



Employment rights: Time's up for mandatory arbitration

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The #MeToo movement has placed previously obscure non-disclosure orders in the spotlight. Global Insight examines why mandatory arbitration clauses may be equally damaging – covering similarly iniquitous behaviour – and considers how they're being challenged.

For some it was a shock. For others, a foregone conclusion. In February 2019, Google ditched mandatory arbitration clauses from its employee contracts. The #MeToo movement has placed the issue of employee rights firmly on the agenda and raised red flags over the misuse of non-disclosure agreements (NDAs). As the pushback against discriminatory employment practices continues, there are growing concerns that NDAs and mandatory arbitration clauses are two sides of the same coin.

The controversial policy of mandatory – or forced – arbitration prohibits workers from taking a company to court, even when allegations of sexual harassment are involved. It captured public attention in November, when thousands of Google employees around the world staged a mass walkout protesting against the practice. The demonstrators called on Google's management to overhaul its policies for handling workplace sexual harassment following several high-profile scandals.

It took just one week for the internet giant to respond, announcing it was making 'arbitration optional for individual sexual harassment and sexual assault claims'. It wasn't the first company to do so. In fact, Google has joined an ever-growing list of household names that include Airbnb, eBay, Facebook, Lyft, Microsoft and Uber, which have already done away with similar policies. Against this backdrop of discontent, Google banned mandatory arbitration altogether

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Professor Alexander Colvin
Cornell University

A company spokesperson confirmed to Global Insight that, following a review of its policies, from 21 March it would no longer require current or future Google employees to arbitrate employment disputes. Much like NDAs, mandatory arbitration clauses permit employees to settle disputes behind closed doors. Google is the highest-profile company to have been outed for such policies, but it's not alone. These clauses have become so integral to the small print of US employment contracts that many employees are unaware they've signed away their rights until they try to bring a claim. Research by Professor Alexander Colvin of Cornell University in 2017 indicated that an estimated 56.2 per cent of non-union, private sector employees in the US are subject to mandatory employment arbitration procedures. That means approximately 60.1 million workers are already being forced to waive their right to appeal or participate in a class action lawsuit. Many are oblivious.

'Mandatory arbitration has gone from being a practice used by a relatively small segment of employers to something that affects most American workers,' Colvin tells Global Insight. He believes it has insidiously infiltrated employee contracts. 'The practice tended to spread within industries. It started off with the restaurant sector, but research has shown that employers across many industries with the lowest paid workforces now are the most likely to impose mandatory arbitration on their employees. This represents a

dramatic and important shift in how employment rights are enforced. What I'm seeing in the data over the past five-to-six years is that there really has been a breakout of these types of cases.'

A ruling of epic proportions

Recent US Supreme Court rulings have influenced the employment law landscape and demonstrated how contentious mandatory arbitration is in many sectors. In May 2018, in a 5-4 ruling in *Epic Systems Corp v Lewis*, the Court gave the green light to employers to draft employment contracts that effectively remove the rights of employees to collective litigation.

The opinion was authored by Justice Neil Gorsuch, President Donald Trump's pick to replace Justice Antonin Scalia, who died in 2016. Professor Jean Sternlight, an arbitration expert at the University of Nevada, Las Vegas William S Boyd School of Law, says the decision could severely damage employee protections in the US. 'Epic Systems is a very harmful case for employees and I certainly wish it had turned out differently,' she says.

Colvin and others are convinced the ruling could lead to a rise in companies drafting mandatory arbitration procedures that include class action waivers.

The decision came as no surprise to plaintiff lawyer Shannon Liss-Riordan, a partner at Lichten & Liss-Riordan in Boston, who has spent more than two decades fighting for the rights of low-wage workers against major companies across the tech and finance sectors, major airlines and household name brands.

'The Supreme Court started altering the playing field with respect to arbitration and class actions in 2011, with Justice Scalia's decision in *AT&T Mobility LLC v Concepcion*,' she says. 'This went against the tide of numerous decisions before that – many of which I'd been involved in – which had not allowed companies to use arbitration agreements with class waivers to shield themselves from challenges to their systemic legal violation.'

At the time of the ruling, the Court was still closely split on important issues like employee rights. However, after Scalia's death in 2016 and the Senate's refusal to confirm President Obama's nominee while he was still in office, it became increasingly clear that the 2016 presidential election would significantly alter the trajectory of workers' rights in the US. 'On Election Day 2016, I saw what was about to happen to class action practice,' says Liss-Riordan. 'In that sense, the Epic ruling was an epic change that those of us practising in this field forecast in 2016.'

She believes the Epic decision has empowered employers to force workers and consumers into individual arbitration and prevented class actions from proceeding. Plaintiff lawyers have responded in kind. 'This has altered our practice in that for many cases we are taking the companies at their word and filing cases in individual arbitration,' she says.

'We are signing up thousands of individuals and we're bombarding them with arbitration. The companies didn't want that; they just hoped that these cases would go away and that they could just go about their business, violating the law and making a lot of money.'

Fast-food chain Chipotle has learnt this the hard way. It introduced mandatory arbitration clauses into its employee contracts several years ago. The company was facing a class action lawsuit involving tens of thousands of employees alleging wage theft when the Epic decision was handed down last May. Around 2,814 of those plaintiffs had signed mandatory arbitration clauses, thus, as soon as the Supreme Court issued its ruling, the judge presiding over the case was forced to expel these plaintiffs from the suit. Now, more than 150 of these workers have filed requests for arbitration. Chipotle didn't respond to Global Insight's request for comment on the case, but Liss-Riordan says it's just one of a growing number of companies that are facing the backlash against mandatory arbitration policies. 'Many companies jumped on this bandwagon of forced arbitration with class action waivers as their ticket to success and staving off these class action cases,' she says. 'They really didn't mean to invite hundreds or even thousands of individuals to sue them individually in arbitration.'

Paul Bland Jr is Executive Director of Public Justice, a US-based non-profit legal advocacy organisation. He says companies often employ mandatory arbitration clauses in contracts to stave off claims. ‘Arbitration from the corporate perspective – no one says this publicly but this is clearly what’s going on – is really about claim suppression,’ he says.

Bland says mass arbitration claims could be one way to turn the tide against wealthy and powerful corporations. ‘Most people just disappear, but if advocates for workers are able to sign up and lawyer on behalf of large numbers of people, then you can start to turn the enormous costliness of arbitration against the employee.’

Sternlight isn’t convinced other employers will be deterred from using mandatory arbitration, even if the economic rationale indicates otherwise. ‘I believe that employers who want to avoid being sued collectively or in mass claims are going to continue to do their best to write clauses to prohibit both class actions and mass arbitrations,’ she says. ‘As a matter of litigation economics, plaintiff-side attorneys will only rarely be able to identify and represent large numbers of employees with similar claims. Thus, I believe many companies are likely to continue using arbitration to insulate themselves from liability in the employment context.’

Mandatory arbitration in employment contracts is less common outside the US. Some jurisdictions use it sparingly, while in others it is outlawed altogether. Selvamalar Alagaratnam co-heads the Employment Practice Group at Skrine in Kuala Lumpur and is Senior Vice-Chair of the IBA Employment and Industrial Relations Law Committee. She says mandatory arbitration isn’t enforceable in employment contracts in Malaysia. ‘Employees have a statutorily protected right to commence their employment-related disputes in the industrial and labour courts and that right may not be ousted by an arbitration clause.’

Other jurisdictions, however, are seeing such clauses used more frequently. ‘I have seen an increased use of arbitration clauses, especially in senior-level employment contracts in India,’ says Vikram Shroff, Treasurer of the IBA Employment and Industrial Relations Law Committee and head of the HR Law practice at Nishith Desai Associates in Mumbai. ‘The argument being that managerial-level employees do not generally have extensive protection under some of the labour laws and accordingly it should be possible to arbitrate contractual disputes, especially when it does not involve a statutory provision and specific courts set up for protection. In a way, the C-suite employees would also prefer to resolve their employment dispute through arbitration since it accords them confidentiality.’

Manuel Cuevas-Trisán is the former Chief Human Resources Officer for Motorola Solutions in Chicago. Before overseeing the HR function, he worked as the company’s top lawyer and agrees confidentiality can be beneficial to all parties. However, he says more than 20 years of experience has shown him the ‘chilling effect’ that the mandatory arbitration clause can have on a workplace. ‘I’m sure most of my colleagues on the management side would consider my point of view very unorthodox, but I’ve worn not just the legal hat, but also the HR hat and from a governance and an HR perspective, it’s just not a great message to convey,’ he says. ‘It resembles a bad pre-nup, because you’re already contemplating divorce before you’re even married.’

Peter Talibart is Managing Partner of Seyfarth Shaw’s London office and Co-Chair of the IBA Employment and Industrial Relations Law Committee. ‘There’s a focus now on any legal mechanism that’s designed to reduce the ability of an employee to assert legal rights,’ he says, ‘and like NDAs in the UK, arbitration provisions are suddenly being demonised as denying fundamental justice to employees. It is somewhat bizarre that the great interest in alternative dispute resolution of the past few years, for all kinds of good reasons, seems to be in full reverse. This has caused a lot of confusion.’

For Cuevas-Trisán, the most problematic aspect of arbitration clauses is that they lead to a ‘virtual abdication of governance’. All too often, he says, they mask wider problems in the workplace: ‘Claim suppression, broadly speaking, and in the most literal sense, is a consequence but it is not the intent. But when you do it systemically for all claims, that’s where there’s an element of unfortunate suppression, which

may actually limit, especially large employers, from more proactive governance. It doesn't allow you to see where a problem may be brewing. I think that's an undesirable bi-product for employees and employers alike.' Cuevas-Trisán believes such clauses also lead to 'organisational voicelessness', which helps no one. 'An arbitration agreement "kicks the can" to a third party that has no context beyond the dispute at hand,' he says. 'It's the perfect deferral of responsibility, an outsourcing of governance, and it doesn't allow engagement between the compliance function and the employee who has the grievance to resolve the immediate issue and then potentially systemic issues.'

Reigniting debate

The 2018 Epic ruling reignited debate on the enforceability of mandatory arbitration clauses. What plaintiff lawyers like Liss-Riordan perhaps weren't prepared for was the Supreme Court's decision in January 2019 that appeared to go against the grain of its previous rulings favouring arbitration and class action waivers. In *New Prime Inc v Oliveira*, the Court issued a unanimous verdict that arbitration agreements with independent contractor truck drivers are not enforceable under the Federal Arbitration Act (FAA), which regulates both domestic and international arbitration in the US. Justice Gorsuch, who authored the Epic judgment, also drafted this opinion.

The decision has been hailed as one of the biggest wins for employees regarding mandatory arbitration in the Court's history. It's particularly important for workers in America's fast-growing gig economy (See box – Gig economy: a new arbitration battleground). Regardless of *New Prime's* wider influence, it does suggest an intriguing change of tack by the Court, according to Alexander Leventhal, a senior associate at Quinn Emanuel Urquhart & Sullivan. 'It does show some sensitivity to employment law issues and a willingness to apply the carve out in the FAA to employment issues,' he says. 'In some of its prior decisions, the Court has interpreted the FAA in a way that allows the Court to enforce arbitration agreements in most employment contracts. Ultimately, there may be some tension between a "strict construction" of the text of the FAA and a modern policy in favour of arbitration.'

Liss-Riordan hopes the case could prompt a wider re-think of the Court's stance on the FAA. 'Somehow, the FAA has been misconstrued in recent years to be turned against workers, often low-wage workers, who had absolutely no idea what rights they were giving up when they took the job. I think that's just a perverse application of this law that it was never intended to have.'

On 7 January, the Ontario Court of Appeal in Canada ruled that an arbitration clause used by Uber in a delivery driver's contract is unenforceable and amounts to 'illegal contracting out of an employment standard'. Liss-Riordan says this alternative take on the class action waiver issue in *Heller v Uber Technologies Inc* may give some pause for thought.

As more cases work their way up to the US Supreme Court, there are growing calls for revising legislation. As with NDAs, legislation to quash pre-dispute arbitration has met with considerable resistance, but the #MeToo movement has played a crucial role in keeping this issue on the agenda. In February 2018, for the first time in about a decade, all 56 US attorney generals joined forces and penned a letter urging Congress to ban mandatory arbitration for workplace sexual harassment. They urged that arbitration, though appropriate in some workplace contexts, should 'not extend to sexual harassment claims'.

Bills proposing a wider ban have failed to gain traction. In September 2018, California's then Governor Jerry Brown vetoed Assembly Bill 3080, which would have banned mandatory pre-dispute arbitration between employers and employees. The bill's critics viewed it as a direct challenge to the Epic ruling and it went far beyond similar proposals by other states, which have tended to prohibit mandatory arbitration only in relation to sexual harassment claims. Brown vetoed the bill on the grounds that it 'plainly violates federal law' and that 'states must follow the Federal Arbitration Act and the Supreme Court's interpretation of that Act'.

It's unclear whether California's new governor, Gavin Newsom, will look to put this proposal back on the table. 'We have not yet seen any movement in the legislature to revive the vetoed bill,' says Rockey. 'Some major tech companies have announced that they will be modifying their employment agreements and guidelines to exclude sexual harassment claims from mandatory arbitration. It remains to be seen whether this kind of self-regulation by industry will be enough to stave off legislative action.'

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Shannon Liss-Riordan

Partner, Lichten & Liss-Riordan, Boston

Perhaps having the buy-in of employees from Silicon Valley's most powerful companies could help the prospects of these bills in the Senate. This is the hope at least for the Forced Arbitration Injustice Repeal (FAIR) Act, which Democrat senators introduced on 28 February with the ringing endorsement of a number of employees from Google and other companies that have fallen foul of mandatory arbitration clauses. The package of bills looks to build on previously proposed legislation and gives workers and consumers, including nursing home residents and members of the military, the right to resolve disputes in courts. 'The new bill will say that in the employment setting you can't have a forced arbitration clause, but you also cannot have a provision separately that bans workers from joining together in a class action – that wasn't in the Arbitration Fairness Act,' says Bland.

Colvin says the new bill shows considerable promise. 'The FAIR Act is important because Federal legislation is the only way to directly address the practice of forced arbitration,' he says. 'State legislative efforts can help but are limited because the courts have held that the FAA pre-empts most state law in this area. The courts themselves have shown a lack of willingness to take major steps to rein in forced arbitration.'

However, according to Colvin, the big question is whether there's sufficient appetite under the Trump administration for this type of law. 'There has been increasing Democratic support for action on forced arbitration as it has become more prominent in the public eye,' he says. 'The problem will be obtaining support in the GOP-controlled Senate and the White House. President Trump has been a liberal user of arbitration in his own organisation's contracts and it is hard to see him being interested in taking away such a powerful tool for businesses to protect themselves against litigation.'

At the Conservative Political Action Conference at the beginning of March, President Trump asserted that he's already looking out for the best interest of US workers. Bland takes a dimmer view of the Trump administration's attitude to employee rights, but is quietly confident that Republicans could support this bill. 'Republican voters are very suspicious of corporate power and of elites. One of the things that President Trump was able to do with unbelievable success in his campaign was to run as if he was an anti-corporate figure,' he says. 'One of the things that is going to become increasingly clear as time goes on is, if you pool Republican voters, they are very strongly supportive of eliminating forced arbitration.'

Bargaining power

In the absence of legislation, others are looking to corporate America to lead by example.

'In the US, I think that market forces tend to be more effective drivers of change, especially because of the war for talent,' says Cuevas-Trisán. 'If high-profile companies like the ones that we've seen take a more evolved approach, and continue to modify their practices voluntarily, then I think the others will see that it's actually more beneficial to not institute those class action waivers and arbitration clauses in agreements – and follow suit.'

In this context, Google's decision to impose an outright ban on mandatory arbitration practices is encouraging, says Christopher Wilkinson, a labour and employment partner at Orrick and former Associate Solicitor at the US Department of Labor. 'I think it will continue to push the tide towards getting rid of these agreements for tech companies,' he says. 'What you will see now is not just the larger companies getting rid of these agreements, it could also spur smaller companies, who were hesitant to do so, into looking more closely at rejecting these types of agreements.'

Although Wilkinson says the Google walkout and the response by the company's management could change attitudes more broadly towards these types of agreements, he hasn't seen much evidence of this outside the tech sector. That said, a similar movement in the legal sector against these types of clauses has already reaped considerable results. Following a backlash on social media launched by student activists from Harvard Law School in 2018, several law firms announced they've removed mandatory arbitration clauses from their summer associate agreements. Orrick; Munger, Tolles & Olson; Skadden, Arps, Slate, Meagher & Flom; and Kirkland & Ellis have all vowed to halt the practice.

Colvin says the students have used their bargaining power effectively to force firms to reassess their position on using these agreements on their own employees. 'It's a very hierarchical profession and these law students have the ability to use their voice to speak out against law firms,' he says. 'In a way, it's very similar to what we've seen with the Google walkout; I think we're seeing more appetite since #MeToo for people to express their interests or concerns publicly.'

Molly Coleman, an organiser with the Pipeline Parity Project and a student at Harvard, is hopeful the campaign can raise greater awareness of this issue among Big Law. 'This is a problem that lawyers have created: lawyers are the ones writing forced arbitration provisions, putting them into contracts and enforcing them on behalf of their clients,' she says.

Wilkinson, whose own firm abandoned the policy in 2018, says the campaign has forced law firms to sit up and take note. 'Certainly among the major law firms this issue is front and centre,' he says. 'I can speak to my firm and to what I know other top firms are thinking about: for the larger firms it really seems like a no-brainer if they want to compete for talent.'

However, Bland is doubtful as to whether this movement can bring wider changes. 'I think it's a great sign and I think many law firms will back down,' he says. 'To the extent that students want to take the next step and say that they don't want the law firm to help corporations do this to their own employees, I'll be much more surprised to see that work.'

It's also worth noting that Google's pledge to ban mandatory arbitration applies to current and future employees, not contractors, which make up a large part of its global workforce. When pressed on this point by Global Insight, a company spokesperson said: 'While we don't control the employment agreements of our extended workforce, we will be notifying our suppliers of the change so that they can consider whether a similar approach is appropriate for them.'

We will also be removing workplace arbitration requirements from our own agreements with our extended workforce.'

Clearly, it will take steps like these and more if we're to see meaningful change. Coleman hopes her group's focus on changing Big Law's views on mandatory arbitration will make more companies realise that such policies don't serve the interests of employees, employers or indeed any third parties with which they work. 'In focusing on law firms' use of forced arbitration in their own employment contracts, we're hoping to create a culture within the legal profession that understands that the use of forced arbitration is unconscionable in all circumstances,' she says. 'Much like how attorneys started refusing to work for tobacco companies, even when their firms represented those companies, we hope to change the culture so that no lawyer feels comfortable devoting their billable hours to enforcing these clauses.'