ARBIRTRATION IN A NUTSHELL

Scope, Procedures, and Current Trends

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Recent Trends and Developments
Spike in Arbitration Clauses in Employment Agreements

- 2018 Economic Policy Institute ("EPI") report
- 56% of nonunion private-sector employees are subject to mandatory individual arbitration
- 30% have signed agreements that include class-action waivers
- In NC, it is approximately 70%

<table>
<thead>
<tr>
<th>State</th>
<th>Mandatory arbitration</th>
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<tbody>
<tr>
<td>California</td>
<td>67.4%**</td>
</tr>
<tr>
<td>Texas</td>
<td>67.9%</td>
</tr>
<tr>
<td>Florida</td>
<td>53.6%</td>
</tr>
<tr>
<td>New York</td>
<td>55.0%</td>
</tr>
<tr>
<td>Illinois</td>
<td>42.3%</td>
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<tr>
<td>Pennsylvania</td>
<td>54.5%</td>
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<tr>
<td>Ohio</td>
<td>51.8%</td>
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<tr>
<td>Georgia</td>
<td>55.3%</td>
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<tr>
<td>North Carolina</td>
<td>70.0%*</td>
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<tr>
<td>Michigan</td>
<td>42.9%</td>
</tr>
<tr>
<td>New Jersey</td>
<td>40.5%*</td>
</tr>
<tr>
<td>Virginia</td>
<td>55.2%</td>
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Mandatory Arbitration of Employment Disputes Is Increasingly Under Fire

• #MeToo movement
• Sexual harassment and discrimination claims
• Confidentiality
Big Law

- Leaked summer associate contracts
- In March 2018, Orrick, Herrington & Sutcliffe, Skadden Arps, and Munger Tolles all announced they were pulling arbitration clauses out of the agreements
Earlier this year, Google announced that it was pulling arbitration clauses out of employment agreements.

Other tech companies
State Legislation

• A number of states, most notably California, spurred by the #MeToo movement, have banned mandatory pre-dispute arbitration provisions in employment contracts

• BUT, most commentators agree that these state measures are likely preempted by the Federal Arbitration Act in most cases.
Federal Legislation

• Since 2009, Democrats in Congress have been attempting to pass legislation to ban mandatory pre-dispute arbitration in employment contracts

• Forced Arbitration Injustice Repeal Act

• Public opinion increasingly favors such legislation
Practical Advantages & Disadvantages to Arbitration
Confidentiality

• Protection of trade secrets and confidential information
  ➢ Fourth Circuit public access standard
• Avoid negative publicity
• But, increasingly under fire
Lower Costs

• Avoid the costs of pretrial motions practice, voir dire and jury selection, motions in limine, jury instructions, etc.
• More limited discovery
• Waiver of class and collective actions
• Arbitrator’s fees
• Depends on complexity of case, scope of discovery, and arbitration rules
Quality of Arbitrators

- Hit or miss
- Expertise
- Baby splitting
Quicker Resolution

• Arbitration can be quicker, but . . .
  ➢ Depends on the nature and complexity of the case
  ➢ Depends on scope of discovery
  ➢ Depends on forum, rules, and procedures used
Outcomes

• 2015 EPI Report
• Win rate for employees against employers in arbitration is significantly lower than in court
• When employees win, the damages awarded by the arbitrator are lower

<table>
<thead>
<tr>
<th>Comparison of outcomes of employment arbitration and litigation</th>
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<tbody>
<tr>
<td>Mandatory employment arbitration (Colvin)</td>
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<tr>
<td>Mean time to trial (days)</td>
</tr>
<tr>
<td>361.5</td>
</tr>
<tr>
<td>Employee trial win rate</td>
</tr>
<tr>
<td>21.40% (n=1,213)</td>
</tr>
<tr>
<td>Median damages</td>
</tr>
<tr>
<td>$36,500</td>
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<tr>
<td>Mean damages</td>
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<tr>
<td>$109,858</td>
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<tr>
<td>Mean including zeros</td>
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<tr>
<td>$23,548</td>
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Procedural Advantages & Disadvantages

- Less of an opportunity to kick case on dispositive motion
- No joinder procedures
- Waiver of class and collective actions
- No appeal
- Arbitration rules and procedures vary
Arbitration Forum, Rules, and Procedures

• Arbitration agreement can prescribe forum (American Arbitration Association (“AAA”), Judicial Arbiter Group (“JAG”), private arbitration

• Arbitration agreement can prescribe rules and procedures that will govern arbitration (AAA rules, FRCP, private rules)

• Different fora and rules have advantages and disadvantages
  ➢ AAA
  ➢ JAG
  ➢ Private arbitration
Practical Tips for Increasing the Advantages of Arbitration

• Private arbitration
  ➢ Quicker, less costly

• Selection of arbitrator

• Venue selection

• Private rules
  ➢ Limit discovery
The Law Governing Arbitration

- Enacted in 1925
- Purpose: To reverse longstanding judicial hostility to arbitration
“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.
An agreement to arbitrate is enforceable if:

1. It is evidenced by a writing
2. It relates to a transaction involving interstate commerce
3. It satisfies all requirements of a valid contract
The FAA Has Teeth!

• Section 3 provides for a stay of federal proceedings when an issue is arbitrable
• Section 4 provides for federal court order compelling arbitration
Federal Policy Strongly Favors Arbitration

These provisions of the FAA manifest a “liberal federal policy favoring arbitration agreements.”

Are Federal Statutory Claims Subject to Arbitration?

• YES!

• “[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.” Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).
Mandatory arbitration clauses in employment contracts are enforceable, including those covering statutory claims for employment discrimination.

Federal Statutes Cont’d

• “[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”  _Id._

  ➢ Text
  ➢ Legislative history
  ➢ “Inherent conflict” between arbitration and underlying purposes of statute

• “[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”  _Id._

Issue: “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?”
Epic Systems

“As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.” Id.
The Issue of Arbitrability

• Threshold issue: whether there is a valid, enforceable agreement to arbitrate claims
The Issue of Arbitrability

• **General Rule:** “It is for the court, not the arbitrator, to decide in the first instance whether the dispute is to be resolved through arbitration.” *ATT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 651 (1986).

• **Exception:** Agreement shows parties’ intent to have arbitrator decide. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 138 S. Ct. 2678 (2018).
The Arbitrability Standard: Two Questions

1. Does a valid, enforceable arbitration agreement exist between the parties?

2. Does the specific dispute at issue fall within its scope?
Fourth Circuit Cases on Validity: Mutuality

• To be valid, arbitration provisions must be mutually binding

• “If an employer asks an employee to submit to binding arbitration, it cannot then turn around and slip out of the arbitration process itself.” O’Neil v. Hilton Head Hospital, 115 F.3d 272, 273 (4th Cir. 1997).
Fourth Circuit Cases on Validity: Hooters

Egregiously One-Sided Arbitration Procedures and Rules

Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999)
Fourth Circuit Cases on Validity: Fee Splitting

• “A fee-splitting provision can render an arbitration agreement unenforceable if, under the terms of the provision, an aggrieved party must pay arbitration fees and costs that are so prohibitive as to effectively deny the employee access to an arbitral forum.” Muriithi v. Shuttle Express, Inc., 712 F.3d 173 (4th Cir. 2013).

• Party seeking to invalidate the arbitration agreement bears the “substantial” burden of showing a likelihood of incurring prohibitive arbitration costs with “firm proof.”
Fourth Circuit Cases on Validity: Employee Handbooks

• The FAA requires a “written provision in . . . a contract.”
• Receipt of employee handbook and continued employment is sufficient evidence of agreement to arbitrate.
• But, watch out for handbook language that disclaims any contractual obligations! Lorenzo v. Prime Comms., LP, 806 F.3d 777, 782 (4th Cir. 2015).
Fourth Circuit Cases on Validity: Waiver of Substantive Federal Statutory Rights and Claims

• Arbitration provision is invalid when it purports to waive a plaintiff’s substantive federal statutory rights and claims

• This includes waiver of substantive statutory rights under the guise of a choice of law provision. Hayes v. Delbert Servs. Corp., 811 F.3d 666 (4th Cir. 2015).
Fourth Circuit Cases on Validity: Correct Parties

• Arbitration agreements are only binding as to disputes between the actual parties.

Scope of Arbitration Provisions: What Claims Are Covered?

• Common language: “Any dispute between the Parties arising out of or relating to” “employment” or “this agreement”

• Covers claims that involve “significant aspects of the employment relationship,” including contractual and statutory claims. Zandford v. Prudential-Bache Sec., 112 F.3d 723 (4th Cir. 1997).

• By contrast, language such as “arising out of the interpretation or application of any of the terms of this agreement” is limited to contract disputes. Brown v. TWA, 127 F.3d 337 (4th 1997).
Practical Tips for Drafting Enforceable Arbitration Provisions

1. Have employees sign a standalone agreement
2. Make sure the agreement clearly states that the employee is assenting to arbitrate employment-related claims
Tips for Drafting Enforceable Arbitration Provisions Cont’d

3. Make sure the agreement covers the procedures that will govern arbitration proceedings between the parties and that the procedures are fair to both sides.

4. Make sure that the actual employing entity is a party to the agreement.

5. Use “arising out of employment” or similar language.
Arbitration Procedures
Parties Can Prescribe Arbitration Procedures in Arbitration Agreement

• The FAA requires courts “rigorously” to “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.” American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 233 (2013).

• The parties may specify in the arbitration agreement how the arbitrator will be selected and the rules of procedure that will govern arbitration proceedings, among other things.
  ➢ AAA Rules, FRCP, Private Rules
Selection of Arbitrator

• FAA § 5: “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.”

• Alternative: federal district court appoints arbitrator
Seeking Ancillary Relief in Federal District Court

• Parties can seek certain relief ancillary to arbitration in federal court
• BUT, the FAA only grants access to a federal forum and does not create new federal jurisdiction. Vaden v. Discover Bank, 556 U.S. 49 (2009)
• There must be an independent basis for federal jurisdiction
  ➢ Court can “look through” to the substance of the complaint to determine if it arises under federal law
  ➢ “Whole controversy,” not just a counterclaim, must qualify for federal jurisdiction

• Move federal court to compel arbitration
• Move federal court to enter a judgment confirming the arbitration award
• Move federal court to vacate arbitration
• Move federal court to compel attendance of witnesses
Very Limited Grounds for Vacating Arbitration Award

• The award was procured by corruption, fraud, or undue means;
• There was evident partiality or corruption;
• The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
• The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)
Grounds for Vacating Arbitration Award Cont’d

• These statutory grounds are exclusive; therefore, they cannot be supplemented by contract. Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008).

• “The scope of judicial review of an arbitration award ‘is among the narrowest known at law.’ Courts may vacate or modify an arbitration award only under the limited circumstances listed in the [FAA] or under common law if the award ‘fails to draw its essence from the contract or evidenced manifest disregard for the law.’” UBS Fin. Servs. v. Padussis, 842 F.3d 336 (4th Cir. 2016).
• The court “is limited to determine whether the arbitrators did the job they were told to do—not whether they did it well, correctly, or reasonably, but simply whether they did it.”

• Beyond basic questions of arbitrability, courts defer to the arbitrator(s) on both substantive and procedural matters.
Federal Courts May Correct or Modify an Arbitration Award If . . .

• There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

• The arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

• The award is imperfect in matter of form not affecting the merits of the controversy.

Questions?