

2018 CLASP Convening

**Partnerships: Private Bar and Impact of
Supreme Court Decision on Mandatory
Arbitration Provisions**

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ABOUT NYS ATTORNEY GENERAL OFFICE

- ▶ OAG Labor Bureau strategically enforces core workplace rights on behalf of New York's most vulnerable workers.
 - ▶ Civil and criminal enforcement of MW, OT, Retaliation and other critical labor laws principally on behalf of low-wage workers in high violation industries (construction, fast food, home health care, transportation)
 - ▶ Strategic enforcement on issues such as joint employer liability, employer misuse of non-competes, and federal action
 - ▶ Appellate litigation on behalf of NYDOL re: W&H, UI, Workers' Comp enforcement/regulation



ABOUT CENTER FOR POPULAR DEMOCRACY

- ▶ National network of community-based organizations.
- ▶ Protecting wins: minimum wage increases, paid leave, fair workweek, wage theft prevention.
- ▶ National campaign for state & local policy solutions to forced arbitration.

Pre-*Epic Systems*: The Problem of Forced Arbitration

- ▶ Over 60 million workers in the United States are blocked from suing their employers due to forced arbitration clauses -- half of all workers and two-thirds of low-wage workers are subject to forced arbitration
- ▶ 98% of claims disappear into a “black hole”-- 315,000 to 722,000 “missing” employment cases every year.
- ▶ The CFPB estimates that these clauses appear in 53% of credit card accounts, 85.75% of private student loans, 98% of payday loans, and 99% of cell phone contracts.
- ▶ In forced arbitration, employees win only 21% of discrimination cases vs. in court, employees win 60% of discrimination cases.
- ▶ Federal regulations to prohibit forced arbitration by nursing homes, for-profit colleges, federal contractors, and financial institutions have been rolled back.
- ▶ *#MeToo* Movement: sexual harassment/gender discrimination cases received national attention - FoxNews, Microsoft, Uber, Lyft

The Fine Print of Arbitration Clauses

If arbitration is chosen...you will [not] have the right to litigate that claim in court or have a jury trial on that claim.

The arbitrator's decisions are as enforceable as any court order and are subject to very limited review by a court. Except as set forth below, the arbitrator's decision will be final and binding. Other rights you or we would have in court may also not be available in arbitration.

There will be no right or authority for any claims to be arbitrated on a class action basis or on bases involving claims brought in a representative capacity on behalf of the general public or other persons similarly situated.

Claims Resolution

Most customer concerns can be resolved by calling our Customer Service Department at the number listed on the back of your card. In the event Customer Service is unable to resolve a complaint to your satisfaction, this section explains how claims can be resolved through mediation, arbitration or litigation. It includes an arbitration provision. **You may reject the arbitration provision by sending us written notice within 45 days after your first card purchase. See *Your Right to Reject Arbitration* below.**

For this section, **you and us** includes any corporate parents, subsidiaries, affiliates or related persons or entities. **Claim** means any current or future claim, dispute or controversy relating to your Account(s), this Agreement, or any agreement or relationship you have or had with us, except for the validity, enforceability or scope of the Arbitration provision. **Claim** includes but is not limited to: (1) initial claims, counterclaims, crossclaims and third-party claims; (2) claims based upon contract, tort, fraud, statute, regulation, common law and equity; (3) claims by or against any third party using or providing any product, service or benefit in connection with any account; and (4) claims that arise from or relate to (a) any account created under any of our agreements, or any balances on any such account; (b) advertisements, promotions or offers financed under any accounts or terms of financing; (c) benefits and services related to card membership (including fee-based or free benefit programs, enrollment services and rewards programs) and (d) your application for any account. You may not sell, assign or transfer claim.

Sending a Claim Notice

Before beginning a lawsuit, mediation or arbitration, you and we agree to send a written notice (a **claim notice**) to each party against whom a claim is asserted, in order to provide an opportunity to resolve the claim informally or through mediation. Go to americanexpress.com/claim for a sample claim notice. The claim notice must describe the claim and state the specific relief demanded. Notice to you may be provided by your billing statement or sent to your billing address. Notice to us must include your name, address and Account number and be sent to

American Express ADR c/o CT Corporation System, 111 8th Ave., NY, NY 10011. If the claim proceeds to arbitration, the amount of any relief demanded in a claim notice will not be disclosed to the arbitrator until after the arbitrator rules.

Mediation

In mediation, a neutral mediator helps parties resolve a claim. The mediator does not decide the claim but helps parties reach agreement. Before beginning mediation, you or we must first send a claim notice. Within 30 days after sending or receiving a claim notice, you or we may submit the claim to JAMS (1-800-352-5267, jamsadr.com) or the American Arbitration Association ("AAA") (1-800-778-7879, adr.org) for mediation. We will pay the fees of the mediator.

All mediation-related communications are confidential, inadmissible in court and not subject to discovery. All applicable statutes of limitation will be tolled until termination of the mediation. Either you or we may terminate the mediation at any time. The submission or failure to submit a claim to mediation will not affect your or our right to elect arbitration.

Arbitration

You or we may elect to resolve any claim by individual arbitration. Claims are decided by a neutral arbitrator.

If arbitration is chosen by any party, neither you nor we will have the right to litigate that claim in court or have a jury trial on that claim. Further, you and we will not have the right to participate in a representative capacity or as a member of any class pertaining to any claim subject to arbitration. Arbitration procedures are generally simpler than the rules that apply in court, and discovery is more limited. The arbitrator's decisions are as enforceable as any court order and are subject to very limited review by a court. Except as set forth below, the arbitrator's decision will be final and binding. Other rights you or we would have in court may also not be available in arbitration.

Initiating Arbitration

Before beginning arbitration, you or we must first send a claim notice. Claims will be referred to either JAMS or AAA, as selected by the party electing arbitration. Claims will be resolved pursuant to this Arbitration provision and the selected organization's rules in effect when the claim is filed, except where those rules conflict with this Agreement. If we choose the organization, you may select the other within 30 days after receiving notice of our selection. Contact JAMS or AAA to begin an arbitration or for other information. Claims also may be referred to another arbitration organization if you and we agree in writing or to an arbitrator appointed pursuant to section 5 of the Federal Arbitration Act, 9 U.S.C. sec. 1-16 (**FAA**).

We will not elect arbitration for any claim you file in small claims court, so long as the claim is individual and pending only in that court. You or we may otherwise elect to arbitrate any claim at any time unless it has been filed in court and trial has begun or final judgment has been entered. Either you or we may delay enforcing or not exercise rights under this Arbitration provision, including the right to arbitrate a claim, without waiving the right to exercise or enforce those rights.

Limitations on Arbitration

If either party elects to resolve a claim by arbitration, that claim will be arbitrated on an individual basis. There will be no right or authority for any claims to be arbitrated on a class action basis or on bases involving claims brought in a purported representative capacity on behalf of the general public, other cardmembers or other persons similarly situated.

The arbitrator's authority is limited to claims between you and us alone. Claims may not be joined or consolidated unless you and we agree in writing. An arbitration award and any judgment confirming it will apply only to the specific case and cannot be used in any other case except to enforce the award.

Post-*Epic Systems*: The Problem of Forced Arbitration Has Only Gotten Worse

- ▶ May 2018: US Supreme Court ruled 5-4 in *Epic Systems Corp. v. Lewis et al.* that collective and class action waivers buried in forced arbitration clauses are legally enforceable
- ▶ DIY Arbitration Tool launched hours after Epic Systems was decided:
<https://ogletree.com/innovations/diy-arbitration>
- ▶ Many more companies will be adopting forced arbitration clauses and class action waivers following *Epic Systems*.
- ▶ States are preempted from directly regulating arbitration.
- ▶ Obscures systemic problems and discourages a culture of compliance
- ▶ The rule of law is undermined and there is no public development of employment law to serve as precedence for workers, companies or public agencies.
- ▶ Makes sexual harassment, discrimination, wage theft more likely.
- ▶ Women, low-wage workers, people of color more likely to be covered by arbitration clauses.

Government Agency Approaches to Forced Arbitration

- ▶ What could agencies/public enforcers do? Practical Considerations for Agencies (share idea; brainstorm?)
 - ▶ Complaint stage: from /ees request copies of any hiring paperwork; triage
 - ▶ Investigation: from /ers request agreements, policies, complaints, settlements
 - ▶ Resolution: take into account in terms of resolution and way you handle the case
 - ▶ Outreach/Education/Media: using the bully pulpit to find out who's using arbitration agreements and educate on what they mean
 - ▶ Relationships: Proactively establish relationships with the private bar/public interest attorneys who may not be able to address the case - what does this look like? If private attorneys are arbitrating with major employers, stay in touch

Government Agency Approaches to Forced Arbitration (cont.)

- ▶ NY AG experience at intake and during investigation;

- ▶ Restrictions on forum and remedies (even if agency brings suit can workers recover?)

- ▶ Uber's arbitration clause for its drivers:

Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration, with the exception of proceedings that must be exhausted under applicable law before pursuing a claim in a court of law or in any forum other than arbitration. Except as it otherwise provides, this Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or **representative (non-PAGA) action**.

- *Mumin v. Uber Techs., Inc.*, No. 15CV6143NKGJO, 2017 WL 934703, at *11 (E.D.N.Y. Mar. 8, 2017)

- ▶ Practical considerations for private bar/public interest attorneys - Be specific with private bar about the kinds of cases the agency would take.

State and Local Legislative Approaches to Forced Arbitration

▶ **Whistleblower Enforcement Legislation**

- ▶ Modeled on California's 2004 Private Attorneys General Act (PAGA); workers or consumers who have been harmed by a company's unlawful practices can join together to bring representative actions on the state's behalf. These actions are not contractually barred because the state is not a party to the private arbitration clauses.
- ▶ Workers and consumers expose company-wide violations and the state collects millions in civil penalties from lawbreakers.
- ▶ CPD is working on campaigns in NY, VT, WA and OR.

▶ **Benefits of Whistleblower Enforcement Legislation**

- ▶ Prioritizing public enforcement
- ▶ Expanding enforcement capacity
- ▶ Increasing revenue (nb: PAGA generates approx. \$5-8 million in revenue for CA each year)
- ▶ Private attorneys can dedicate resources that agencies may not have (e.g., pursuing cases that agencies may not be able to take), while still collecting penalties for agencies and deterring non-compliance

State and Local Legislative Approaches to Forced Arbitration (cont.)

- ▶ **Lessons learned from California's PAGA**
 - ▶ California companies enforce long-forgotten standards/driving a culture of compliance with previously neglected: ex. suitable seating requirement
 - ▶ Modifications to CA PAGA model
 - ▶ Enhanced state oversight
 - ▶ Focus serious violations
 - ▶ Representative organizations
 - ▶ Community based enforcement
- ▶ **Another state/local legislative approach** -- Model procurement executive order and ordinance: encouraging corporate transparency and deterring noncompliance

► Questions/comments