

Mandatory Arbitration of Employment Disputes: What's New and What's Next?*

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The authors suggest that it may be prudent for employers to question the conventional wisdom about the advantages of employment agreements requiring arbitration of employment disputes.

Over the last decade, many employers have implemented alternative dispute resolution policies that include agreements requiring arbitration of employment claims. This initiative responded to a series of Supreme Court decisions, starting with *Gilmer v. Interstate Lane*,¹ which established that statutory-based employment claims can be made subject to mandatory arbitration agreements (MAAs). Interest in MAAs escalated following the Supreme Court's more recent decisions in *Rent-A-Center v. Jackson*² and *AT&T Mobility v. Concepcion*.³ MAA advocates cite the conventional wisdom that arbitration facilitates faster and less expensive resolution of employment law claims in a private environment.

Yet pursuit of these worthy objectives remains elusive for many employers. Indeed, some companies that have implemented MAA schemes will confess privately to having a case of buyer's remorse. Other companies have taken a "wait and see" approach to this subject. Such caution may be sensible, in light of two principal challenges confronting employers. First, there

* Published at 39 *Employee Relations Law Journal* 22 (No. 3, Winter 2013), published by Aspen Publishers, 76 Ninth Avenue, Seventh Floor, New York, NY 10011.

is still continued uncertainty regarding several legal issues critical to an employer's ability to enforce MAAs. This is so, notwithstanding several recent Supreme Court decisions that have clarified certain aspects of the law in ways that are generally favorable to employers. Second, in part because of legal uncertainties, many companies encounter significant challenges in the administration of their MAA programs. These challenges suggest it may be prudent to challenge some of the assumptions about the efficacy of MAA programs.

RECENT GUIDANCE FROM THE SUPREME COURT

The Supreme Court issued two decisions this past term that affect the enforceability of MAAs. Although neither are employment cases, both are important for employers seeking to understand the current state of the law.

In *Oxford Health Plans LLC v. Sutter*,⁴ the Court held that an arbitrator did not exceed his authority in permitting class arbitration of a contractual reimbursement dispute between a physician and a health insurance plan, notwithstanding the fact that the agreement did not explicitly permit class arbitration. The Court's unanimous decision concluded that review of the arbitrator's decision was unavailable under the Federal Arbitration Act (FAA).⁵ The Court observed that the FAA permits a court to vacate an arbitrator's award only in "very unusual circumstances," and that a party "bears a heavy burden" in arguing that the arbitrator exceeded his powers. The Court concluded: "It is not enough . . . to show that the [arbitrator] committed an error – or even serious error." Because the parties "bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits."

The Court distinguished its earlier decision in *Stolt Nielsen v. Animalfeeds International Corp.*⁶ In that case the parties had stipulated to the fact that their agreement did not address class proceedings, because they had not considered the issue at the time of contract formation. Under those circumstances, the Court held, there would be no basis for inferring that the parties had agreed to allow for class action proceedings in arbitration. Conversely, where the parties agree that the availability of class proceedings is merely a question of contract interpretation, that question will be for the arbitrator to decide – and that decision will be binding on the parties.

In retrospect, the Court’s decision in *Oxford Health Plans* is not surprising. Labor lawyers, after all, have known since *The Steelworkers Trilogy*⁷ that one of the hallmarks of grievance arbitration under collective bargaining agreements is that the employer is almost always going to be “stuck” with the arbitrator’s decision, particularly if the arbitrator purports to interpret the parties’ agreement. Judicial review of adverse arbitration decisions for alleged violations of public policy is also an uphill battle.⁸ For purposes of MAAs, the major takeaway from *Oxford Health* is that either a contractual drafting choice (or a tactical litigation decision) to delegate decisions to an arbitrator will result in an extremely limited ability to obtain judicial review of that decision. As Justice Kagan explained, the “arbitrator’s construction holds, however good, bad or ugly.”⁹

The Court’s second decision is an important endorsement of class-action waivers in mandatory arbitration agreements. *American Express Co. v. Italian Colors Restaurant*¹⁰ presented the question whether, under the FAA, a court may invalidate an arbitration agreement with an explicit class-action waiver on the ground that the agreement effectively prevented the vindication of statutory rights. A group of merchants who had brought an antitrust case against American Express argued, in opposing a motion to compel arbitration, that their Sherman Act

claims could not be effectively pursued in individual arbitration proceedings. Their principal argument was that the cost of retaining an expert would be well in excess of any damages that could be recovered in an individual antitrust claim. In a 5-3 decision written by Justice Scalia, the Court rejected that argument. The Court held that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. The majority concluded there was nothing in the Sherman Act that required class proceedings, and it rejected the notion that claimants have a right to aggregate claims because of the relatively low value of an individual claim. Justice Kagan's sharply-written dissent argued that the outcome is inconsistent with the notion that federal courts are authorized under the FAA to invalidate arbitration agreements for reasons that include a finding that they prevent the "effective vindication" of a federal statutory right.

UNSETTLED LEGAL ISSUES

Enforceability of Mandatory Arbitration Agreements

The last dozen years have seen a significant development in the law of MAAs. Numerous cases involving consumer and franchise agreements, as well as employment agreements, have formed a broad consensus in favor of arbitration. Courts are now presumptively willing to enforce an MAA, even in situations where employees are presented with a non-negotiable form agreement implemented by an employer as part of an alternative dispute resolution policy. The Court's decision in *Concepcion*¹¹ gave a significant boost to MAAs. The *Concepcion* Court held that the FAA preempts state law rules of decision that reflect hostility to arbitration, directly authorizing a class action waiver in a consumer contract that would otherwise have been held unconscionable under California law.

In the wake of *Concepcion*, there should be no further wholesale bar on explicit class action waivers in MAAs, even if general principles of contract formation and unconscionability permit challenges to specific agreements. But such analyses should be biased in favor of arbitration. As Justice Scalia observed in *Concepcion*: “The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.... And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”¹²

Questions nonetheless remain as to the ability of employers to enforce MAAs. Mindful of the Supreme Court’s teaching in cases such as *First Options of Chicago, Inc. v. Kaplan*¹³ and *Rent-A-Center West Inc. v. Jackson*,¹⁴ courts applying the FAA typically perform a preliminary “gatekeeper” function to determine whether to compel arbitration. In doing so, courts look at ordinary state law principles governing the formation of contracts in deciding whether a particular agreement is enforceable. This often involves analysis of both procedural and substantive unconscionability principles. Procedural unconscionability typically involves questions of whether the agreement is a classic adhesion contract, as well as an analysis of whether fraud or duress was involved in its presentation and execution. Substantive unconscionability involves questions of whether the terms of the agreement are unfairly one-sided.

Resolution of these issues is often both tricky and unpredictable. The Fourth Circuit’s recent decision in *Muriithi v. Shuttle Express*¹⁵ is a good example. *Muriithi* was an FLSA and Maryland state law wage/hour complaint brought by an airport shuttle bus driver who had executed a franchise agreement with the defendant. The plaintiff alleged he was misclassified as a franchisee and independent contractor. The franchise agreement mandated arbitration of all

disputes and precluded any class proceedings in arbitration. The district court denied the defendant's motion to compel arbitration, concluding that three provisions were unconscionable, *i.e.*, the class action waiver, an arbitration "fee splitting" provision, and a one-year statute of limitations for bringing all claims under the agreement. The Fourth Circuit vacated and remanded.

The court first held that *Concepcion* required reversal of the district court's decision regarding the class action waiver, as the FAA preempted state law on the topic. The court interpreted *Concepcion* as broadly prohibiting "application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement under these circumstances."¹⁶ The Fourth Circuit then rejected the plaintiff's argument about the fee-shifting provision, concluding that he had failed to meet his evidentiary burden of showing that such costs would be prohibitive under the particular circumstances of the case. Finally, the court concluded that the plaintiff's challenge to the statute of limitations was a question to be resolved by the arbitrator. The court reasoned that, under Section 2 of the FAA, courts exercising their gatekeeper function should be limited to resolving enforceability challenges relating exclusively to the arbitration clause itself, and should not consider unconscionability arguments addressed to the arbitration agreement as a whole. Because the limitations provision was not contained in the arbitration clause itself, the court concluded that this issue should be decided by the arbitrator.

A 2012 decision by the Fifth Circuit serves as a reminder that employers seeking to enforce MAAs must also pay close attention to state law rules governing contract formation. In *Carey v. 24 Hour Fitness, Inc.*,¹⁷ the Fifth Circuit affirmed a district court's decision invalidating the employer's mandatory arbitration agreement under Texas law. The MAA in that case contained a broad reservation of rights provision that was interpreted by the court to permit the

company to make retroactive changes in the terms of the arbitration agreement. The court concluded that this provision rendered the agreement an illusory and unenforceable contract under Texas law.

California law presents unique challenges for employers seeking to enforce MAAs. The viability of class actions waivers remains uncertain in California courts, with appellate courts having reached incompatible decisions regarding the survival of the onerous California test (the four-factor Gentry test) in the wake of *Concepcion*. The California Supreme Court has agreed to review one of these appellate cases, *Iskanian v. CLS Transp. Los Angeles, LLC*.¹⁸ Moreover, since the seminal *Armendariz* case a decade ago,¹⁹ California has imposed the toughest standards in the country with respect to procedural and substantive unconscionability analyses. These standards create open questions about the viability of MAA terms that are often enforceable in much of the rest of the country, such as shortened statutes of limitations, limitations on discovery, and the splitting with plaintiffs of the arbitrator's fees.

"Who Decides" Arbitrability

The enforceability issues summarized above suggest that resolution of what is commonly called "arbitration of arbitrability" is one of the most important unresolved questions in this area of law. This is so, irrespective of whether the employer has followed the teaching of *Rent-A-Center v. Jackson* and included in its MAA a so-called "delegation clause" that grants power to the arbitrator to decide arbitrability matters, including unconscionability arguments.

The Third Circuit's decision in *Quilloin v. Tenet Health Care Corporation*²⁰ illustrates the complexity of this issue. The plaintiff in that case was a registered nurse who signed a series of mandatory arbitration agreements during her employment with a Philadelphia hospital. When she filed a lawsuit alleging violations of the Fair Labor Standards Act and Pennsylvania state

wage and hour laws, the employer moved to compel arbitration. The plaintiff opposed that motion on unconscionability grounds, and the district court denied the employer's motion. The Third Circuit reversed. The court applied the substantive arbitrability principles announced by the Supreme Court in *Prima-Paint*²¹ and *Rent-A-Center*.²² In doing so, the court rejected the employer's principal argument that the parties had agreed that an arbitrator should resolve any questions of unconscionability. The court distinguished *Rent-A-Center*, and concluded that there was no evidence the parties had agreed to have the arbitrator resolve such questions through a delegation clause. Unlike the Fourth Circuit in *Muriithi*, the Third Circuit rejected the employer's argument that a court's unconscionability analysis must be limited to a review of terms contained in the arbitration clause itself.

The Third Circuit then reviewed the specific unconscionability arguments addressed by the district court. The court determined that the class action waiver provision in the agreement was not substantively unconscionable, relying on *Concepcion*'s analysis of FAA preemption of state law. The court reached the same conclusion about the shorter limitations period contained in the arbitration agreement, rejecting on the facts the plaintiff's argument that this provision would permit an employer to "run out the clock" on a valid claim.

The most interesting part of *Quilloin* was its analysis of the fee shifting provision in the arbitration agreement. The Third Circuit concluded that because the clause was ambiguous, resolution of that dispute was properly reserved for an arbitrator. Relying on the Supreme Court's decision in *PacifiCare*,²³ the court characterized this as a "preliminary question" that is not a question of arbitrability for the court to resolve.²⁴

Quilloin exemplifies the difficulty lower courts have had in reconciling language in various Supreme Court decisions on the issue of "who decides" preliminary questions in enforceability challenges. In particular, Justice Scalia's attempt in *PacifiCare* to articulate the difference between

gateway questions reserved for a court and “preliminary questions” to be resolved by an arbitrator,²⁵ has proved unsatisfactory. The conflict is illustrated by the Supreme Court’s 2010 decision in *Granite Rock Co. v. Int’l Brotherhood of Teamsters*.²⁶ There the majority held that a dispute over the date of ratification of a collective bargaining agreement was a question of contract formation for a court to decide, rather than a question for the arbitrator. Justice Sotomayor’s dissenting opinion viewed the dispute as a pedestrian “merits issue” that should be resolved by an arbitrator.

The National Labor Relation Board’s View

The National Labor Relations Board (NLRB) has adopted an extremely restrictive view as to whether MAAs are enforceable. In *D.R. Horton, Inc.*,²⁷ the NLRB held that a class waiver provision in an MAA constituted a *per se* violation of the Section 7 of the National Labor Relations Act,²⁸ in that it inevitably interfered with the rights of employees under Section 7 to engage in “protected concerted activities.” NLRB Administrative Law Judges have followed *D.R. Horton*. For example, in *Ralph’s Grocery*,²⁹ an ALJ reaffirmed the reasoning articulated by the NLRB in *D.R. Horton* and concluded that this analysis was unaffected by the Supreme Court’s decision in *Italian Colors*.

D.R. Horton is on appeal to the Fifth Circuit. To date, the NLRB’s position has met with a healthy degree of skepticism in the courts. Several courts have refused to follow the NLRB’s logic, noting, among other things that courts are not required to give deference to the NLRB’s interpretation of the FAA.³⁰

Vindication of rights under other federal statutes

Courts continue to address whether class action waivers are inappropriate under a variety federal labor and employment law statutes. For employment lawyers who litigate class actions, the most important unresolved question following *Italian Colors* is how the majority’s restriction of the “effective vindication” rule will be extended to pending cases involving various statutes.

While the majority opinion suggests that these cases should be resolved in the same way as the antitrust claims at issue in *Italian Colors*, textual differences in some of these statutes make it difficult to predict the outcome of those cases. The Court in *Italian Colors* added very little to the discussion about whether there is a “contrary congressional command” in other federal statutes that would override the FAA’s command that an arbitration agreement must be enforced according to its terms.

As of this writing, pending cases involve Title VII, the FLSA, and the Equal Pay Act. The results in these cases leave considerable doubt as to the ultimate outcome of this issue. In March 2013, a panel of the Second Circuit rejected a challenge to a mandatory arbitration agreement in a Title VII “pattern or practice” suit.³¹ The court concluded that Title VII’s “pattern-or-practice” provision, which is only available in class actions, not a freestanding cause-of-action, but merely a method of proving an element of a Title VII claim. Accordingly, the court held that the plaintiffs had no substantive law-based right to pursue such a claim in arbitration.

Another Second Circuit panel reversed a district court’s decision denying an employer’s motion to compel arbitration in a wage/hour case brought under the FLSA and New York state law.³² The court noted first that the FLSA, like the Sherman Act, does not include a “contrary congressional command” that prevents waivers in arbitration agreements. The Second Circuit construed the collective action provision contained in Section 216 of the FLSA³³ as a procedural device rather than a substantive right conveyed by the statute. Relying on the majority opinion in *Italian Colors*, the court was unsympathetic to the plaintiff’s argument that it would be prohibitively expensive to effectively pursue her wage hour claim in individual arbitration. As of this writing, petitions for *en banc* review are pending in both cases.

By contrast, the Sixth Circuit recently held that an arbitration agreement imposing a six month statute of limitations for bringing claims under the Fair Labor Standards Act and the Equal Pay Act amounted to an inappropriate waiver of rights under those statutes.³⁴ The court rejected the employer's attempted distinction between substantive and procedural rights under the FLSA as "notoriously elusive." The court also distinguished Title VII cases permitting a shorter statute of limitations, relied on by the employer, on the grounds that Title VII clearly permits a private party waiver of such claims.

ADDITIONAL CLARIFICATION FROM THE SUPREME COURT?

The Supreme Court has granted certiorari in *BG Group PLC v. Republic of Argentina*.³⁵ That litigation arose from an international sovereign state arbitration proceeding. The U.S. Court of Appeals for the District of Columbia Circuit reversed a district court ruling and vacated an arbitration award of over \$185,000,000 obtained against the Republic of Argentina by a United Kingdom-based energy company.³⁶ The dispute began with a series of actions taken by the government of Argentina in response to the 2001-02 collapse of the Argentine economy. Those actions adversely affected the financial interest of the claimant, which had made significant investments in response to an earlier decision made by Argentina to privatize its state-owned natural gas transmission and distribution company. The parties submitted their dispute to a multi-stage arbitration process established under a treaty signed by both the United Kingdom and Argentina. The claimant decided unilaterally to bypass the first step of that process, which called for an initial submission to an appropriate court in the host country. The claimant instead proceeded directly to an arbitration panel convened under a subsequent step of the arbitration process, arguing that the first step was futile. The arbitration panel decided that it was acceptable

for BG Group to skip the first step in the particular circumstances presented, and subsequently decided the merits in favor of the energy company. Argentina sued to vacate the award.

The D.C. Circuit determined that the gateway question was whether a court or an arbitrator should decide whether BG Group could bypass the first step of the arbitration process. The court applied *First Options*³⁷ and *Howsam v. Dean Witter*³⁸ to determine whether the parties agreed to have a court or an arbitrator to decide that question. The appellate court decided there was only one defensible interpretation of the parties' agreement and the underlying treaty, and then concluded that the district court erred in failing to perform the "clear and unmistakable evidence" inquiry required by *First Options*.³⁹

BG Group is worth watching. Although it is not an employment case, the Court's decision may provide additional guidance on how courts should define what constitutes a gateway question of arbitrability in MAA litigation. After all, the Court's decision in *Oxford Health v. Sutter* noted that *that* case would have presented a different issue had it been presented as a question of arbitrability.⁴⁰ Additional clarification on this point would help employers in addressing the "who decides arbitrability" question that currently causes so much current collateral litigation over enforceability of MAA policies.

PRACTICAL IMPLICATIONS FOR EMPLOYERS

Despite the landmark decision in *Concepcion*,⁴¹ there has been a substantial increase in enforceability challenges to MAAs. Consumer rights advocates and plaintiffs' lawyers widely condemn *Concepcion* as being unfair to individuals and inconsistent with the Seventh Amendment right to a jury trial. These challenges will surely continue. Therefore, it may be premature for employers to declare victory on the issues summarized here. While it is reasonably certain that employers can draft an agreement that *should be* enforceable, as with

most complex issues, significant uncertainties remain. The following checklist should be helpful to employers in conducting an MAA drafting exercise:

- identifying employees to be covered by the MAA;
- defining the claims that will be covered by the MAA;
- identifying specific claims to exclude from the MAA, with particular attention to the principles of California law (if applicable) and the challenge posed by the NLRB's current position on class waivers;
- providing for legally enforceable consideration and consent;
- considering whether to include an opt out provision;
- defining the procedural features of the MAA in anticipation of unconscionability challenges. Recurring issues include:
 - the parties' obligations to pay arbitration fees,
 - the process for selecting the arbitrator(s),
 - any shortening of the applicable statutes of limitations for covered claims,
 - the scope of allowable discovery,
 - the availability of summary judgment procedures,
 - the obligations of the arbitrator to render a written decision, and
 - the requirement to keep the arbitration proceedings (and result) confidential;
- deciding whether to include a delegation clause; and
- providing for voluntary (or mandatory) pre-arbitration procedures for presenting concerns/disputes to management for informal resolution.

IS THE CONVENTIONAL WISDOM CORRECT?

Corporate America now has more than a decade of experience in administering – and litigating – various types of MAA programs. Employers and their counsel have learned many lessons from this experience. One of the most important is that an MAA policy is not a panacea in managing the rising tide of employment litigation. The legal and practical issues summarized above make it challenging for employers to draft and implement enforceable MAAs. The constant threat of collateral litigation regarding the enforceability of MAAs poses a real threat to companies' expectations that they can resolve employment disputes quickly, and in a confidential proceeding. As a result, many companies have found, contrary to their expectations and best intentions, that arbitration is not always quicker and cheaper than litigation. Moreover, under current law, MAAs may not always represent an effective tool in curbing employee class actions and avoiding the risk of runaway juries.

Employers that are considering the implementation (or modification) of an MAA policy should consider the following “Top 10” list of (perhaps unintended) consequences of MAAs.

1. *You may get more claims.* MAA policies often make it easier for individuals to file claims, as current employees need not go to the trouble of finding legal representation before filing a claim against their employer.
2. *You may end up having more trials.* Arbitrators are often unwilling to grant employer motions to dismiss and/or for summary judgment.
3. *You may end up losing more cases.* Discovery may well give claimants the additional information needed to persuade an arbitrator that the company's decision was not “fair.” Arbitrators are famously reluctant to enforce evidentiary rules, and are often more sympathetic to claimants.

4. *Collateral litigation is almost inevitable.* The principles discussed above ensure that litigation over the validity of the MAA remains likely, especially if a current or former employee is motivated to bring a putative class or collective action.
5. *You may spend a lot of time, money and resources in getting a resolution.* In part because of the unconscionability and other enforcement issues summarized above, arbitration has become considerably more complex in recent years.
6. *You have virtually no chance of appealing an adverse ruling by an arbitrator.* If it wasn't clear before, *Oxford Health v. Sutton* confirms this point.
7. *You may end up litigating in multiple forums.* Former employees will not be subject to new MAAs, and there will be no way to prevent a disgruntled one from pursuing claims in court, even if current employees are bound to individual arbitration.
8. *You may not be able to keep the proceedings confidential.* Confidentiality is a factor that may weigh against the employer in an unconscionability challenge. This is especially true in wage-hour cases, where public policy principles militate against maintaining confidentiality of settlements.
9. *You may not be able to minimize investigations and complaints by government agencies.* Arbitration policies cannot limit employees' rights to complain to government agencies, ranging from the Department of Labor to the regulatory enforcement bodies.
10. *You may be substantially limited in your ability to pursue legal action against dishonest employees.*

CONCLUSION

The legal landscape in mandatory arbitration continues to evolve, with more high-profile cases scheduled in the months ahead in both federal and state courts, including the United States Supreme Court. As the picture becomes clearer in the months and years ahead, employers will be in a better position to fully evaluate the benefits – and risks – of mandatory arbitration policies.

¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

² *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010).

³ *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

⁴ *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013).

⁵ 9 U.S.C. § 1 *et seq.*

⁶ 559 U.S. 662 (2010).

⁷ *United Steelworkers of America v. American Mrg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navitation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 1358 (1960).

⁸ *United Paperworkers Intl Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987) ("In such cases, and this is such a case, the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.").

⁹ *Sutter*, 133 S.Ct. at 2071.

¹⁰ *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013).

¹¹ *Concepcion*, 131 S.Ct. at 1749.

¹² *Id.* at 1749.

¹³ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 1920 (1995).

¹⁴ *Rent-A-Center*, *supra*, note 2.

¹⁵ *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173 (2013).

¹⁶ *Id.* at 180.

¹⁷ *Carey v. 24 Hour Fitness USA, Inc.*, 669 F.3d 202 (2012).

¹⁸ *Iskanian v. CLS Transp. Los Angeles, LLC*, 206 Cal.App.4th 949, 142 Cal.Rptr.3d 372 (2012) ("[W]e find that the *Concepcion* decision conclusively invalidates the *Gentry* test").

¹⁹ *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal 4th 83 (2000).

²⁰ *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221 (2012).

²¹ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

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- ²² Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772 (2010).
- ²³ PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003).
- ²⁴ 673 F.3d at 232.
- ²⁵ 538 U.S. at 407 fn. 2.
- ²⁶ 130 S.Ct. 2847 (2010).
- ²⁷ 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012).
- ²⁸ 29 U.S.C. § 157.
- ²⁹ Ralph's Grocery Co. and Terri Brown, 21-CA-073942, 2013 WL 3964787 (N.L.R.B. July 31, 2013).
- ³⁰ Richards v. Ernst & Young LLP, Case No. 11-17530 (9th Cir. Aug. 21, 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053-54 (8th Cir. 2013); Delock v. Securitas Sec. Servs. USA, Inc., 883 F. Supp. 2d 784, 789 (E.D. Ark. 2012); Morvant v. P.F. Chang's China Bistro, Inc., 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012). *But see*, Herrington v. Waterstone Mortg. Corp., No. 11-cv-779-BBC, 2012 WL 1242318 at *6 (W.D. Wis. March 16, 2012) (deferring to NLRB and invalidating class action waiver).
- ³¹ Parisi v. Goldman Sachs & Co., 710 F.3d 483 (2013).
- ³² Sutherland v. Ernst & Young LLP, 2013 WL 4033844 (2d Cir., Aug. 9, 2013).
- ³³ 29 U.S.C. § 216(b).
- ³⁴ Boaz v. FedEx Customer Info. Serv., Inc., 2013 WL 3985015 (6th Cir. 2013).
- ³⁵ BG Group PLC v. Republic of Argentina, 135 S.Ct. 2795 (cert. granted June 10, 2013).
- ³⁶ Republic of Argentina v. BG Group PLC, 665 F.3d 1363 (D.C. Cir. 2012).
- ³⁷ First Options of Chicago, Inc. v. Kaplan, 514 U.S. 1920 (1995).
- ³⁸ Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).
- ³⁹ Republic of Argentina, *supra* note 36.
- ⁴⁰ Sutter, *supra* note 4 at 2068, fn 2.
- ⁴¹ 131 S.Ct. 1740 (2011).