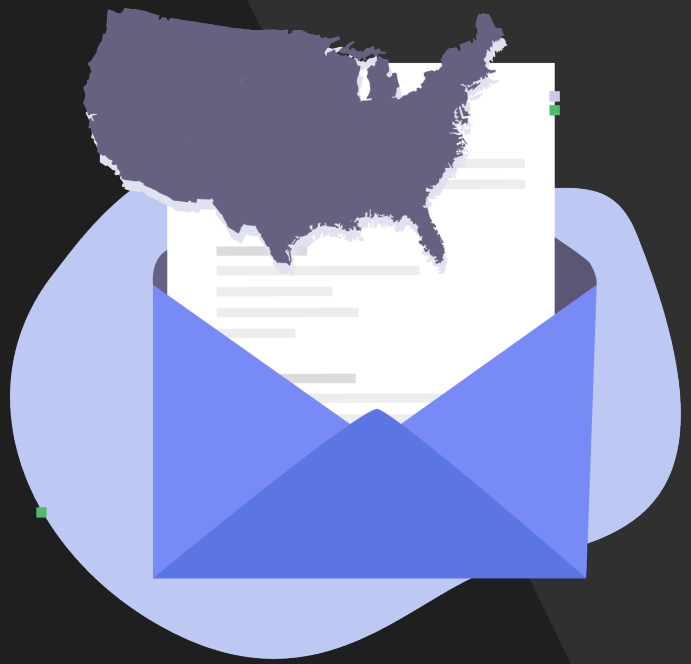
Discovery

- Discovery Plan can be created:
  - At outset of agreement,
  - Or post-dispute between parties and arbitrator.
- Arbitrators will try to limit discovery to necessary requests.
- Reduced document production.
  - Faster
  - Less expensive

Finality

- Arbitration Award must be in writing.
- If they are not followed, they may be confirmed by the Court and given legal effect.
- Generally, awards are not appealable.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021



- Congress passed the Act on a bipartisan basis in February 2022
- On March 3, 2022, President Biden signed the bill into law, which went into effect immediately
- What does the law do?
  - Amends the Federal Arbitration Act
  - At the choice of the claimant, invalidates pre-dispute arbitration agreements related to sexual harassment or sexual assault claims
  - At the choice of the claimant, invalidates pre-dispute joint action waivers for claims related to sexual harassment or sexual assault
  - Effect: claimant has option to arbitrate or go to court
  - Effective immediately on March 3, applies to all future disputes/claims

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POLL # 2

The Specifics of the Law

- Applies only to cases that “relate[] to the sexual assault dispute or the sexual harassment dispute.”
- The law does not affect:
  - Other discrimination claims based on race, national origin, sex/gender (other than sexual harassment or sexual assault), sexual orientation, religion
  - Wage and hour claims
  - Breach of employment contract claims
- Applies only to pre-dispute arbitration agreements.
- What is a ”pre-dispute joint action waiver”?
- Court must decide if claim is subject to arbitration under the law
- The immediate effect of the law invalidates covered arbitration agreements entered into before the law, to the extent they conflict with the law

PRACTICAL EFFECT ON EMPLOYERS

- Going forward, review your form arbitration agreement and consider updating it consistent with the new law

- For current arbitration agreements, employers have several options:
  1) Do nothing, but don't attempt to compel arbitration if employee files sexual harassment or sexual assault claim.
  2) Provide written notice to employees that under the new law, employees may, but are not required to, arbitrate sexual harassment or sexual assault claims, despite contrary arbitration agreement
  3) Have employee sign a modified or new arbitration agreement consistent with the new law

- Expect employees to have increased settlement leverage

- Employers who tried to shield sexual harassment or assault in the workplace from the public will no longer be able to do that, and should expect these claims to be litigated in a public forum going forward

State Limitations on Mandatory Arbitration

Despite the broad federal law, many states have attempted to ban mandatory arbitration of certain employment disputes, with varying degrees of success.

CA

State Law: Can't as a condition of employment require arbitration of violation of CA Fair Employment and Housing Act or Labor Code.

Exceptions: Post-dispute settlement agreements or negotiated severance agreements.

Status: Currently paused while litigation continues in 9th Circuit.

IL

State Law: Can't require as a unilateral condition of employment require employee to arbitrate harassment or discrimination claims based on any protected category.

Exception: Strict requirements for showing of mutuality.

Status: In effect, so far unchallenged

NY

State Law: Can't unilaterally require arbitration of any claim of discrimination.

Exceptions: By mutual agreement

Status: Split of authority; probably preempted

- 3 federal courts and 2 NY state courts found preemption
- 1 NY state court found no preemption

WA

State Law: Can't require arbitration of any discrimination claim

Exceptions: None

Status: In effect, unchallenged

WHAT'S GOING ON IN CALIFORNIA: THE PAGA SAGA

- The California Private Attorney General Act ("PAGA") gives employees the right to sue employers for violation of the CA Labor Code.
- Under current CA law, employers cannot require employees to arbitrate PAGA claims or waive their right to participate in a PAGA class action
- A 2014 CA Supreme Court decision ruled that the FAA did not preempt PAGA limits on arbitration/class actions waivers, meaning those limits were enforceable.
- Now, the U.S Supreme Court will decide whether the FAA preempts PAGA's prohibition on arbitration and class action waivers. Oral arguments are scheduled for March 30, 2022.
- The case represents a potential massive shift in arbitration law for CA employers.

SUMMARY

1. To comply with new federal law, update arbitration agreements to remove any requirement to arbitrate sexual harassment or sexual assault disputes and to remove any waiver of rights to participate in class action of those claims. At minimum, don't try to enforce arbitration agreements for those claims.

2. Be aware of potentially stricter state limitations, and consider complying with those laws until the issue of FAA preemption is resolved.

3. If you have employees in California, monitor both the AB 51 case and the PAGA case to see whether you will need to update your employee arbitration agreements, or do away with them entirely.