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Recent developments in employment arbitration law

KEEPING CURRENT WITH IMPORTANT EMPLOYMENT ARBITRATION DECISIONS FROM 2025 AND 2026

As always, employment arbitration remained a hot topic in 2025 and 2026. (See *Recent Developments in Employment Arbitration Law* articles by Stephen M. Benardo in the September 2022, 2023, 2024, and 2025 issues of *Advocate*.)

Failure to timely pay arbitration fees

Under Code of Civil Procedure sections 1281.97 and 1281.98, if the drafter of an employment arbitration agreement fails to pay within 30 days of invoice fees and costs to initiate arbitration (1281.97) or continue arbitration (1281.98), the drafter is in material breach and default, and waives the right to arbitrate. The employee may elect to withdraw from arbitration, proceed in court, and seek sanctions.

California cases strictly enforced these statutes, holding that if payment is not received in 30 days, it does not matter why. But in 2024, the dissent in *Hohenshelt v. Superior Court* (2024) 99 Cal.App.5th 1319, asserted that, as interpreted, section 1281.98 runs afoul of the Federal Arbitration Act ("FAA") by singling out arbitration contracts to be voided for late performance when other contracts would not.

Taking the case up, the California Supreme Court in *Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310, ended the "30 days means 30 days" rule, finding sections 1281.97 and 1281.98 were enacted subject to established contract-law principles, such as Civil Code section 3275 (if nonperforming party acts in good faith, has reasonable excuse for delay, tenders performance promptly, and adequately compensates the other party for harm, equity can excuse nonperformance), Civil Code section 1511 (breach may be excused when performance would be impossible, illegal, or impracticable due to extreme and unreasonable difficulty, expense, injury, or loss), and Code of Civil Procedure section 473, subdivision (b) (relief may be granted due to mistake, inadvertence, surprise, or excusable neglect). The supreme court held that when interpreted to permit these defenses, sections 1281.97 and 1281.98 do not contravene the FAA, and remanded for reconsideration.

What that remand and motions-to-enforce sections 1281.97 and 1281.98 will look like was shown in *Wilson v. TAP Worldwide, LLC* (2025) 114 Cal.App.5th 1077, where the employer initiated electronic bill payment on the 30th day after invoice, a Friday, and the arbitration provider received it the following Monday. The trial court strictly applied the 30-day rule, but the court of appeal, applying *Hohenshelt*, reversed, finding as a matter of law the delay in payment was not willful, grossly negligent, or fraudulent, and monetary sanctions adequately compensated the employee for delay.

Transportation exemption

Section 1 of the FAA exempts from coverage transportation workers engaged in foreign or interstate commerce. In *Flowers Foods, Inc. v. Brock* (May 28, 2026) 2026 U.S. LEXIS 2297, the defendant's baked goods were transported interstate to a warehouse, from where the plaintiff worker delivered them intrastate to local stores. The U.S. Supreme Court held the transportation exemption applied, holding the exemption does not require the worker to cross state lines or interact directly with vehicles that do, so long as the worker "plays a direct and necessary role in the free flow of goods across borders."

In *Vela v. Harbor Rail Services of California, Inc.* (2026) 120 Cal.App.5th 353, the court held the transportation exemption did not apply to an employee of a railroad repair company because the employer was not a carrier, the employee had no contract with the carrier whose property was repaired, and the employee's work repairing out-of-service railroad cars was too far removed from transportation of goods.

The Labor Code Private Attorneys General Act of 2004 ("PAGA")

In *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639 and *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, the U.S. and California Supreme Courts created the "individual PAGA claim" and the now-familiar procedure requiring employees to arbitrate individual PAGA claims before litigating representative PAGA claims in court.

In *Villalobos v. Maersk, Inc.* (2025) 114 Cal.App.5th 1170, the court held that because the employee was a transportation worker engaged in foreign or interstate commerce, California law, not federal law, applied to the arbitration agreement. Citing language in *Adolph* that *Viking River* "requires enforcement of agreements to arbitrate a PAGA plaintiff's individual claims *if the agreement is covered by the FAA*," the *Villalobos* court held the employee's entire PAGA claim would remain in court.

In *LaCour v. Marshalls of CA, LLC* (2025) 117 Cal.App.5th 505, the arbitration agreement included a so-called "poison pill" stating that if the PAGA waiver were found invalid, the PAGA claim must be litigated in court. The *LaCour* court found the failure to specify that only "non-individual" PAGA claims must be litigated in court meant *all* PAGA claims must be litigated in court.

In *Gavriiloglou v. Prime Healthcare Management, Inc.* (2022) 83 Cal.App.5th 595, the court held an arbitrator's finding that the employee did not suffer Labor Code violations did *not* preclude the employee from litigating aggrieved employee status in court. But since then, the list of cases holding an arbitrator's finding of no violations *does* preclude the employee from establishing aggrieved employee status has grown – *Rocha v. U-Haul Co. of California* (2023) 88 Cal.App.5th 65; *Rodriguez v. Lawrence Equipment, Inc.* (2024) 106 Cal.App.5th 645 – and the California Supreme Court, in dicta in *Adolph*, *supra*, and the Ninth Circuit, in a concurrence in *Johnson v. Lowe's Home Centers* (9th Cir. 2024) 93 F.4th 459 (J. Lee, concurring) have indicated an arbitrator's findings can create issue preclusion.

Prime Healthcare Management, Inc. v. Superior Court (2025) 117 Cal.App.5th 12, was the return to the court of appeal of the *Gavriiloglou* parties. The Court of Appeal stuck to its guns that an arbitrator's award cannot create issue preclusion on PAGA claims and also distinguished subsequent authority.

The split, though, is now more lopsided. In *Sorokunov v. NetApp, Inc.* (2026) 118 Cal.App.5th 1009, the court reviewed the cases cited above and held an arbitrator's finding that the employee did not suffer underlying Labor Code violations precluded the employee from establishing aggrieved-employee status in court, eliminating standing to pursue representative PAGA claims.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") provides: "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute … no predispute arbitration agreement … shall be valid or enforceable with respect to a case which … relates to the sexual assault dispute or the sexual harassment dispute." Courts have held a *single* claim of sexual harassment or assault means *no* claims in the case may be compelled to arbitration over the employee's opposition.

Quilala v. Securitas Security Services USA, Inc. (2025) 117 Cal.App.5th 75, is the latest California decision holding "the EFAA renders an arbitration agreement unenforceable as to the entire case, not just the sexual harassment claim." The *Quilala* court also addressed the phrase "at the election" of the party alleging sexual harassment or assault. The employer argued the employee waived EFAA rights by not expressly invoking the statute, including not raising it in opposition to the motion to compel arbitration, but the *Quilala* court held that by filing a complaint alleging sexual harassment or assault, the employee makes an election under the EFAA to proceed in court.

Illusory contracts

In *Sorokunov*, *supra*, the Court of Appeal held a provision giving the employer the unilateral right to modify the arbitration agreement was not illusory because the agreement not only exempted filed claims from the unilateral modification provision, but also required modifications to be "consistent with and to the extent permitted by applicable law." Therefore, an exemption for known but unfiled claims could be implied, and the agreement enforced.

Formation

In *Santana v. Studebaker Health Care Center, LLC* (2026), 120 Cal.App.5th 1, the employer required the employee to sign three agreements regarding arbitration. The trial court ruled differences in language regarding FAA applicability, arbitrator selection, and PAGA coverage meant no arbitration agreement was formed. The Court of Appeal reversed, applying the principle that contracts should be construed in favor of validity, and finding the differences reconcilable. Applying that principle, the court also held that judicial-enforcement provisions in the parties' confidentiality agreement did not unreasonably favor the employer and were not unconscionable.

Unconscionability

Three other California appellate decisions held that when ruling on unconscionability, courts must consider all documents impacting arbitration rights and duties.

In *Fuentes v. Empire Nissan, Inc.* (2026) 19 Cal.5th 93, the California Supreme Court found that when reading the arbitration agreement together with two confidentiality agreements, there was lack of mutuality because the employee was required to arbitrate claims she was more likely to bring, whereas the employer could choose court for claims it was more likely to bring, i.e., claims regarding unfair competition, confidential information, and trade secrets. The Supreme Court interpreted the confidentiality agreements to permit court litigation because they used the phrase "legal action" and did not contain an arbitration provision.

The *Fuentes* court addressed another issue that was the subject of a split of authority, holding tiny print and illegible format are issues of procedural unconscionability, not substantive unconscionability.

In *Silva v. Cross Country Healthcare, Inc.* (2025) 111 Cal.App.5th 1311, the employee was required to sign: a) an arbitration agreement requiring employee and employer to arbitrate all claims and b) an employment agreement limiting the employee's use of confidential information, competition, and solicitation, and allowing the employer to pursue violations in court and to seek injunctive relief without posting a bond.

The *Silva* court cited Civil Code section 1642, which provides "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." The court found lack of mutuality because the employee was required to arbitrate claims she was more likely to bring, whereas the employer could litigate in court claims it was more likely to bring. Severance was inappropriate because when the documents were construed together unconscionability permeated the arbitration agreement.

In *Gurganus v. IGS Solutions LLC* (2025) 115 Cal.App.5th 327, the employee was required to sign: a) an arbitration agreement, and b) a confidentiality and non-disclosure agreement giving the employer the right to litigate in court claims for improper disclosure of confidential, proprietary, or trade-secret information, and seek injunctive relief without a bond or proof of damages. The court held the two documents must be read together to determine the "net effect" on the parties' arbitration rights, which was lack of mutuality. The court also found the confidentiality provision in the arbitration agreement unconscionable because it would preclude the employee from interviewing witnesses outside formal discovery. Severance was inappropriate because the arbitration agreement was permeated by unconscionability.

In *Ayala-Ventura v. Superior Court* (2026) 119 Cal.App.5th 241, the court held provisions requiring arbitration of all claims for an indefinite duration, including claims outside the employment relationship, and requiring the employee to arbitrate claims against the employer's employees, were not substantively unconscionable. The court distinguished *Cook v. University of Southern California* (2024) 102 Cal.App.5th 312, finding: a) the agreement was not overbroad because the possibility that the employee of the janitorial services company in *Ayala-Ventura* would be required to arbitrate claims unrelated to the employment relationship is far less than for the university employee in *Cook* due to USC's broad "reach" and b) the agreement did not lack mutuality because unlike *Cook,* the *Ayala-Ventura* employee was only required to arbitrate claims against the employer's employees when acting "in their capacity" as employees or agents.

Delegation clauses

Once a court finds a valid arbitration agreement covering the plaintiff's claims, the court decides whether contract defenses preclude enforcement, unless the arbitration agreement contains a clear and unmistakable "delegation" provision for an arbitrator to determine arbitrability.

In *Sandler v. Modernizing Medicine, Inc*. (9th Cir. 2026) 170 F.4th 1209, the Ninth Circuit ruled the district court erroneously relied on California state court cases finding a delegation clause is not clear and unmistakable if the agreement also provides a court may sever invalid provisions. The Ninth Circuit held that, under federal law, a severability provision enforceable by a court does *not* defeat a delegation clause. The Ninth Circuit also held, following well-established federal case law, an arbitration agreement's incorporation of an arbitration provider's rules that empower the arbitrator to determine validity of the agreement constitutes clear and unmistakable delegation.

In *Villalobos*, *supra*, the California Court of Appeal noted California cases "reach varying conclusions" on whether incorporation of an arbitration provider's rules is sufficient to constitute clear and unmistakable delegation of validity issues to an arbitrator, and cited the cases on both sides. The *Villalobos* court held that under the circumstances before it there was no clear and unmistakable delegation, because neither document signed by the employee had an express delegation provision, only one document included a link to the AAA Rules, and the employee would not learn about delegation until accessing the lengthy AAA Rules and finding the rule stating the arbitrator has the power to determine jurisdiction.

In *O'Dell v. Aya Healthcare Services* (9th Cir. 2026) 171 F.4th 1173, four employees' claims were compelled to separate arbitrations, and pursuant to a delegation provision, two arbitrators found the arbitration agreement enforceable, while two arbitrators found it was not. The district court adopted the findings of the arbitrators who found the agreement unenforceable and applied the doctrine of non-mutual offensive collateral estoppel, ruling the claims of all four employees, and 255 other employees, would remain in court. The Ninth Circuit reversed, effectively ruling that under the arbitration agreement and the FAA, the parties were entitled to an individual ruling in each employee's case.

Class actions and waiver

In *Sierra Pacific Industries Wage & Hour Cases* (2025) 116 Cal.App.5th 1038, as modified, (Jan. 5, 2026), the parties litigated a putative class action for four years before class certification. The employer subsequently produced over 3,400 arbitration agreements signed by unnamed class members and filed a motion to compel arbitration as to the signatories. The employer argued its motion was timely because no named plaintiff had signed an arbitration agreement, and arbitration could not be compelled against unnamed employees before class certification. The *Sierra Pacific* court held the fact that the employer could not have filed a motion to compel arbitration until class certification did not mean pre-certification conduct should be disregarded in determining whether the employer waived the right to arbitrate. A court must consider the totality of the parties' conduct, and the employer waived its right to arbitrate by acting inconsistently with that right throughout litigation by, inter alia, resisting the plaintiffs' efforts to discover whether putative class members were bound to arbitrate, refusing to produce signed arbitration agreements despite a court order, participating in extensive class discovery, repeatedly implying in discovery responses that putative class members' claims would be litigated, participating in two mediations to resolve all employees' claims, and deleting its affirmative defense of arbitration from its answer to the plaintiffs' second amended complaint.

In *Avery v. TEKsystems, Inc*. (9th Cir. 2025) 165 F.4th 1219, the Ninth Circuit held that under Rule 23 of the Federal Rules of Civil Procedure, the district court properly denied the employer's motion to compel arbitration as to unnamed class members who signed arbitration agreements after the class action was filed where: a) the employer made misleading communications and disparaging remarks to employees regarding the class action and b) the agreement contravened Rule 23 by stating each employee agreed to arbitrate and waive class claims unless the employee affirmatively opted out of the agreement.

Third parties

In *Toothman v. Redwood Toxicology Laboratory, Inc.* (May 5, 2026) 2026 Cal. App. LEXIS 283, the court held an arbitration agreement between the employee and a staffing company could not be enforced by the defendant employer with whom the staffing company had placed him where the employee's claims arose entirely after he ceased to be the staffing company's employee and became a direct employee of the defendant employer.

Petitions to confirm or vacate arbitration awards

In *VIP Mortgage Inc. v. Gates* (9th Cir. 2025) 162 F.4th 1010, the parties stipulated to dismiss and bear their own fees regarding the employer's counterclaims, and the arbitrator signed the stipulation. The arbitrator later issued an award for the employee on her claims and awarded attorneys' fees without distinguishing between fees incurred on the employee's claims versus the employer's counterclaims. The district court denied the employer's motion to vacate for manifest disregard of law. The Ninth Circuit affirmed because manifest disregard requires that the arbitrator must have known about the undisputed fact (i.e., the stipulation) when deciding the legal issue (i.e., awarding the fees), the fee award was made 14 months after the stipulation, and the employer failed to raise the issue in opposition to the fees motion.

In *Jules v. Andre Balazs Properties* (May 14, 2026) 2026 U.S. LEXIS 2035, the U.S. Supreme Court held a district court that stays a case pending arbitration retains jurisdiction to hear a motion to confirm or vacate the arbitrator's award.

Arbitrator eligibility

In *Getzels v. The State Bar of California* (2026) 112 Cal.App.5th 388, the Court of Appeal upheld the State Bar of California's rule that inactive licensed attorneys cannot serve as private arbitrators or mediators.

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