



# Keeping up with changes in employment-arbitration law

## RECENT DEVELOPMENTS FROM 2024 AND 2025

Courts and the Legislature continue to grapple with employment arbitration. (See *Recent Developments in Employment Arbitration Law from 2023 and 2024* by Stephen M. Benardo in the September 2024 issue of Advocate.)

### The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (“EFAA”), 9 U.S. Code, section 401, et seq., provides: “at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute ... no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which ... relates to the sexual assault dispute or the sexual harassment dispute.” (*Id.*, § 402 (a).) Plaintiffs’ attorneys should be prepared to plead sexual harassment or sexual assault claims whenever possible and to argue these claims require a court to deny a defendant’s motion to compel arbitration on *all* causes of action.

In *Doe v. Second Street Corp.* (2024) 105 Cal.App.5th 552, the employee pled three causes of action for sexual harassment and related FEHA violations, six wage and hour causes of action, slander, and libel. The court noted Congress’s use of the word “case” in EFAA (as opposed to “claims”) and the fact that EFAA directly amended the Federal Arbitration Act (“FAA”) (as opposed to amending Title VII) to hold: a) *the entire case* “relates to ... the sexual harassment dispute” and b) the FAA overrides the California principle that where there are arbitrable and non-arbitrable claims, arbitrable claims must be sent to arbitration. The court denied the employer’s motion to compel arbitration as to *all* causes of action. The court also held EFAA applies to cases alleging that sexual harassment claims occurred both before and after the EFAA’s effective date.

In *Liu v. Miniso Depot CA, Inc.* (2024) 105 Cal.App.5th 791, the court held “the plain language of the EFAA exempts a plaintiff’s entire case from arbitration where the plaintiff asserts at least one sexual harassment claim subject to the act.” The employer’s motion to compel arbitration was denied both as to the employee’s sexual-harassment cause of action, but also on the remaining causes of action for sexual-orientation discrimination, retaliation, wrongful termination, intentional infliction of emotional distress, and wage-and-hour violations.

The court in *Casey v. Superior Court* (2025) 108 Cal.App.5th 575, denied the employer’s motion to compel arbitration as to all the employee’s causes of action, including wage-and-hour causes of action. The court also held that the EFAA applied even though the arbitration agreement provided for interpretation under state law. Where employment involves interstate commerce, the FAA and EFAA preempt the California Arbitration Act (“CAA”) regarding enforceability of arbitration agreements where the plaintiff alleges sexual harassment or sexual assault.



### Transportation exemption

Section 1 of the FAA exempts from FAA coverage transportation workers engaged in foreign or interstate commerce.

In *Lopez v. Aircraft Service International* (9th Cir. 2024) 107 F.4th 1096, the court held “a fuel technician who places fuel in an airplane used for foreign and interstate commerce” qualified for the exemption because the worker play[s] a direct and necessary role in the free flow of goods across borders.”

Whether an employee who does not come into direct contact with a vehicle is an exempt “transportation worker” depends on a fact-intensive analysis of the employee’s relationship to the movement of goods. (Compare *Uwaoma v. OTS Solutions, LLC* (C.D.Cal. Mar. 7, 2025) 2025 U.S. Dist. LEXIS 41865; 2025 WL 1017505 [exemption applied to a “warehouse” worker “who was actively engaged in the process of intaking goods and preparing them for delivery,” including scanning and stocking] with *Villasenor v. Dollar Tree Distribution, Inc.* (C.D.Cal. Aug. 6, 2024) 2024 U.S. Dist. LEXIS 189442; 2024 WL 4452853 [exemption did not apply to an “administrative” worker whose “job duties included staffing the front desk, handling paperwork, compiling reports, assisting with event preparation, answering the phone, and ordering supplies,” who neither handled merchandise, nor processed invoices].)

### Third parties – alleged joint employers

In *Gonzalez v. Nowhere Beverly Hills LLC* (2024) 107 Cal.App.5th 111, the employee did not sue the entity with whom he had entered into an arbitration agreement, but instead sued nine entities as alleged joint employers. The court compelled arbitration, ruling the employee was equitably estopped from arguing the nine entities were joint employers, while at the same time arguing the agreement did not bind him to arbitrate with them.

The *Gonzalez* court discussed the split of authority on whether an employee must arbitrate with alleged joint employers who are not signatories to the arbitration agreement where the signatory is not sued, siding with *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782 [employee must arbitrate with alleged joint employers] over *Soltero v. Precise Distribution, Inc.* (2024) 102 Cal.App.5th 887 [employee not required to arbitrate with alleged joint employers].

### Waiver

In *Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562, the California Supreme Court followed the United States Supreme Court decision in *Morgan v. Sundance, Inc.* (2022) 596 U.S. 411, holding that a party asserting waiver of the right to arbitrate does *not* have to show prejudice.

In *Campbell v. Sunshine Behavioral Health, LLC* (2024) 105 Cal.App.5th 419, the court held the employer waived the right to compel arbitration where: 1) its answer asserted an affirmative defense that some putative class members signed arbitration agreements, 2) two months later the parties stipulated to exchange discovery and to class-wide mediation, 3) the employer claimed to have discovered the plaintiff's signed arbitration agreement one month later and informed plaintiff's counsel two weeks after that, 4) the parties jointly requested a six-month continuance to allow for mediation, 5) three months later, the court signed the stipulation and order re

discovery and mediation, but defense counsel informed plaintiff's counsel the employer would not mediate, and 6) six weeks later the employer filed a motion to compel arbitration. As in *Quach*, the *Campbell* court did not accept representations of the employer and defense counsel as to when the arbitration agreement was "discovered."

*Quach* and *Campbell* illustrate that waiver claims are fact-intensive, and that plaintiffs' counsel should be prepared to highlight facts showing the conduct of the defendant or its counsel were less than forthright, especially evidence that the employer and/or defense counsel may be misrepresenting when they discovered the existence of the arbitration agreement.

In *Arzate v. Ace American Ins. Co.* (2025) 108 Cal.App.5th 1191, the trial court granted the employer's motion to compel, staying representative PAGA claims and compelling arbitration of individual claims. Five months later, neither employee nor employer had made a demand for arbitration. The trial court ruled the employer waived the right to arbitrate by failing to submit a demand, based on language in the arbitration agreement stating, "[a] party who wants to start the Arbitration Procedure should submit a demand within the time periods required by applicable law."

The Court of Appeal held the employer had the right to appeal because, under the "functional equivalent doctrine" the waiver ruling left the employer in the same position it would have been in if the trial judge had denied the motion to compel in the first place. The court then rejected the argument that the employer was the party who "wants" arbitration because the employer prefers arbitration to court litigation, and held the employee was the party who "wants" arbitration because the agreement ruled out court litigation and made arbitration the only forum for the employee to pursue her claims. Absent contrary language in an arbitration agreement, the *employee* must demand

arbitration after a motion to compel is granted.

### Unconscionability

In *Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478 ("*Ramirez II*"), the California Supreme Court reaffirmed that certain provisions in employment-arbitration agreements are substantively unconscionable: a) exclusion of claims the employer is more likely to bring, b) requiring FEHA claims to be submitted to arbitration within the time limit for filing an administrative charge, and c) requiring a party who unsuccessfully resists arbitration of statutory claims to pay the other side's attorneys' fees and costs of compelling arbitration. The Supreme Court also set forth the five factors to be used to evaluate provisions that limit discovery rights.

Laying to rest a long-standing controversy, the Supreme Court clarified that there is no bright-line rule *prohibiting* severance where there is *more than one* unconscionable provision, or *requiring* severance where there is *only one* unconscionable provision, but "the greater the number of unconscionable provisions a contract contains the less likely it is that severance will be the appropriate remedy." When deciding whether or not to sever unconscionable provisions, courts should consider, *inter alia*, whether the defects in the agreement indicate the stronger party engaged in a systematic effort to impose arbitration on the weaker party to secure a forum that works to the stronger party's advantage and should consider the "deterrent effect" of severance versus refusal to enforce the agreement.

On remand, in *Ramirez v. Charter Communications, Inc.* (2025) 108 Cal.App.5th 1297 ("*Ramirez III*"), the court of appeal held the unconscionable provisions could not be severed. Lack of mutuality indicated the purpose of the agreement was to maximize the employer's advantage, deleting language excluding 14 types of claims from the agreement's coverage would be rewriting the

agreement to include claims neither party agreed to arbitrate, and enforcing the agreement with three significant unconscionable provisions would not be in the interest of justice and would incentivize the employer to continue to draft one-sided agreements.

In *Jenkins v. Dermatology Management, LLC* (2024) 107 Cal.App.5th 633, the court held the arbitration agreement was procedurally unconscionable despite the lack of a declaration by the employee, based on: a) the inequality in bargaining power between the employer and the employee, who was not a highly sought-after employee, b) the agreement was pre-signed by the employer, which indicated it could not be negotiated, and c) the employer representative who pre-signed the agreement was absent when it was presented to the employee. (Practice pointer: *Always* submit the employee's declaration regarding procedural unconscionability.) The agreement was substantively unconscionable because: a) the agreement lacked mutuality by excluding the employer's claims for equitable or injunctive relief while requiring arbitration of the employee's claims for equitable and injunctive relief under the UCL, b) there was a one-year statute of limitations, c) the agreement provided arbitrator's fees and costs would be shared equally, which was not cured by application of the AAA rules that require the employer to pay fees and costs, and d) the agreement provided for inadequate discovery by limiting parties to one fact witness deposition, one expert deposition, and requests for production upon a showing of substantial need, which was not cured by application of the AAA rules that give the arbitrator authority to ensure adequate discovery. Severance was denied because the four unconscionable terms indicated a systematic effort to impose arbitration as a forum that works to the employer's advantage, severance would incentivize employers to impose one-sided agreements, and severance would not further the interests of justice.

In *Ronderos v. USF Reddaway, Inc.* (9th Cir. 2024) 114 F.4th 1080, the court

held the arbitration agreement was procedurally unconscionable for the typical reasons (agreement was condition of employment, employee was not highly sought-after, employee was pressured to sign immediately, employee did not understand agreement and it was not explained), and also because the agreement was ambiguous as to which state's law applied to a cost-splitting provision, making it unclear whether there would be cost-splitting or the employer would pay arbitration costs. The agreement was substantively unconscionable because: a) it required specific detailed notice within a one-year statute of limitations for the employee, but not for the employer and b) it carved out claims for preliminary injunctive relief by the employer, but not by the employee. Severance was denied because the central purpose of the agreement was tainted with illegality and the agreement contained multiple provisions benefiting the employer to the employee's detriment.

In *Velarde v. Monroe Operations, LLC* (June 6, 2025) \_\_ Cal.App.5th \_\_, the court found a high degree of procedural unconscionability where the employee was given 31 documents to sign during orientation on her first day of work, including a preprinted-form arbitration-agreement she said she did not want to sign, and the employee was told she had to sign the agreement or she could not begin working. The court found the agreement substantively unconscionable because, when the employee said she did not understand the agreement, a manager misinformed her that the agreement would give the employer the power to resolve all disputes between employer and employee without either party having to pay for lawyers.

In *Vo v. Technology Credit Union* (2025) 108 Cal.App.5th 632, the court held an arbitration agreement that was silent as to third-party discovery was not unconscionable where JAMS discovery rules incorporated by the agreement gave the arbitrator authority to order third-party discovery based on necessity.

## Failure to timely pay arbitration fees

**[Immediately before publication of this article, the California Supreme Court issued its opinion on *Hohenshelt v. Superior Court (Golden State Foods Corp.)*, S284498. The opinion has implications for Code of Civil Procedure section 1281.98 and several cases cited.]**

Under Code of Civil Procedure sections 1281.97 and 1281.98, if the drafter of an employment or consumer arbitration agreement fails to pay within 30 days of invoice the fees and costs to initiate arbitration (1281.97) or to continue the arbitration proceeding (1281.98), the "drafting party" is in material breach, is in default, and waives the right to compel arbitration. The employee or consumer may elect to withdraw from arbitration, proceed in court, and seek sanctions.

On May 21, 2025, the California Supreme Court heard oral argument in *Hohenshelt v. Superior Court*, Docket No. S284498. In *Hohenshelt v. Superior Court* (2024) 99 Cal.App.5th 1319, the Court of Appeal held the arbitration provider and the arbitrator do not have authority to extend the 30 days or set a new deadline, and followed prior cases holding the FAA does not preempt sections 1281.97 and 1281.98. The dissent asserted section 1281.98 does run afoul of the FAA because it singles out arbitration contracts to be voided for late performance when other contracts would not be. Courts of appeal split on FAA preemption in two other cases being held by the California Supreme Court pending their decision in *Hohenshelt*: *Keeton v. Tesla, Inc.* (2024) 103 Cal.App.5th 26 (section 1281.98 is not preempted) and *Hernandez v. Sohnen Enterprises, Inc.* (2024) 102 Cal.App.5th 222 (section 1281.97 is preempted).

In *Trujillo v. J-M Manufacturing Co., Inc.* (2024) 107 Cal.App.5th 56, defense counsel notified plaintiff's counsel of the existence of an arbitration agreement, and the parties entered into a stipulation to arbitrate that was signed into a court order. When the employer made late payment of an invoice by the arbitrator,

the employee argued material breach, default, and waiver under sections 1281.97 and 1281.98.

The *Trujillo* court held sections 1281.97 and 1281.98 did not apply because the case proceeded to arbitration based on the parties' *stipulation*, not the arbitration agreement, so the employer was not the "drafting party." The court also held sections 1281.97 and 1281.98 only apply to *predispute* arbitration agreements, not *postdispute* agreements such as a stipulation.


After *Trujillo*, plaintiffs' attorneys need to include language in stipulations to arbitrate stating the provisions of sections 1281.97 and 1281.98 shall apply in the arbitration proceeding.

In *Anoke v. Twitter, Inc.* (2024) 105 Cal.App.5th 153, the employee's counsel inadvertently paid the invoice for the initial arbitration fees. One month later,

JAMS informed the parties of the mistake, refunded payment to the employee, and sent a new invoice to the employer, which the employer paid within 30 days. The *Anoke* court rejected the employee's argument that the employer's payment was untimely, ruling that what mattered was that the employer paid the fees within 30 days of the invoice sent to the employer.

In *Colon-Perez v. Security Industry Specialists, Inc.* (2025) 108 Cal.App.5th 403, the court held mandatory relief under Code of Civil Procedure section 473 based on attorney declaration of mistake, inadvertence, or neglect is *not* grounds for relief from a failure to timely pay an arbitration invoice, because an order under section 1281.98 is not a default, entry of default, default judgment, or dismissal. The court held that discretionary relief under section 473 based on excusable

neglect is also *not* available because section 1281.98 creates a bright line rule of timely payment to be strictly enforced.

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