4-21-2019

PAGA Saves the Day Against Forced Arbitration

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Golden Gate University Law Review

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PUBLISHED ON *April 21, 2019 by lettychavez*

On May 21, 2018, the Supreme Court of the United States issued a decision in *Epic Systems Corp. v. Lewis* (https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf), declaring it legal for employers to force employees, as a condition of employment, to give up their right to sue their employer in open court. The Court also held that employers may require employees to forego their right to bring claims in a group or class action.

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What about the constitutional right to a jury trial, as required by due process? The Federal Arbitration Act (FAA) (https://www.law.cornell.edu/uscode/text/9/chapter-1) provides for private dispute resolution by an arbitrator where the parties have contracted to settle controversies through arbitration. The FAA (https://www.law.cornell.edu/uscode/text/9/2) deems arbitration agreements generally "valid, irrevocable, and enforceable." However, the "savings clause" in Section 2 (https://www.law.cornell.edu/uscode/text/9/2) of the FAA, provides that traditional contract defenses

may serve to render arbitration agreements unenforceable upon "such grounds that exist at law or in equity." Nevertheless, in reality, litigants have not enjoyed success when employing defenses against arbitration agreements.

In *AT&T Mobility v. Concepcion* (https://www.supremecourt.gov/opinions/10pdf/09-893.pdf),) consumers sued AT&T alleging that an arbitration agreement in a consumer contract of adhesion, requiring customers to waive their rights to bring a class action suit, was unconscionable. The U.S. Court of Appeals for the Ninth Circuit agreed with the consumers, but the Supreme Court did not. The Supreme Court held that state "rules aimed at destroying arbitration" are preempted by the FAA because such rules are incompatible with the FAA's purpose of "ensur[ing] that private arbitration agreements are enforced (https://www.supremecourt.gov/opinions/10pdf/09-893.pdf) according to their terms." As such, the Court foreclosed the use of the unconscionability doctrine to invalidate arbitration clauses, thereby thwarting consumer defenses against forced arbitration agreements.

Image by ijmaki (https://pixabay.com/users/ijmaki-1797813/?utm_source=link-attribution&utm_medium=referral&utm_campaign=image&utm_content=1266989) from Pixabay (https://pixabay.com/?utm_source=link-attribution&utm_medium=referral&utm_campaign=image&utm_content=1266989)

The Court's reverence to arbitration agreements as applied to consumers and employees is misaligned with the historical purpose of the FAA. The FAA, enacted by Congress in 1925 (https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1743&context=jdr), is a product of the roaring twenties, prohibition, World War I, and a changing national and international economy. Congress designed it to provide private dispute resolution for commercial disputes between merchants (https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1743&context=jdr). It is unlikely that its authors envisioned its broader modern application to consumer and employment disputes, where a vast bargaining power disparity exists between powerful corporations and unsophisticated parties.

While it serves practical business needs that merchants may opt for private dispute resolution by entering into a binding arbitration agreement, it strikes many as unfair that unsophisticated consumers and employees are forced to choose between waiving their right to a jury trial or not entering into a contract for a basic necessity, such cell phone service or a job.

Arbitration agreements are becoming increasingly common in the employment setting, with over 60 million (https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/) Americans being bound by one. In the private sector, 56.2 percent (https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/) of nonunion employees are bound by mandatory arbitration agreements. In California, 67.4 percent (https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/) of workplaces are subject to mandatory arbitration. Employees are less likely to win (https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/) their cases in arbitration than in court. This may be due, in part, to the fact that arbitrators, who serve as private judges in arbitration proceedings, are generally paid by employers (https://www.theguardian.com/commentisfree/2019/jan/08/forced-arbitration-sexual-harassment-metoo). Even when employees do win in arbitration, they recover less in damages (https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/) than they would in court. Unlike court proceedings, arbitration is confidential. Many employers, such as Google, have used arbitration to keep claims secret (https://www.theguardian.com/commentisfree/2019/jan/08/forced-arbitration-sexual-harassment-metoo) and thus, shield themselves from negative publicity. Employees who are subject to arbitration are less likely to even bring their claims (https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/) because, given the lower likelihood of success and lower damages, attorneys are less likely to take on such claims. The suppression effect of mandatory arbitration agreements on employment litigation poses a danger to employee rights. Employers have less incentive to abide by the law if they are less likely to be sued for violations.

"Google employees, like their counterparts at a ballooning number of American companies, were subject to forced arbitration." https://www.theguardian.com/commentisfree/2019/jan/08/forced-arbitration-sexual-harassment-metoo (https://www.theguardian.com/commentisfree/2019/jan/08/forced-arbitration-sexual-harassment-metoo). Photograph: Jeenah Moon/Reuters

Forced arbitration clauses are especially detrimental to victims of sexual harassment seeking to enforce their rights under the law. Karla Amezola (http://employeerightsadvocacy.org/the-faces-of-forced-arbitration/#jp-carousel-1227) was a news reporter for Estrella TV, where for six years, she was subjected to sexual advances by Andres Angulo, the network's Vice-President of News. On one instance Angulo cornered Ms. Amezola, groped her, and kissed her against her will. Ms. Amezola was fired after complaining to the network's human resources department. She sued her former employer, but because she was subject to an arbitration agreement, her claim will not be heard in court. Instead, the claim will be handled in private arbitration proceedings, where her story and the employer's unlawful conduct will be kept secret, thereby undermining Ms. Amezola's efforts to obtain justice and hold her perpetrator accountable.

While the Supreme Court's bolstering of mandatory arbitration agreements in *Epic Systems* is likely to encourage more employers to adopt such agreements, all is not lost in California. Through the Private Attorneys General Act (https://www.labor.ca.gov/Private_Attorneys_General_Act.htm) (PAGA), the California Labor Code authorizes aggrieved employees to file lawsuits in court to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations. The stated purpose of PAGA is to "augment the enforcement abilities of the Labor Commissioner by creating an alternate 'private attorney general' system of labor enforcement."

Because the state is a party in PAGA lawsuits, mandatory arbitration clauses do not bar a claim from being heard in court. This is due to the fact that the State of California does not agree to an arbitration clause, even if an individual employee does. In *Iskanian v. CLS Transportation Los Angeles, LLC* (https://www.courts.ca.gov/opinions/archive/S204032A.PDF),) the California Supreme Court held that agreements requiring employees to waive potential PAGA claims are unenforceable because the claim belongs to the state, not the individual employee. The California Court of Appeal went even further in *Correia v. NB Baker Electric, Inc* (https://www.courts.ca.gov/opinions/documents/D073798.PDF), holding that employers may not require employees to arbitrate their PAGA claims without the state's consent.

Tracy Warren (https://news.bloomberglaw.com/daily-labor-report/ogletree-faces-sex-bias-claims-in-california-court-1), a former Ogletree, Deakins, Nash, Smoak & Stewart P.C. equity shareholder filed a PAGA lawsuit accusing the law firm of discriminating against her and other female attorneys in violation of the California Equal Pay Act. Filing the lawsuit as a PAGA claim may be Ms. Warren's best strategy to have her case heard in open court, as opposed to arbitration. A related suit filed as a class-action claim in federal court, alleging that female employees at the firm are denied equal pay for equal work, will be heard in private arbitration proceedings.

The increase in PAGA lawsuits in recent years (https://www.courthousenews.com/the-two-sides-of-unique-california-labor-law/)) is likely associated to the increase in mandatory arbitration agreements. As more employees find themselves without access to the courts, PAGA claims offer the only remaining recourse for employees to have their day in court. Though remedies under PAGA are limited to penalties as opposed to traditional damages, employees benefit by bringing a PAGA claim. PAGA claims allow broad, statewide discovery (https://static.reuters.com/resources/media/editorial/20171114/Williams%20v%20Superior%20Court.pdf). In *Williams v. Superior Court*, the California Supreme Court held than a Marshall's employee bringing a PAGA claim could seek contact information (https://static.reuters.com/resources/media/editorial/20171114/Williams%20v%20Superior%20Court.pdf).) for all Marshall's employees in California, even without proving that they were also "aggrieved" employees. Burdensome discovery requirements and high litigations costs to employers may provide an incentive to abide by the law to avoid lawsuits.

On the whole, mandatory arbitration fails to serve the optimal interests of both employers and employees in California. Though mandatory arbitration is becoming increasingly popular, employees will continue to seek their day in court if they have been wronged, even if under PAGA, they must forego traditional damages. Without any other recourse to the courts, employees will likely utilize PAGA to a larger extent, thereby subjecting employers to litigation costs. While PAGA serves an important interest in enforcing the California Labor Code, it functions best in conjunction with traditional employment litigation in the courts as opposed to arbitration.

Our society is deeply founded on our Seventh Amendment right to a jury trial to resolve disputes. Arbitration simply does not serve the principles of fairness and justice embodied in our Constitution and our long-held tradition of petitioning the courts for redress.

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