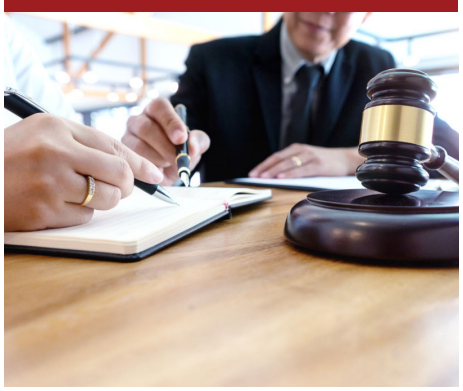
FOCUS: EMPLOYMENT LAW

Arbitration Considerations in Employment Matters



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The State of the Law in Federal and NY State Courts

An arbitration clause, whether contained in an employment agreement or in a separate free-standing agreement, is a contract: pure and simple.[1] Under the FAA, arbitration agreements, must be in writing, but need not be signed.[2] State law contract principles are used to determine whether parties have agreed to arbitrate look to general state law contract principles to interpret the scope of an arbitration provision.[3] Indeed, although employment handbooks predominately state that the handbook is not a contract, some courts have enforced arbitration agreements contained in employee handbooks.[4]
As such, the Federal Arbitration Act ("FAA") is controlling in most instances.[5] There are limited exceptions within the statute itself and by congressional mandate which will be addressed *infra*.

A motion to compel arbitration may be filed in federal court or state court. To file in federal court, there must be an independent basis for federal subject matter jurisdiction.[6] If no independent subject matter jurisdiction exists i.e., lack of diversity and amount in issue does not exceed $75,000 or there is no federal question involved, then a litigant cannot seek relief form the federal court's and a matter filed in state court cannot be removed to federal court. Nonetheless, a New York State court will engage in the same analysis that a federal court would. In sum, the party seeking arbitration does not need to demonstrate that the arbitration agreement was enforceable, but merely whether it exists or not and whether it applies to the suit at hand.[7]

To Arbitrate or Not to Arbitrate?

The question is almost entirely rhetorical. If an agreement exists and one party or the other wants to arbitrate, with rare exception, it will be arbitrated. However, it is a worthy question nonetheless. First, although impractical, an employee can refuse to agree to arbitrate any claims it may have in the future against its prospective employee. Most likely, the employee simply will not get the job. But that is not to say that an employee is without any recourse. An arbitration clause is contractual and contracts can be negotiated. The where's and when's in the clause may be up for debate, as might the number of arbitrators, who pays what, how much (and what type of) discovery will be permitted are potential subjects for discussion.

For employers the general consensus has been it is more cost efficient, faster and some think—confidential. Well, maybe yes and maybe no. As for costs, with both JAMS and the AAA, the employer pays, essentially, all substantive costs associated with the arbitration. As any practitioner knows, these can add up—quickly. As for speed—yes—the resolution can come faster (most of the time) but the employer's attorney should keep in mind that the one thing that could short circuit a trial in court—summary judgment—is rarely granted in an arbitration setting. While JAMS specifically permits the filing for summary dismissal—the AAA does not.[8] Therefore, in arbitration the parties are more likely than not to go to "trial" to resolve their dispute.

And what of confidentiality? Arbitrations are private. They are not confidential. For instance, JAMS only "requires the Arbitrator to maintain the confidential nature of the Arbitration, not Plaintiffs." In fact, the AAA makes clear in its statement of Ethical Principles that "[t]he parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement." Further, the CPLR does not provide for issuance of confidentiality orders in aid of arbitration. CPLR 7502(c) specifically provides that the court may entertain an application for provisional remedies, i.e., for an order of attachment or for a preliminary injunction. However, a confidentiality order has been held not to be in the nature of a provisional remedy.[9] As for the FAA, it has been held to have a "strong policy protecting the confidentiality of arbitral proceedings … ."[10] Of course, confidentiality, even if reduced to writing, can for the most part become a moot point if one side or the other seeks to confirm or reject the Award. Finally, a word on waiver. First, both sides can choose not to pursue arbitration. The courts are not required to enforce compulsory arbitration

unless one party asks for it. "There is no provision of the CPLR that requires a court to direct arbitration based upon the existence of what the court believes to be an applicable arbitration provision covering the subject matter of the action, absent a request from one of the parties to arbitrate."[11]

Moreover, the mere fact that a party otherwise entitled to arbitration participates in a judicial action or seeks a remedy accorded to it by a court has been held, in and of itself, a waiver.[12] Rather, the inquiry is to what extent a party used the court's such that, that party's actions are inconsistent with a later claim that the parties were obligated to arbitrate the dispute.[13] Facts will differ, but determining through a review of relevant caselaw how much court intervention will be too much should be factored in from the outset.

Push Back on Arbitrability of Claims

While it is abundantly clear that arbitration agreements will be enforced to the letter, there are some actual existing exceptions to mandatory arbitration together with a potential expansion of those exceptions.

While it has long been the case that the FAA's mandates in support of its "liberal federal policy favoring arbitration agreements," that policy may be "overridden by a contrary congressional command."[14] For example, in 2018, New York enacted the amended Human Right's Law that prohibited the mandatory arbitration of sexual harassment claims. Then in 2019, the New York legislature amended CPLR 7515 to encompass claims of discrimination generally instead of being limited to sexual harassment claims. However, it has long been the law that "the FAA pre-empts state laws [that] 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'"[15] Accordingly, in 2019 District Judge Denise Cote, recognizing that :[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA" ruled that Section 7515 presents no generally applicable contract defense, whether grounded in equity or otherwise, and as such cannot overcome the FAA's command that the parties' Arbitration Agreement be enforced."[16]

As for New York's 2019 legislation, it too has been held to be in conflict with the FAA. However, the passage of The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") somewhat resolved that issue and is one of those instances where the FAA has been lawfully pre-empted by federal legislation. It was signed into law on March 3, 2022 but it applies only to claims that accrued on or after that day and does not have retroactive effect.[17] But what if the plaintiff asserts multiple claims-some arbitrable and some not? The general rule is that when a complaint contains both

arbitrable and non-arbitrable claims, the FAA requires courts to "compel arbitration of pendent arbitrable claims, even where the result would be the maintenance of separate proceedings in different forums."[18] But that rule is in question in light of a recent decision rendered by Federal District Court Judge Englemayer that, where the employer only moved to compel arbitration on the employee's FLSA, and pay, race, gender and ethnicity discrimination, the court held that the EFAA rendered the arbitration clause unenforceable to the entire case.[19] But this June, in another decision from the S.D.N.Y, the court distinguished Judge Engelmayer's ruling holding that "[s]ince Plaintiff's wage and hour claims under the FLSA and the NYLL do not relate in any way to the sexual harassment dispute, they must be arbitrated, as the Arbitration Agreement requires."[20]

Even the U.S. DOL has weighed in with a recent posting on its website entitled "Mandatory Arbitration Won't Stop Us from Enforcing the Law."[21] In its posting, the DOL focuses on misclassification, pay discrimination and wage and hour issues as it pushes back against mandatory arbitration of those claims. And finally, keep in mind that the EEOC is not prohibited from pursuing claims that would otherwise be covered by an arbitration agreement.[22]

In conclusion the forces on each side of this issue are entrenched. The law favoring arbitration may be clear and "well settled", but that does not mean that it will not be weakened at the periphery over time with the exceptions eventually swallowing the hole.

1. The FAA requires all arbitration agreements to be in writing, however, it does not require to be contained in in a separate integrated written contract.
2. See 9 U.S.C. §3; see also Thomson–CSF S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776–77 (2d Cir.1995).
3. "New York law governs the contract and requires courts to "give effect to the parties' intent as expressed by the plain language of the provision." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 176 (2d Cir. 2003) quoting *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 58 (2d Cir. 2001).
4. *See, e.g., Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (11th Cir.1997); *Bishop v. Smith Barney, Inc.,* No. 97 Civ. 4807, 1998 WL 50210, at *5 (S.D.N.Y.1998).
5. The FAA does not cover "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9.U.S.C. §1. The FAA also does not apply to arbitrations arising out of collective bargaining agreement as CBA's are covered by the Labor management Relations Act of 1947. *Coco Cola Bottling co. of N.Y. v. Soft drink & Brewery Union Local 812 Int'l Bhd. of Teamsters*, 243 F.3d 52 (2d Cir. 2001).
6. The FAA does not create independent federal question jurisdiction, establishing diversity jurisdiction or another basis for federal question jurisdiction is required for removal. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 26 n.32 (1983)).
7. *Zachman v. Hudson Valley Credit Union*, 49 F.4th 95 (2d Cir. 2022).
8. AAA Employment Rule 27 state: "[t]he arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case." This may be overridden by an explicit agreement between the parties in the arbitration agreement.
9. *Ghassabian v. Hematian*, 28 Misc.3d 957, 903 N.Y.S.2d 872 N.Y. Co. 2010).
10. *In re IBM Arbitration Agreement Litigation*, 74 F. 4th 74, 85 (2d Cir. 2023).
11. *P.S. Finance, LLC v. Eureka Woodworks*, 214 A.D.3d 1, 184 N.Y.S.3d 114 (2d Dep't 2023.
12. *Spirs Trading Co. v. Occidental Yarns, Inc.*, 73 A.D.2d 542, 542, 423 N.Y.S.2d 13, 15 (1st Dep't 1979).
13. *Id.*
14. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012) (citation omitted).
15. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478–479, 109 S.Ct. 1248, 103 L.Ed.2d 488 [1989], *quoting Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 [1984]; see *Preston v. Ferrer*, 552 U.S. 346, 349–350, 128 S.Ct. 978, 169 L.Ed.2d 917 [2008.
16. *Latif v. Morgan Stanley et al.* 2019 WL 2610985 * 4 (S.D.N.Y. 2019).
17. *See* 9 U.S.C. §§401, 402, *Johnson v. Everyrealm, Inc.* ---F.Supp ---, 2023 WL 2216173 (S.D.N.Y. 2023). Note: a litigant might want to explore whether an arbitration clause agreed to prior to the date has somehow been "reborn" in some way so that one may argue the date of the clause should be deemed to be effective after March 3, 2022.
18. *Mera v. SA Hospitality Group, LLC*, ---F.Supp. ---, 2023 WL 3791712 (S.D.N.Y. 2023). *KPMG LLP v. Cocchi*, 565 U.S. 18, 22, 132 S.Ct. 23, 181 L.Ed.2d 323 (2011) (*quoting Dean Witter Reynolds, Inc. v.* Byrd, 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985)). In *Mera*, the court held that, since Plaintiff's wage and hour claims under the FLSA and the NYLL did not relate in any way to the sexual harassment dispute, those claims must be arbitrated. Thus, the Court finds that the plaintiff was compelled to arbitrate his FLSA and NYLL claims, but not his NYSHRL and NYCHRL claims, which did not relate to the sexual harassment dispute.
19. *Johnson*, 2023 WL 2216173 * 4 (S.D.N.Y. 2023). *Mera v. SA Hospitality Group, LLC.* ---F.Supp.---, 2013 WL 3791712 (S.D.N.Y. 2023).
20. *Mera v. SA Hospitality Group, LLC.* ---F.Supp.---, 2013 WL 3791712 *4 (S.D.N.Y. 2023).
21. https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law.
22. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28–29, 11 S.Ct. 1647) (1991) (finding that a victim of discrimination may still file a charge with the EEOC despite being subject to an arbitration agreement, but also noting that "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration.").

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FOCUS: CONSTRUCTION LAW

The Construction Industry Wage Theft Act Beware!

Michael Ganz

Wage theft, particularly in the construction industry, has become a hot button issue that has put greater onus on general contractors to ensure that construction workers are paid fairly.

In Fiscal Year 2022 alone, the United States Department of Labor's Wage and Hour Division recouped more than $32.9 million in back wages in the construction industry for more than 17,000 employees.[1]

Locally, in January 2022, New York State passed the Construction Industry Wage Theft Act (New York Labor Law 198-E) (the "Act"), joining a host of others states that have passed similar laws, including Illinois and Minnesota.[2]

The purpose of this bill was to amend the existing wage theft law to increase the likelihood that exploited workers in the construction industry will be able to secure payment and collect unpaid wages and benefits for work that has already been performed.

Compliance is critical, considering wage theft continues to fall under the scrutiny of enforcement officials. Among enforcement efforts, last July, NYS launched a hotline to report wage theft and recover stolen wages[3]; this past February, Manhattan District Attorney Alvin L. Bragg, Jr. announced the creation of the Office's first-ever Worker Protection Unit, of which the Office's Construction Fraud Task Force will be part of, to investigate and prosecute wage theft.[4]

Driving Factors Fueling Wage Theft

During the past few years, and especially heightened by the Covid-19 Pandemic, construction contractors have come under increased financial pressure due to enormous increases in material prices, as well as timely availability of those materials. Moreover, recent labor issues, which affect all aspects of the economy are particularly problematic in the construction industry. Unfortunately, contractors often seek to skirt New York's labor laws by underpaying their workers in order to increase their profits, gain an unfair advantage over other contractors bidding on the same work, and even to simply survive. Since contractors generally purchase equipment and materials from similar sources and at similar rates, a contractor's most effective price reduction option is to focus on its labor costs, which are also its largest cost component on most projects.

The Construction Industry Wage Theft Act

New York State's Construction Industry Wage Theft Act, which went into effect January 4, 2022, is intended to curb this wage abuse. It applies to the majority of construction projects within New York State for which contracts were entered into, renewed, revised or amended on or after that date. Specifically excluded from the reach of this law are home improvement contracts for 'occupied homes' or projects for the construction of less than ten (10) 1 or 2 family homes at one location. Obviously, there are nuances to the above, but as the law is still relatively new, the exact implications, restrictions and liabilities have not been tested in the courts.[5]

Specifically, the Act imposes strict liability on a contractor for wage violations, not only for the actions of its direct subcontractors, but also for any-tier of subcontractor performing work under the contractor. This can be particularly challenging, considering many contractors may not even know the identities of all tiers of sub-subcontractors on its projects. Regardless, the law makes this practice even more egregious than before because the contractor is considered jointly and severally liable for its subcontractor's and the subcontractor's subcontractors' unpaid wages, benefits, wage supplements, and any other remedies available pursuant to the requirements of the Act.[6] .Prior to the law change, workers could only lodge a private lawsuit for unpaid wages against their direct employer.

It is also noteworthy that employees or subcontractors cannot waive the liability assigned to the contractor except under a very narrow exception, specifically if it is done through "a collective