The Performance Review Podcast
Greenberg Traurig, LLP
Episode 30

Speaker 1 (00:00):

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Michael Wertheim (00:18):

Welcome back to The Performance Review. You're here with your hosts Michael Wertheim and Brian Kelly from Greenberg Traurig. Today we are talking arbitration. We hinted to this on the last episode, and after a brief hiatus, we're back, baby.

(00:33):

Arbitration, Brian. Our predecessors talked about arbitration in 2021 and in 2023. Why in 2025 are we talking about it again? Because like many things, in California labor and employment law, the landscape is always changing. We thought this would be a good time to jump back into the world of arbitration to explain what it is, why you might arbitrate, and how you might do that. You're not saying anything, so I'm just going to keep going here, Brian.

Brian Kelly (01:02):

You're on a roll, Michael, and I don't want to interfere with that. Please, have at it.

Michael Wertheim (01:08):

That's why this team really works because we don't get in each other's way, it's perfect. Here's the deal with arbitration in the last couple of years. There was a push in California within Assembly Bill 51 that was going to make mandatory arbitration unlawful, meaning that you could not, as a condition of employment, require your employees to resolve disputes with the company through arbitration. That was permanently enjoined by the 9th Circuit. At the federal level, the Court of Appeals at the 9th Circuit said, "That is preempted by the Federal Arbitration Act, so California, you can't do that." That was essentially basically struck down.

(01:47):

Where we're at now, you can, as a condition of employment, require mandatory arbitration under the Federal Arbitration Act. That's a big deal. I know we're starting with the legal points. Usually, I like to go the other way and do building blocks of simplicity towards more complexity. But that complexity, I think is important to inform why we're talking about this again, is that arbitration's back. Arbitration is still on the menu. Employers in California need to know all about it.

(02:16):

The other thing is there's been some cases that have gone all the way up to the US Supreme Court that deal with certain exemptions to the Federal Arbitration Act. While the Federal Arbitration Act still applies and can preempt certain things in California, you got to make sure that it, the Federal Arbitration Act applies. A lot to go through here. Take a breath.

(02:37):

Now, let's talk about the simplicity of arbitration. What is it? Now it's your turn, Brian.

Brian Kelly (02:44):

I like starting at the end, Michael. Some of my favorite movies and TV shows, they do that flash-forward, like Lost for instance. Give us a little glimpse of the future before we get all the background, so I appreciate that.

(02:56):

All right, I'll be the basic bro, I'll cover what is arbitration. Arbitration is the most traditional form of private dispute resolution that we have as a country. It's just an alternative to resolving dispute in public court. Arbitration is administered most often by a private organization, like AAA or JAMS, and there's a variety of others, that maintain lists of available arbitrators who would preside over the proceeding. The private organization also promulgates rules for the arbitration and how it will be conduced. Everything from filing cost, to what types of motions can be filed, to discovery rules, so on and so forth. The organizations typically manage the arbitration proceeding, either in whole or in part.

(03:47):

One unique thing about arbitration is that, unlike in a public court setting where you're assigned a judge, parties often select the arbitrator on the basis of their particular substantive expertise. We all know that California employment law is quite substantive, to put it lightly. Arbitrators are usually retired judges or attorneys, and possess that deep knowledge in their particular area. They'll render a decision at the end of the arbitration hearing, which is final and binding on the parties, subject to a limited appellate court review.

(04:23):

Arbitration isn't unique to employment-related disputes, Michael, but as you and I have both seen even over our relatively short careers, it's become increasingly popular for employment-related disputes, especially in a frequent litigation state like California.

Michael Wertheim (04:39):

There's real reason for that, because there's several potential benefits really centered around both the privacy of the proceedings, and the efficiency of the proceedings. Really, for plaintiffs or defendants, there's upside in both of those categories to both sides. But really, at the expedient nature of arbitration, or at least the potential for it to be more expedient, presents tremendous upside for everybody involved. Think about long, protracted litigation that draws out over years, neither side gets resolution if that drags out. Arbitration is one way that parties can hopefully get to a resolution much quicker.

(05:21):

It also allows the parties to have some agency over who their neutral is. The parties can negotiate, and discuss, and agree to a particular arbitrator who will oversee their dispute. That gives some sense of security over knowing, like you said, usually somebody who's a practitioner or maybe even a retired judge who spent their career being neutral, that can present additional upside and may help ameliorate some of the anxiety that comes with litigation.

(05:52):

There are still procedures and rules that the parties will need to follow, both in getting the agreement signed, which we'll talk about, and then also how the actual arbitration will proceed with the rules that it'll follow. But at it's most basic level, arbitration allows employers and employees a private and potentially more efficient way to handle claims between them.

(06:16):

But it's not always perfect. What are some of the drawbacks that you might see in arbitration versus the alternative, which is using taxpayer money and going to court?

Brian Kelly (06:26):

Nothing in life is perfect, so let's talk about some of the cons. The flip side of the coin to expediency is maybe the discovery in arbitration will be less fulsome than you'd get in a court proceeding, although the parties can mutually agree to whatever discovery extend process they want. But baseline, maybe it's a type of dispute where the most fulsome possible discovery process in court could be beneficial to one or both parties.

(06:54):

Additionally, because arbitrators and arbitrations are handled by private organizations, there can be the potential for repeat arbitrations with the same arbitrator on more than one occasion. That can lead, potentially inaccurately, to a perception of unfair bias on behalf of the party that has used that same arbitrator multiple times.

(07:17):

Arbitration is getting a little more expensive in recent years. Not surprising given, again, the volume and increased popularity of it. And there is decreased scope of appellate review. For parties that really want the ability to push back and say, "No, I think we got an unjust result," it's going to be harder to that after an arbitration decision than it would be after a court decision.

(07:42):

From the employer's perspective, you should also be thinking through is a private proceeding always beneficial? There might be certain instances in which you're dealing with a particularly bad faith current or former employee who has a claim to be disingenuous. Holding that potential plaintiff's feet to the fire by having to file a claim in court which is public, maybe the public nature of that claim would discourage the plaintiff from filing it all together. Conversely, maybe having a private forum like arbitration encourages someone to bring a claim they otherwise know is BS.

(08:23):

From the employee's perspective, again, the private nature of the proceeding. Maybe the plaintiff is really eager to get the PR associated with a public court filing. From that perspective, it's just the flip side of the coin of the other consideration.

Michael Wertheim (08:38):

I've talked with plaintiff's counsel and there is this sense that, "Oh, employers always want to push for arbitration and the employee doesn't." It's not true. There's plenty of plaintiff's counsel who have told me, "We like arbitration. It is faster. I don't care if the scope is limited in terms of discovery, we're going to get right to it." And they can press for attorney's fees. They still put some pressure on employers because the employer is paying for the arbitrator. They're getting all the procedural safeguards of the litigation process, but sometimes that forum is the right place for them. And like you said, vice versa. There might be instance where it's not the appropriate manner in which to resolve a dispute. It really depends on the facts of each case, the proclivities of the counsel involved or the particular nature of the dispute.

Brian Kelly (09:26):

I think it's important to call out that not all employment-related claims are arbitrable. I always struggle how to say that word, the Ts and the Rs together. Not all claims are subject to arbitration. There are some important carve-outs, both under federal and state law.

(09:42):

Those would include, most recently and interestingly, sexual assault and sexual harassment disputes and related claims. Now, this is the result of law that was passed under the Biden Administration called the End Forced Arbitration Act. There was a sense arising out of the Me, Too movement that the private nature of arbitration was not shining a bright enough light publicly on really damaging sexual assault and sexual harassment disputes. At the federal level, there's now a prohibition on compelling those types of claims to arbitration.

(10:19):

Other types of claims that are not arbitrable, IE not subject to arbitration, worker's compensation claims, unemployment compensation claims. Administrative charges filed with the Equal Employment Opportunity Commission. Unfair labor practice claims filed with the National Labor Relations Board. And a creature of California's always unique laws, non-individual California Private Attorney General Act claims, PAGA claims. There are interesting considerations, given that PAGA claims are most often brought on a representative basis on behalf of all aggrieved employees. There is a way, that we'll discuss a little later, where the individual and non-individual claims in any PAGA action could potentially be bifurcated with the individual claims going to arbitration and the non-individual claims staying in court.

(11:13):

You are very experienced in one other very important exception to arbitration and that's under the FAA, with respect to transportation workers. Do you want to talk a little bit about that?

Michael Wertheim (11:24):

The Federal Arbitration Act itself has an exception for transportation workers. It's referred to as the Transportation Worker Exemption under that act. Basically, stating that certain categories of workers that are transportation workers are outside of the purview of the FAA. That's existed for a very, very long time, but in recent years, the jurisprudence that's come out around it has to do with, well, who is a transportation worker and how do we define that?

(12:00):

The High Court, the Supreme Court, decided that it isn't just workers who work in the transportation industry. You could work for a transportation-like company or a company that does transportation, say an airline, that doesn't mean you're a transportation worker. The focus is on what the job duties of that particular worker are and it's going to be a case-by-case basis. A number of cases have then followed from that, the lower courts all grappling and wrestling with a very fact-specific inquiry for those workers as to whether they are transportation workers. We don't need to dive into all of that.

(12:35):

But it is a very interesting way that this has developed because if you are a transportation worker, then the FAA could be found to not apply. Well, what does that mean then? It doesn't mean you're not able to arbitrate, because California has its own Arbitration Act. It could very well be the case, an arbitration agreement that was originally purported to be covered under the FAA is still actually covered under the CAA, California's Arbitration Act. You could still end up in arbitration or arbitrate a dispute even if the person is a transportation worker.

(13:11):

Just to follow up the point about PAGA, when we say more to follow on that, that's probably fodder for yet another episode, which we wouldn't have time to get into today. But it's such an interesting, and I would say nerdy area of what we do, that it's worth picking that apart in a deeper dive on a later episode.

Brian Kelly (13:31):

Michael, I think it's cool. Don't diminish what we do. We're cool guys.

Michael Wertheim (13:36):

I have to explain PAGA to my spouse all the time and I know that she loves it. She loves the ins and outs of PAGA. It's a great topic to go through at the dinner table. But that's not what we're talking about, we're still talking about arbitration here.

Brian Kelly (13:48):

All right. If you go through the steps to have your employees be subject to mutual arbitration, you want to make sure that that agreement's going to be enforceable. There are a bunch of potential considerations that courts look at to determine whether an agreement is enforceable or not. Courts break this down by looking at two specific prongs of whether the agreement's enforceable. It's procedural unconscionable and substantive unconscionability. Unconscionability, that's a fun word to say. I like that more than arbitrable.

(14:23):

Let's focus first on procedural unconscionable. What are the factors that a California court might examine to determine whether an agreement is procedurally unconscionable, and therefore unenforceable? First, just basically, how is the agreement presented to the employee? If it's part of an onboarding package, is the agreement a clear, standalone document? Or conversely, is it buried in a tiny, little single provision in small font that's part of a much broader package of documents or agreements that has no reference to arbitration? You can imagine which way a court would say is less procedurally unconscionable.

(15:04):

Further, if you're using an online document signing or review system, are employees required to scroll through all pages of the arbitration agreement before signing? Or is the functionality of the system such that they can just click through the second the screen pops up without having to read through it? You can imagine that requirement for someone to read through would help with the enforceability argument.

(15:30):

To the extent that an employee doesn't have ready access to an online review system or an email copy, is the employer making paper copies available at no cost to the employee to review that way instead? Separately, how long are you giving employees to review the document before requiring them to sign? Are you having their new manager who they're trying to impress stand over their shoulder and say, "Hey, sign this right now so we can get started, otherwise I'm going to hire someone else for the job?" Or are you giving them a couple days to think about signing all of their offer documents, only one of which is the arbitration agreement?

(16:08):

Then finally, under certain circumstances, are you allowing employees to opt-out of the agreement after signing it? That's a topic that's worthy of a whole separate discussion. I think there was a pretty robust look at whether opt-outs were required for a certain period of time prior to the permanent injunction of AB 51. Those are some of the procedural unconscionability elements that courts might consider.

(16:33):

Michael, how about substantive unconscionability?

Michael Wertheim (16:36):

Right. Then the next factor you first look at, well, how is this agreement presented? Thinking of forming a contract, was it fairly formed? Then substantively, will it be administered in a fair way?

(16:48):

I, too, love the word unconscionable. Every time I hear it and I've read briefs all the time using unconscionability and unconscionable, I think about the guy from Princess Bride who says "inconceivable" all the time. I here it in my head as "unconscionable." I want to leave you with that.

(17:04):

But in terms of the substance, this is going to be things like is it a mutual agreement? Does it apply both ways? Are the employer and the employee going to be bound by the same rules, is it lopsided in that way? Were the rules presented to the employee? Which teeters I guess towards whether it was even presented fairly, but the rules themselves, how it's going to be governed. Whether it's the JAMS rules, AAA rules, or run under the California Code of Civil Procedure, are those specific rules allowing the proceedings to be fair?

(17:38):

Meaning, does it, for example, truncate certain deadlines for filing? Does it impact statutes of limitations that would otherwise be available if they didn't arbitrate? Does it allow for at least a minimal amount of discovery for the parties to get what they need to be able to prove their case or defend the case? Who pays for the cost of arbitration? Is this unnecessarily putting pressure on the plaintiff, which might then dissuade participation in the process, or is it employer funded? Are there any waivers that are involved in that process, such as waiving the right to participate in a collective or a class action? Those are serious and significant considerations that would go into an agreement like this. And is the process and is the substance of it fair? Those are really what courts look at.

(18:23):

The bigger picture question, and I like seeing ... Brian, you handle a lot of this on the front end as these agreements get drafted, and discussed, and dispersed. I deal with it then on the backend, when somebody decides to file a lawsuit in court, and we need to either enforce that arbitration, or affirmatively move to file a demand for arbitration. The way I see this is how is this agreement going to be enforced? Either it's moving to compel, or it's affirmatively filing a demand for arbitration. And when challenged, this is exactly the factors that courts go through. They're going to look at the procedural and substantive fairness. It's not necessarily that one factor will dictate everything, it's a sliding scale. That's why I get to write the word unconscionable 17 times in every brief and that's why it's such an important part of my dinner table talk.

Brian Kelly (19:13):

That's the dream.

(19:13):

Some other important points to consider. It goes without saying, but inherent in an arbitration agreement is a waiver of the right to have a jury trial. That's just what it is. Often times, in arbitration, they will make that expressly clear so that there's not an illusion on the employee's part that they somehow still get a jury, despite having to proceed with their claim in private arbitration.

(19:38):

Also, Michael alluded to it, but arbitration, mutual arbitration agreements, especially in California, often and should have class action waivers. It can obviously change the value proposition for both employers and employees with any potential claim, especially in those claims that are most often brought in a class action form, like wage an hour.

(19:58):

Then of course, we have our good old PAGA. Michael, I promise I won't go too far into the waters here. But it's clear under California law at the moment, always changing, but that PAGA representative claims, meaning claims that are brought not only on behalf of the named PAGA plaintiff, but on behalf of all other aggrieved employees, those representative claims cannot be subject to arbitration. However, the named plaintiff's individual claim underlying the PAGA representative claim can be subject to arbitration, so long as the arbitration agreement clearly calls that out. An arbitration agreement should also call out the fact that, because the individual claim is subject to arbitration, it will be severed from the representative claim, and the representative claim should be staid in court pending the outcome of the arbitration of the individual claim. That's very procedural, very wonky. Cool, not nerdy. But these are the down in the weeds things that you need to consider in order to have a fully realized arbitration agreement.

(21:01):

All right. In conclusion, arbitration agreements offer a potentially more efficient and cost-effective way for both sides to adjudicate potential claims relating to employment, subject to certain exclusions and enforceability concerns. We very possibly may be revisiting the same topic two years from now, for a fourth time on this podcast, if there are further developments that warrant our listeners' attention.

(21:25):

Michael, most importantly, let's turn to Pop Culture Corner and examine how does arbitration interact with some of our favorite pop culture moments?

Michael Wertheim (21:35):

Right. I would say there's a real hole in the market for a good movie about arbitration, or a movie that takes place in arbitration. It makes you then wonder, how could the course of history be changed if certain major courtroom scenes had been in the arbitral forum rather than done in court, with that public bravado?

(21:57):

You think of A Few Good Men with that scene, "You can't handle the truth!" Does that same soliloquy ring? Does it hit as hard in the four corners of a conference room at arbitration proceeding? Do you have these great pop culture moments like in Liar, Liar, where of Jim Carrey is a lawyer who cannot tell a lie and has to present his case without lying? He says, "Objection, Your Honor!" The court says, "On what grounds?" He says, "It's devastating to my case!" You get all those comedic moments for that one. Does that hit the same in arbitration?

Brian Kelly (22:33):

I don't know. This might be a deep cut, but from my childhood, Miracle on 34th Street, Kris Kringle famously provides key testimony that causes the judge, the jury, the packed courthouse to believe in Santa. If that testimony was given in a private arbitration room, what is Santa's status at large in society today? I don't know. Maybe we've all collectively lost our belief. Is that a good or a bad thing? I'm not here to say, but just a question I'm posing.

(23:02):

Then, a movie like Philadelphia. Tom Hanks, terrific performance in front of a packed courthouse, eyes of the nation upon him. If it's in private arbitration, does Tom Hanks win the Academy Award for that performance? I don't know. If he's not winning the Academy Award for that, is he getting the role for Forrest Gump? I don't know. If he's not getting the role for Forrest Gump, do we have Bubba Gump Shrimp Co Restaurants all over the United States today?

(23:28):

These are unknowable questions. But perhaps there might have been more expedient and cost-effective resolutions in all of the above. I'll leave you with that.

Michael Wertheim (23:39):

Schrodinger's arbitration, whether it could have changed the course of history. But importantly, arbitration can change the course of your history with respect to your company or with your employees. We're always happy to field questions about it because it's such an important topic. We hope that you enjoyed this episode. We'll see you next time on The Performance Review.