ABA Section of Labor and Employment Law Federal Labor Standards Legislation Committee

Puerto Vallarta, Mexico
February 15, 2023

Strategies for Arbitrating FLSA Claims *En Masse*

Clara Coleman, Nichols Kaster PLLP, Minneapolis, MN
Susan N. Eisenberg, Cozen O'Connor, Miami, FL
Lisa (Lee) A. Schreter and Pierre Noebes, Littler Mendelson, P.C. Atlanta, Ga.
Allen Waxman, International Institute for Conflict Prevention & Resolution, (CPR)

I. Challenges to and Defenses of The Arbitration Agreement:

A. Creating and Maintaining an Arbitration Agreement

There is no one size fits all arbitration agreement and employers must carefully consider what features they want to include when developing their arbitration program. The various options available to employers are not without their own benefits and drawbacks. For example, including a provision that requires the parties to engage in mediation before arbitration may help avoid the additional costs associated with arbitration. Conversely, such a provision may inadvertently give credence to or unnecessarily prolong a frivolous matter. Employers may also want to consider additional provisions, for example, whether individuals will waive notice of class and collective actions. Including such a provision can be helpful, even if your arbitration agreement contains a class and collective action waiver, because some courts will send notice of class and collective actions to individuals that are subject to an arbitration agreement.

Beyond the terms of the arbitration agreement, employers must also give careful thought to the arbitration provider they want to use. The provider selected by an employer can have a significant impact on how arbitrations are initiated and conducted particularly in the event of mass arbitration. For example, arbitration providers charge filing fees and other fees that vary widely. These fees and the payment schedule established by an arbitration provider can have a ruinous financial impact on the employer in the event of the mass filing of individual arbitration claims.

Arbitrations have filing fees and the employer should insure that the arbitration agreement does not require the employee to pay more than that fee. That means that the employer pays all remaining costs. Most of those costs are obvious such as the remaining arbitration administrative fees, and payment to the arbitrator. Arbitration administrators such as CPR's Dispute Resolution Services, AAA and JAMS have those fees listed on their websites. Selection of a specific arbitration administrator will likely result in the mandatory use of the administrator's rules. Thus, it is a good practice to review the applicable rules in advance of selecting an administrator.

Often overlooked are costs related to court reporter appearance fees, cost of transcripts, interpreter, copies, and location for final hearing, all of which default to the employer. An arbitration agreement should consider listing the costs associated with arbitration and which party will be responsible for payment. Keeping in mind, the employee should not be required to pay more than they would if the case was brought in court, an arbitration agreement can state just that: employee will be required to cover any costs that would normally be paid by a plaintiff in court. Clarity in the arbitration agreement may allow some of the costs to be shifted to the employee without preventing access to justice.

Additionally, because each provider has its own set of rules and procedures, employers must carefully consider which provider they are most comfortable using. An employer that is not comfortable with the way its chosen provider conducts arbitrations, or has not familiarized itself with the provider's rules, will likely find more frustration than success and may risk incurring substantial liability even where there was none.

After creating an arbitration agreement, employers should periodically review their agreements on an annual basis. By regularly reviewing their arbitration agreements, employers put themselves in the best position to identify changes they want or need to make based on changes to their business or the controlling law. For example, because the law in this area is constantly evolving, employers will want to review their agreements to consider new tactics as the law advances to ensure their arbitration programs are running efficiently and the agreements evolve to address problems that may arise in the administration of arbitration claims. One such considerable change in this area was the federal government's enactment of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which banned pre-dispute arbitration agreements and joint-action waivers covering sexual assault or sexual harassment disputes. Employers that have not reviewed and revised their arbitration programs and agreements may run afoul of federal law, at least in part, and may find themselves forced to expend considerable resources defending the enforceability of their arbitration agreements.

In addition, arbitration agreements should be reviewed in light of virtual hearings. In the last 2.5 years a lot of arbitrations have taken place very effectively virtually via Teams or Zoom. Holding virtual hearings has advantages. The cost of the final hearing is greatly reduced as no one has to travel. Witnesses can testify from their own location increasing the likelihood that they will make themselves available. Keep in mind that virtual arbitration hearings, take some planning. For instance, you need to make sure that all witnesses have proper equipment to be able to join the virtual hearing. Cell phones typically do not work since witnesses will not be able to see documents on the screen. Also handling exhibits can be a challenge. Some use the screen share mode on the virtual platform while others still like to have the witnesses review hard copies (and some arbitrators insist on having hard copies). This can be challenging where counsel does not want the witness or counsel to have access to the documents in advance. One way to handle this is to provide the witness with the exhibits in a sealed envelope and have the seal broken and the envelope opened in front of everyone during the virtual hearing. If virtual hearings are an option, consider adding that option to the arbitration agreement. Also, consider whether the option will be permissible or mandatory.

B. Discovery and Procedural Limitations

When drafting a discovery provision in an arbitration agreement, or challenging such discovery limitations, it is important to examine what types of discovery limitations have been found unconscionable in your jurisdiction. The U.S. Supreme Court has held that limitations on discovery do not necessarily render an arbitration provision invalid, but a party can still challenge extreme limitations on discovery as unconscionable. *See, e.g.*, *Gonzalez v. Interstate Cleaning Corp*., No. 19-CV-07307-KAW, 2020 WL 1891789, at *4 (N.D. Cal. Apr. 16, 2020) (finding arbitration agreement which limited discovery to one interrogatory identifying potential witnesses, 25 requests for production, and two eight-hour days of witness depositions unconscionable); *but see Tapley v. Cracker Barrel Old Country Store, Inc*., 448 F. Supp. 3d 1143, 1150 (D. Or. 2020) (finding agreement which limited the parties to three depositions but granted the arbitrator authority to permit additional discovery was not unconscionable); *Hubbard v. Comcast Corp*., 2020 WL 4188127, at *8 (D.N.J. July 21, 2020) (finding agreement's limitations on discovery were not substantively unconscionable because "the arbitrator ha[d] discretion to grant additional discovery and hearing time"); *Cyphers v. Camino Real Cmty. Servs*., No. SA-22-CV-00357-JKP, 2022 WL 4280906, at *3 (W.D. Tex. Aug. 24, 2022) (finding an agreement limiting discovery to 15 document requests and two depositions per side was not unconscionable). In evaluating discovery limitations courts balance the desired efficiency of arbitration against the ability to adequately arbitrate a claim. *See Poublon v. C.H. Robinson Company*, 846 F.3d 1251, 1270 (9th Cir. 2017) (in arbitration the "desirable simplicity" of limiting discovery must be balanced against employees' need for discovery "sufficient to adequately arbitrate their statutory claim"); *Armendariz v. Foundation Health Psychcare Svcs*., Inc., 24 Cal. 4th 83, 106 (2000) (acknowledging that while employees may not be entitled to the full range of discovery in arbitration, "they are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses"); *see also Cyphers*, 2022 WL 4280906, at *3 (finding the relevant analysis is "whether particular discovery limitations impede the effective prosecution of a specific case.") In drafting such provisions it's also important to consider that while limits on discovery can be cost-effective and further arbitration's goal of efficient resolution, they can hamper the ability to successfully defend a case.

Arbitration agreements often also dictate the procedural mechanisms available to the parties. Most arbitration agreements invoke an arbitration providers' rules, and most rules indirectly give arbitrators wide latitude in the procedures the parties can use to litigate the case. However, an arbitration agreement could explicitly limit the procedural mechanisms available. For example, an agreement could explicitly state that motions for summary judgment cannot be brought by either party. Again, while these limits can further the goal of efficient litigation, one should consider whether they will hamper the ability to successfully litigate a case.

C. Who Can Be Bound

In deciding whether to compel arbitration, or to argue an arbitration agreement cannot be enforced, it is critical to know which parties are bound by the arbitration agreement. While you might think a cursory review of the signature page would be sufficient, that is often not the case. Rather, courts have held that a non-signatory (someone who did not sign the agreement) can compel a signatory to arbitration and vice versa. Common law state contract theories, such as alter ego, third-party beneficiary, and waiver and estoppel, can support compelling arbitration in the

context of a non-signatory. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643 (2020) (recognizing that state contract law governs who is bound by an arbitration agreement.)

An arbitration agreement with one party presumptively provides no benefits to another absent application of doctrines like agency, estoppel, or third-party beneficiary. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009). "[A]rbitration agreements apply to non-signatories only in rare circumstances." *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517 (5th Cir. 2006). Non-signatories may compel signatories to arbitrate under the FAA only if state contract law provides a basis to enforce the arbitration clause. *Arthur Andersen*, 556 U.S. at 631.

Circuits are divided on the issue of whether a non-signatory can utilize an arbitration agreement to force a party, who it does not have an arbitration agreement with to arbitrate their claims against it. For example, the Fifth Circuit agreed that a non-signatory to a contract cannot argue that equitable estoppel can rewrite a contract. *Newman v. Plains All Am. Pipeline, L.P*., 23 F.4th 393, 398-408 (5th Cir. 2022) (*Newman I*); *Hinkle v. Phillips 66 Co*., 35 F.4th 417, 419-20 (5th Cir. 2022); *Kennedy v. Pioneer Nat. Res. Co*., No. 21-50256, 2022 WL 2357077, at *1 (5th Cir. June 30, 2022); *Newman v. Plains All Am. Pipeline, L.P*., No. 21-51089, 2022 WL 1114407, at *1 (5th Cir. Apr. 14, 2022) (*Newman II*).

In fact, in *Kennedy*, the Fifth Circuit found a non-signatory, Plains, could not use a staffing company's, Applied's, arbitration agreement to compel the plaintiff to arbitration against it, ultimately holding that "Kennedy did not agree to arbitrate his claims against Plains, and Plains does not have a close enough relationship with Onshore and Applied Consultants to enforce their agreements through equity." *Kennedy*, 2022 WL 2357077, at *1.In contrast, the Tenth Circuit held in *Ferrell* a non-party could use the arbitration agreement, and to not allow it would permit the Plaintiff to "artfully plead[] around the arbitration clause in his contract by only asserting claims against the customer he had been assigned to." *Ferrell v. Cypress Envtl. Mgmt.-TIR, LLC*, No. 20-5092, No. 20-5093, 2021 WL 5576677, at *3 (10th Cir. Nov. 30, 2021) (refusing to allow the plaintiff to "artfully plead[] around the arbitration clause in his contract by only asserting claims against the customer he had been assigned to," as the plaintiff "would not have performed work for [customer], much less had any grounds for asserting FLSA claims against it, were it not for his employment agreement with [employer]"). Despite *Ferrell*, the Tenth Circuit employs "the well-accepted rule that ambiguities in contracts [including arbitration provisions] are construed against the drafter." *Dumais v. American Golf Corp*., 299 F.3d 1216, 1219 (10th Cir. 2002) (citation omitted).

D. Delegation Provisions

In *Becker v. Delek US Energy, Inc.*, the Sixth Circuit held the question of whether a putative employer could enforce the delegation provision in an arbitration agreement was for an arbitrator to decide, not the court. *Becker v. Delek US Energy, Inc*., 39 F.4th 351, 356 (6th Cir. 2022)

Relying on *Rent-A-Center, W., Inc. v. Jackson*, the Sixth Circuit held "practical effect of a delegation provision is that if arbitrability is challenged, then the arbitrator, not the court, must address the challenge. Such a challenge may come in the form of a coverage challenge or as an

enforceability challenge. Regardless, the outcome is the same: a valid delegation provision removes judicial purview and transfers the question of arbitrability to an arbitrator." *Becker v. Delek US Energy, Inc*., 39 F.4th 351, 355 (6th Cir. 2022) (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010)).

To challenge the delegation clause is a hard test to meet. *Becker v. Delek US Energy, Inc*., 39 F.4th 351, 356 (6th Cir. 2022). Under Sixth Circuit precedent, a party must "show that the basis of their challenge is directed specifically to the delegation provision." *In re StockX Customer Data Sec. Breach Litiga*., 19 F.4th 873, 886 (6th Cir. 2021) A party fails to make this showing if its challenge to a delegation clause "simply recycle[s] the same arguments that pertain to the enforceability of the agreement as a whole." *Id*.

Thus, a party's challenge to a delegation clause must rest, in part, on different factual or legal grounds than the ones supporting its challenge to the arbitration agreement as a whole. *See id.* at 887 (an agreement must "operate[ ] on the delegation clause ... differently" that it does on the arbitration agreement as a whole).The Sixth Circuit advises the challengers analysis of enforceability of the delegation provision and the analysis of the enforceability of the agreement as a whole should be separate arguments. *Becker v. Delek US Energy, Inc*., 39 F.4th 351, 356 (6th Cir. 2022)

The answer to the question of who is covered by this arbitration agreement is clearly not an easy one.

II. The Importance of Arbitrator Selection and Selection Strategies

A. Vetting The Arbitrator

One of the most significant decisions you will make in arbitration is selecting an arbitrator. The arbitrator selected will undoubtedly impact the outcome of your case – the goal is to predict which arbitrator will do so in a favorable way. There are numerous processes by which an arbitrator may be selected, including by mutual agreement, a strike process, or a ranking process. Regardless of the selection process you should thoroughly research all potential arbitrators. There are various tools for doing so. First, you should check online arbitrator review websites, such as the plaintiff-side ArbitratorRater or publicly available resources like WestLaw's arbitrator materials, which contain the outcome of arbitrators' prior decisions and reviews by attorneys who previously handled cases in front of them. In addition to tools specifically developed to assist in arbitrator research, there are other practical research methods such as reviewing the arbitrator's resume or online biography, using Westlaw to research the types of cases they have argued as litigators, or, if they are a retired judge, researching opinions from their time on the bench.

In reviewing these resources to vet arbitrators there are several key considerations. The first is the arbitrator's experience. You want to select an arbitrator who has experience with the type of claim you are litigating. Arguably, whether an arbitrator has experience with the types of claims at issue is the *most important* consideration. An arbitrator who has an in-depth understanding of the legal issues and governing case law will be more likely to "get it" and to reach the right conclusion. Moreover, since the litigation schedule in arbitration will be truncated and briefing (if there is any) will likely be limited it's crucial to have an arbitrator who can quickly

grasp onto the relevance of certain evidence or arguments. The second consideration is whether an arbitrator has a bias in favor of one side or the other. To attempt to predict these predispositions you can look to whether the arbitrator has exclusively represented corporations or plaintiffs. You can also check public records, such as the Federal Election Commission website, for political contributions. However, keep in mind that biases are often difficult to predict. The most reliable indicator of bias will likely be the arbitrator's prior rulings or feedback from attorneys who have previously litigated a case in front of that arbitrator. Third, it's important to evaluate the arbitrator's temperament and case management style. You will want to know whether an arbitrator pushes cases along, quickly decides disputes, and stays engaged during the hearing. This information will be difficult to find on resumes or bios – rather, again, the best information will likely come from attorneys who have previously litigated a case in front of that arbitrator.

B. Arbitrator Selection Strategies for Mass Arbitrations

When filing or defending arbitrations *en masse* it's important to evaluate the different strategies for choosing arbitrators. You need to decide whether to select different arbitrators for each arbitration, group a handful of claimants with numerous arbitrators, or select only a few arbitrators to handle all of the arbitrations. The benefit to having separate arbitrators for each arbitration is that it ensures the poor reasoning or bias of one arbitrator does not impact all of your claims. The other benefit is that it keeps things moving – if an arbitrator is only assigned to one or two cases their schedules will not be bogged down. The benefit to the second approach, assigning a handful of claimants to numerous arbitrators, is that you obtain the efficiencies of having arbitrators who are familiar with the claims handle more than one case, while still not putting all of your eggs in one basket. Finally, the approach of assigning all of your cases to only a select few arbitrators can significantly streamline the process. However, if one arbitrator gives you a bad result, you are stuck with that arbitrator (and likely that result) for all the other arbitrations.

In evaluating these strategies attorneys should do a cost analysis. For plaintiff-side attorneys, one of the goals in litigating mass arbitrations is to put financial pressure on the respondent. One way to do this is to avoid giving the respondent the benefit of streamlining by insisting on separate arbitrators for each case. However, plaintiff-side attorneys need to know their breaking point – litigating arbitrations *en masse* without any efficiencies can take a significant toll on a firm's resources. Likewise, while defense-side attorneys may appreciate the ability to streamline by assigning dozens of cases to only a few arbitrators, the potential cost-savings benefit of such an approach must be weighed against the above-detailed risk of being stuck with an arbitrator who gives you a bad result.

C. Some Considerations When Bringing or Defending Mass Arbitrations

Managing these mass arbitrations as a litigant raises a number of issues and strategies for handling must be thoroughly analyzed. Some of these issues include:

Costs of mass arbitration can be staggering. Since the arbitrator in each arbitration must be paid, mass arbitrations can be very expensive. On average, depending on jurisdiction and rates charged by the arbitrator, this cost alone can be $40,000. In addition, there is the cost of the venue where each final hearing will be held. For respondent, there is the cost of travel for the corporate

representative who will sit through the arbitration and if there is a separate 30(b)(6) witness, that will be an additional cost. If the same defense counsel handles all claims, then there is the cost of travel for counsel. If different counsel (even from the same firm) will handle the arbitrations, then there is the cost of the learning curve for each lawyer.

Consolidation of discovery is one way to save costs and avoid having witnesses (usually defense witnesses) testify repeatedly. You can see how easily a key witness could get stuck in a cycle of doing nothing for a year but testifying in arbitration proceedings. Having witnesses testify multiple times can potentially lead to inconsistent testimony that will allow the witness to be effectively impeached. Also, determine whether one set of document requests and interrogatories to respondent will suffice.

Confidentiality can be a blessing and a curse. Many arbitration agreements state that no part of an arbitration proceeding may be disclosed outside of that arbitration. This prevents counsel from disclosing a ruling in one arbitration in another subsequent arbitration. But sometimes a party gets a favorable ruling in one arbitration and wants to let another arbitrator know. Often, there are repeat witnesses in successive arbitrations. In such cases, it is difficult to maintain consistent testimony, exposing the witness to impeachment. Arbitrators are reluctant to uphold confidentiality provisions in these situations.

Inconsistent rulings. Arbitration rulings, even once confirmed, have no precedential value. In the wage and hour context, this truly means an employer will be subject to case after case, win and lose. Inconsistent rulings provide headaches for employer in arbitrations, because even a defense finding is only worth the proverbial paper it is written on. Alternately, a court order validating a pay practice or exemption defense can have the effect of res judicata, preventing further litigation.

Timing and Staffing should also be considered. Mass arbitrations do not fit the typical models employed by Plaintiff or Defense firms. For Plaintiff firms, arbitrations must be done on an hourly model to be financially viable. For Defense firms, reduced hourly rates or flat rates are often negotiated because it is typically too expensive to litigate mass arbitrations at usual top-tier firm rates. Plaintiffs or Defense firms must treat and staff mass arbitrations like a high-volume car wreck docket to minimize costs and risks; emulate the car wreck lawyer versus insurance company model.

Which claimant goes first should be something that is analyzed and not left to "availability" of the arbitrator, counsel and witnesses. Each side should consider their best case and push to have that one go first. This will take some maneuvering since the best case for one side will typically be the worst case for the other side.

III. Key Issues in California Arbitrations

A. Failure to Pay Arbitration Costs

Under California's Forced Arbitration Accountability Act, codified as § 1281.97 of the California Code of Civil Procedure, an employer must pay certain fees and costs within thirty days of the payment's due date before an arbitration can proceed. The statute goes on to provide that if an employer fails to pay the fees necessary to commence or continue arbitration within thirty days

after such fees are due, they will be held to have materially breached the agreement and be in default. Cal. C.C.P. § 1281.97(a)(1). Employers face a multitude of repercussions in the event of such a breach. For example, if the costs to initiate an arbitration proceeding are not paid within thirty days after they are due, the statute provides that the employer waives its right to compel arbitration. *Id.* If the employer fails to pay the fees necessary to continue arbitration, employees can withdraw the claim from arbitration and move the matter to court. *Id.* at § 1281.97(b)(1). Additionally, Section 1281.97 imposes mandatory monetary sanctions on any employer found to be in default of an arbitration agreement for its failure to pay arbitration costs. The court or arbitrator may impose additional sanctions as well. *Id.* at § 1281.97(d). These additional sanctions include an evidentiary sanction that prohibits the employer from conducting discovery in the civil action, terminating sanctions that strike out pleadings by the employer or issues a default judgement against the employer, and a contempt sanction that treats the employer as in contempt of court. *Id.* at § 1281.99.

B. PAGA and Viking River

On June 15, 2022, the Supreme Court issued its decision in *Viking River Cruises v. Moriana Court*, finding that the Federal Arbitration Act ("FAA") preempts California law, precluding "division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *See Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1924–25 (2022). In *Viking River* an employee alleged an individual PAGA claim based on her employer's alleged failure to pay final wages within the time required by the California Labor Code, plus representative PAGA claims based on Labor Code violations sustained by other Viking River employees. Viking River moved to compel arbitration of the plaintiff's individual PAGA claim and to dismiss the other PAGA claims. The trial court denied the motion based on the California Supreme Court's holding in *Iskanian v. CLS Trans. L.A., LLC*., that categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and nonarbitrable representative claims. *See Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 360 (2014). In *Viking River*, the U.S. Supreme Court held in an 8-1 decision that the *Iskanian* rule was preempted, not because the FAA prevents states from barring waivers of an employee's right to represent the state in representative claims, but rather because it conflicts with the FAA by refusing to allow the named plaintiff to waive her right to act as a representative on behalf of other employees. In accordance with *Viking River* defendants facing PAGA claims can now move to compel arbitration of the named plaintiffs' individual claims and request dismissal of the representative claims.

While *Viking River* dealt a significant blow to PAGA, the decision left open several avenues for plaintiffs to attempt to potentially continue to bring PAGA claims in court. First, in her concurring opinion, Justice Sotomayor invited the California Legislature to amend PAGA's standing requirement. Second, the decision gave the California Supreme Court a possible avenue to find that under California state law the representative component of a PAGA claim does not need to be dismissed for lack of standing because the individual's PAGA claim is compelled to arbitration. It appears the California Supreme Court may do just that.

IV. Unique Considerations for Settling Mass Arbitrations

A. Aggregate Settlement Rule

Recently, individual arbitration – once the bane of the plaintiff's bar – has been transformed into an entirely new category of cases being handled by plaintiffs' lawyers as "mass arbitrations." These mass arbitrations bring virtually identical arbitration demands against the same defendant on an individual basis in an effort to pressure the defendant into an aggregate settlement to resolve all of the individual claims. While this strategy has been used extensively in the mass tort context, it is still relatively new in the employment law space. As with any new strategy comes potential risk and of primary concern for most plaintiffs' lawyers is what is known as the "aggregate settlement rule." This rule stems from ABA Model Rule of Professional Conduct 1.8(g), which states:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.

Every state has adopted a version of this rule, either as written above or with minor alterations. For example, in California, the aggregate settlement rule states as follows:

> A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients . . . unless each client gives informed written consent. The lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.

Under these rules, it would appear that plaintiffs' lawyers must obtain "informed written consent" from their clients for any proposed settlement. Additionally, some believe that the aggregate settlement rule does not allow an attorney to obtain a client's "informed written consent" in advance of a proposed settlement. For these individuals, it is argued that informed consent is only possible after a proposed settlement is negotiated and each client is told how the actual settlement proceeds will be allocated between them. *See* Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 Hofstra L. Rev. 292, 310–11 (the required disclosures include "the number of claimants covered by the settlement agreement; the aspects of their individual claims relevant to determining their individual settlement offer values; each claimant's relevant claim characteristics for purposes of determining her settlement offer value; and each individual's settlement offer value."). However, authority on this issue is sparce and inconclusive at best.

This is particularly true in the context of collective actions that are dismissed when the plaintiffs and putative collective members are compelled to individual arbitration, but the parties negotiate a global settlement. At least three federal courts (including a federal circuit court of appeals) have, however, addressed this issue and held that it is not necessary to provide opt-in

plaintiffs in a collective action with notice or an opportunity to opt out of a settlement where the named plaintiffs and plaintiffs' counsel have been expressly authorized to settle claims on their behalf as you have been here. *See Hood v. Uber Techs.*, 2019 WL 93546, at **3–4 (M.D.N.C. Jan. 3, 2019) (Section 216(b) opt-in plaintiffs received sufficient notice that by opting into the case they were authorizing Plaintiff to, among other things, settle this case on their behalf without further consultation with or approval by collective members); *Haskett v. Uber Techs.*, 780 F. App'x 25, 27 (4th Cir. 2019) (Plaintiff-Appellant's argument that the district court erred by not notifying the members of the collective of the proposed settlement agreement is "without merit" and stating that "[u]nlike Rule 23, section 216(b) does not require a district court to notify potential claimants about a proposed settlement."); *Hager v. Omnicare, Inc.*, 2021 WL 5311307, at *4 (S.D. W. Va. Nov. 15, 2021) (no additional notice to the collective action members was required before the settlement may be approved because their claims in this case arose solely under the FLSA and they had all submitted opt-in forms that gave their consent to be represented by Plaintiffs' counsel, including for purposes of settlement).

B. Binding Release of FLSA Claims

The Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) reaffirmed what is now a well-established principle that parties can contract to pursue claims under the FLSA through arbitration. Since this decision, however, it has become increasingly unclear how parties in arbitration can obtain a binding release of FLSA claims once a settlement is reached.

For more than forty years, most jurisdictions have adhered to *Lynn's Food Stores, Inc. v. U.S. Dept. of Labor*, 679 F.2d 1350 (11th Cir. 1982) explanation that a FLSA settlement may become final and enforceable only if it is supervised by the Department of Labor or approved by a court. Of course, this creates significant challenges in situations where the parties reach a settlement to resolve FLSA claims in arbitration. Here, an employer has no clear mechanism to ensure it is able to obtain a binding release of the plaintiff's FLSA claims. As such, strategic considerations play a significant role in the resolution of FLSA claims in arbitration. For example, on an individual plaintiff basis, there may be less concern for an iron-clad release of FLSA claims. Here, an employer may decide that the arbitrator's review of the settlement is sufficient and may determine that the possible risks of relying on the arbitrator are outweighed by the settlement of the arbitration. However, whether the arbitrator has the authority to approve an FLSA settlement is still an open question. Alternatively, an employer may want to do whatever they can to ensure the release of FLSA claims will be binding. If the arbitration matter was originally filed in federal court, the most conservative approach is to have both the arbitrator and court review and approve the FLSA settlement.

There is also the option of having the arbitrator's approval of the settlement confirmed by the court. The standard for have arbitration awards confirmed is rather easy to meet. Confirmation is the process through which a party to arbitration completes the award process, and the award becomes a final and enforceable judgment. *See Teamsters Local 177 v. United Parcel Serv.*, 966 F.3d 245, 248 (3d Cir. 2020). The confirmation of an arbitration award is "a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Id.* Keep in mind that arbitration awards are, to a certain extent confidential. Once that award is taken to court for confirmation, it is in the public record.

These considerations change dramatically, however, in mass arbitrations that are filed in the first instance with the arbitration service provider and are not the product of a federal court proceeding. If a group of plaintiffs' lawyers file hundreds of arbitrations and the parties eventually decide they want to settle all of the cases, it is unclear what mechanism is available to ensure the settlement and release will be enforceable. Many employers may be unwilling to rely solely on an arbitrator's review and approval of a proposed settlement and run the risk that the release is challenged in a subsequent proceeding and, if there are multiple arbitrators involved, the parties will need to get settlement approval from all of the arbitrators which may prove to be an impossible challenge. To further complicate this scenario, if all of the arbitrations were filed as individual actions, the inconclusive authority on the aggregate settlement rule fails to provide any guidance as to what plaintiffs' counsel's obligations are related to informing individuals about the total value of the settlement and how their share was determined.

While courts, arbitrators, and attorneys are regularly grappling with these issues, we are still without a definitive answer to the issues discussed above. At best, there are now several cases – *Martinez v. Bohls Bearing Equipment Co.*, 361 F. Supp. 2d 608 (W.D. Tex. 2005), *Martin v. Spring Break '83 Productions, L.L.C.*, 688 F.3d 247 (5th Cir. 2012), and *Alcantara v. Duran Landscaping, Inc.*, Case No. 2:21-cv-03947, 2022 WL 2703610 (E.D. Pa. July 12, 2022) to name a few – holding that, in certain circumstances, court approval of an FLSA settlement is not necessarily required. Unfortunately, these cases did not involve arbitration related issues so it may be some time before parties to arbitrations have a specific mechanism to obtain a binding release of FLSA claims other than by seeking court approval of the arbitrator's award.

V. Managing Mass Arbitrations from the Provider's Perspective

Through a series of decisions -- AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), American Express, Inc. v. Italian Colors Restaurant, 570 U.S. 228 (2013), Epic Systems Corp v. Lewis, 585 U.S. __ (2018) – the United States Supreme Court has allowed employers to require as a condition of employment or engagement (for independent contractors) that disputes are to be resolved through arbitration and on an individual rather than collective basis. The appeal of avoiding courts and class actions has proven irresistible for many companies. According to a recent study, 53.9% of nonunion private-sector employers deploy mandatory arbitration procedures, and amongst the largest companies with over 1000 employees, the number goes up to 65.1%. Alexander J.S. Colvin, Econ. Pol'y Inst., *The Growing Use of Mandatory Arbitration* 2 (2018), https://epi.org/publication.

However, while the lure of mandatory arbitration may be enticing, the actual administration of a mass of individual arbitration claims has proven vexing for both the parties and the providers. Many of the principal arbitration providers, as a part of their efforts to level the playing field in employment (and consumer) cases, require that the Respondent company pay almost all the costs of arbitration, including those for a claimant who was required to sign an arbitration agreement. See, e.g., CPR Dispute Resolution's Due Process Protections (https:// https://static.cpradr.org/docs/Due-Process-Protections.pdf). And, to the extent a provider chooses to charge the fees for arbitration upfront at the time of filing, there can be very large fees imposed on the Respondent as a consequence of the filing of a mass of arbitration claims. See, e.g., Uber Technologies, Inc. v. American Arbitration Association (2021), in which the AAA assessed $10 million in initial fees against Uber before the merits of any claims were to be addressed.

Companies themselves have developed various strategies for taming these challenges. These include:

- Requiring parties to engage in mediation or informal dispute resolution exercises prior to making an arbitration demand.

- Requiring the submission of demands claim by claim rather than a single demand attaching a list of claimants.

- Requiring claimants to pay some fees, even if limited to the cost of a court filing.

- Including in the dispute resolution clauses express permission for the tribunal to award costs for frivolous claims.

- Including in the dispute resolution clauses a protocol for addressing mass claims, which might include the batching of claims.

However, there are limits to what a company can do. For example, in MacClelland v. Cellco P'ship, __ F.3d___, No. 21-CV-08592-EMC, 2022 WL 2390997 (N.D. Cal. July 1, 2022), the Court found that various provisions inserted by Verizon in its arbitration agreements went too far. These included attempts to shorten the statute of limitations, prohibit punitive damages, waive a customer's ability to seek public injunctive relief, and proscribe the use of extrinsic evidence in arbitration to prove fraud. MacClelland, 2022 WL 2390997, at *5-11. In addition, the procedure Verizon outlined for administering a mass arbitration – batching 10 cases at a time for arbitration and not allowing others to be filed until the prior 10 are resolved -- was deemed by the Court to be "unreasonably favorable" to Verizon. Id. at *12. The Court focused on the implications of such a provision; that it, it could lead to lead to lengthy delays and could result in claimants forfeiting their legal rights. The Court concluded that the agreement was procedurally and substantively unconscionable and refused to enforce it. Id. at *11-14.

In reaching its decision, the Court contrasted Verizon's approach to mass arbitration with those offered by two established arbitration providers: the American Arbitration Association (AAA) and CPR Dispute Resolution. The mass arbitration procedures of these two organizations along with that of a third, FedArb, were recently reviewed by the Hon. Shira A. Scheindlin. See Reuters Legal News, *A New ADR development: Mass Arbitrations* (December 22, 2021).

In short, the AAA has developed a set of supplementary rules for multiple case filings. The rules apply whenever there are 25 or more similar cases filed and are intended to encourage the parties to agree on a number of topics – including scheduling, the use of a special master, and others – in an effort to streamline the process.

The framework set forth by FedArb deploys an MDL approach. This approach is triggered when 20 or more claims are made that involve a common set of factual and legal issues. All individual arbitrations filed are stayed while an ADR-MDL panel is convened to resolve common issues.

Finally, there is the protocol developed by CPR, which was prepared with the assistance of a task force of both plaintiffs' and defense counsel as well as experienced neutrals. The Protocol is the most detailed of the frameworks by the organizations. It offers a unique approach for resolving mass claims, and requires more explanation.

The Protocol is triggered when 30 or more cases of a similar nature are filed. A special Administrative Arbitrator is available to resolve any issue if there is disagreement regarding the similar nature of the cases.

Then, ten cases are randomly to be selected for expedited arbitration, with each side being given an opportunity to identify an additional five cases for inclusion based on the judgment of the Administrative Arbitrator. The remaining cases are stayed, and the statute of limitations is tolled by agreement of the parties.

Once arbitrators are assigned to the initial 10-20 cases, the cases are to proceed to award (a Reasoned Award) within 120 days. The awards are then anonymized and provided to a mediator selected by the parties. The mediator convenes the parties over a 90-day period to determine whether the framework for a global agreement can be reached.

If the mediation is successful in reaching an agreed-upon framework, offers aligned with the framework will be made by Respondent to outstanding claimants. The claimant is free to accept the offer or proceed in arbitration. If the mediation is unsuccessful, then either the Respondent employer or individual claimants can elect to opt out of arbitration and proceed in court or proceed forward with their individual arbitrations.

Throughout the arbitration process, CPR is free (as are the parties) to deploy the Administrative Arbitrator to help streamline the process, including in the management of discovery.

In McGrath v. DoorDash, Inc., No. 19-cv-O5279-EMC, 2020 WL 6526129 (N.D. Cal. Nov. 5, 2020), the same Court that subsequently rejected Verizon's provisions in the MacClelland case, found the terms of the CPR Protocol "appear fair." Id. at *10.

Whichever approach is adopted by the parties, managing a mass arbitration is an evolving area that warrants a sharing of best practices amongst providers, parties and counsel if they are to deliver a more efficient mechanism for resolving many claims.