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Time Well Spent
Session 4:

Arbitration of Wage and Hour Claims

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Seyfarth Shaw LLP

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Agenda

1 | Arbitration of Wage and Hour Claims: The Basics

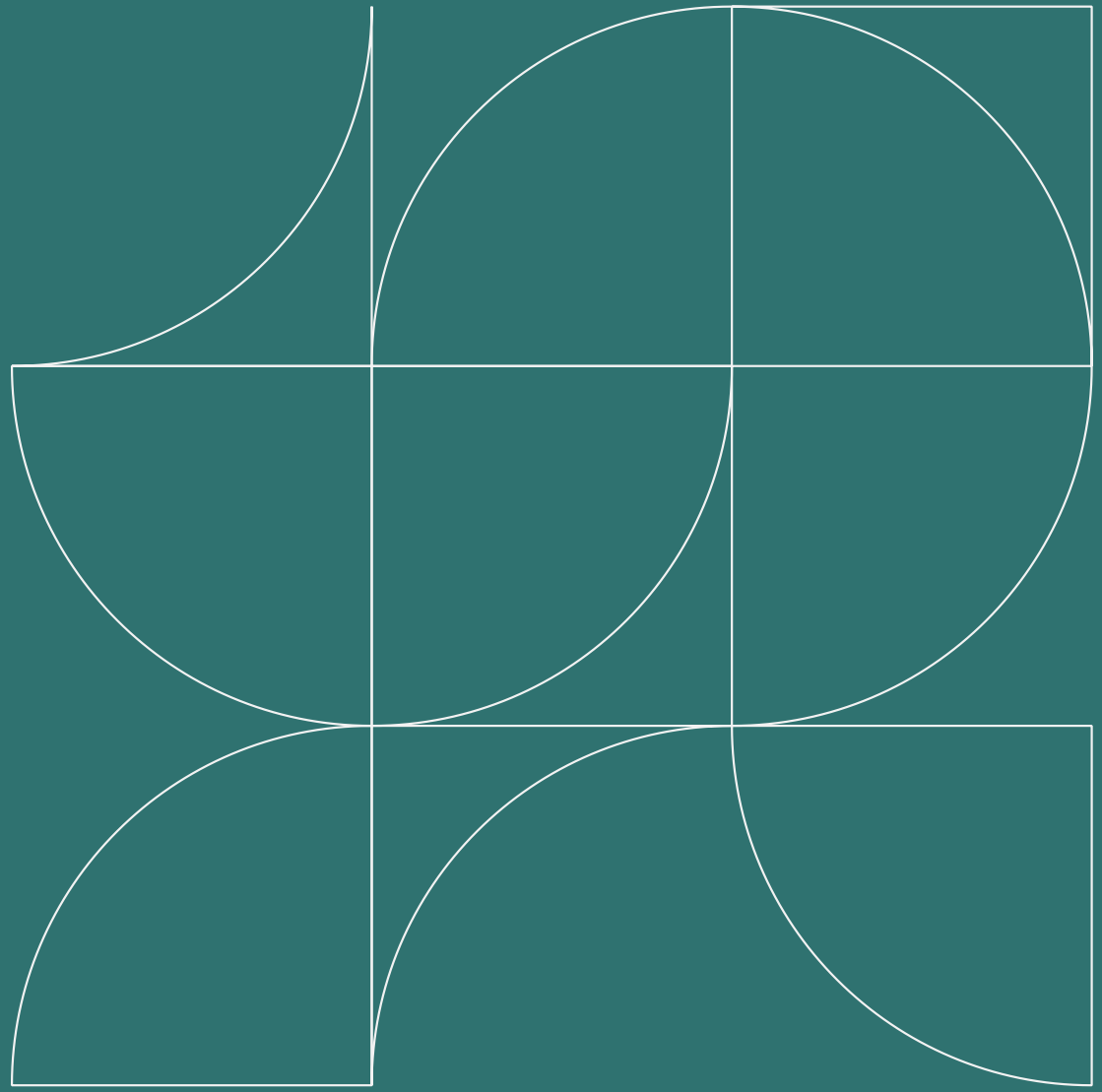
2 | California Nuances

3 | Issuance of Notice to Employees with Arbitration Agreements

4 | Mass Arbitration

5 | Upcoming Webinars

Arbitration of Wage and Hour Claims: The Basics



Why or Why Not?

Why Arbitration?

- Private and (more) confidential than actions in court
- Allow for parties to select venue, choice of law
- Allow for resolution of disputes on an individual basis and waivers of class or collective actions
- Arbitrator selection
- May be less expensive

Why Not?

- Arbitrator deference, not bound by precedent
- Limited pre-trial discovery and motion practice
- Limited ability to dispose of case before hearing on basis of statutory defenses (e.g., exemptions, employer coverage, good faith)

Enforceability of Arbitration Agreements

- Applicable law: The **Federal Arbitration Act (FAA)** generally applies to employment contracts. *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001).
  - **States** also have their own arbitration acts providing procedures Similar to FAA.
  - FAA's "core substantive requirement" applies in federal and state court. *Southland Corp. v. Keating*, 465 U.S. 1, 12-16 (1984).
- Class and collective action waivers in arbitration agreements are enforceable in FLSA actions. *Epic Sys. Corp. v. Lewis.,* 138 S.Ct. 1612 (2018).
- FAA does not apply to transportation workers. *Circuit City v. Adams*; *New Prime Inc. v. Oliveira,* 139 S.Ct. 532 (2019).
- FAA allows employees to avoid arbitration agreements by asserting generally applicable contract defenses. *E.g.,* fraud, duress, unconscionability. Cannot be a defense that applies only to an agreement to arbitrate.
- Formation Issues: Is there an agreement to arbitrate?

Recent Developments

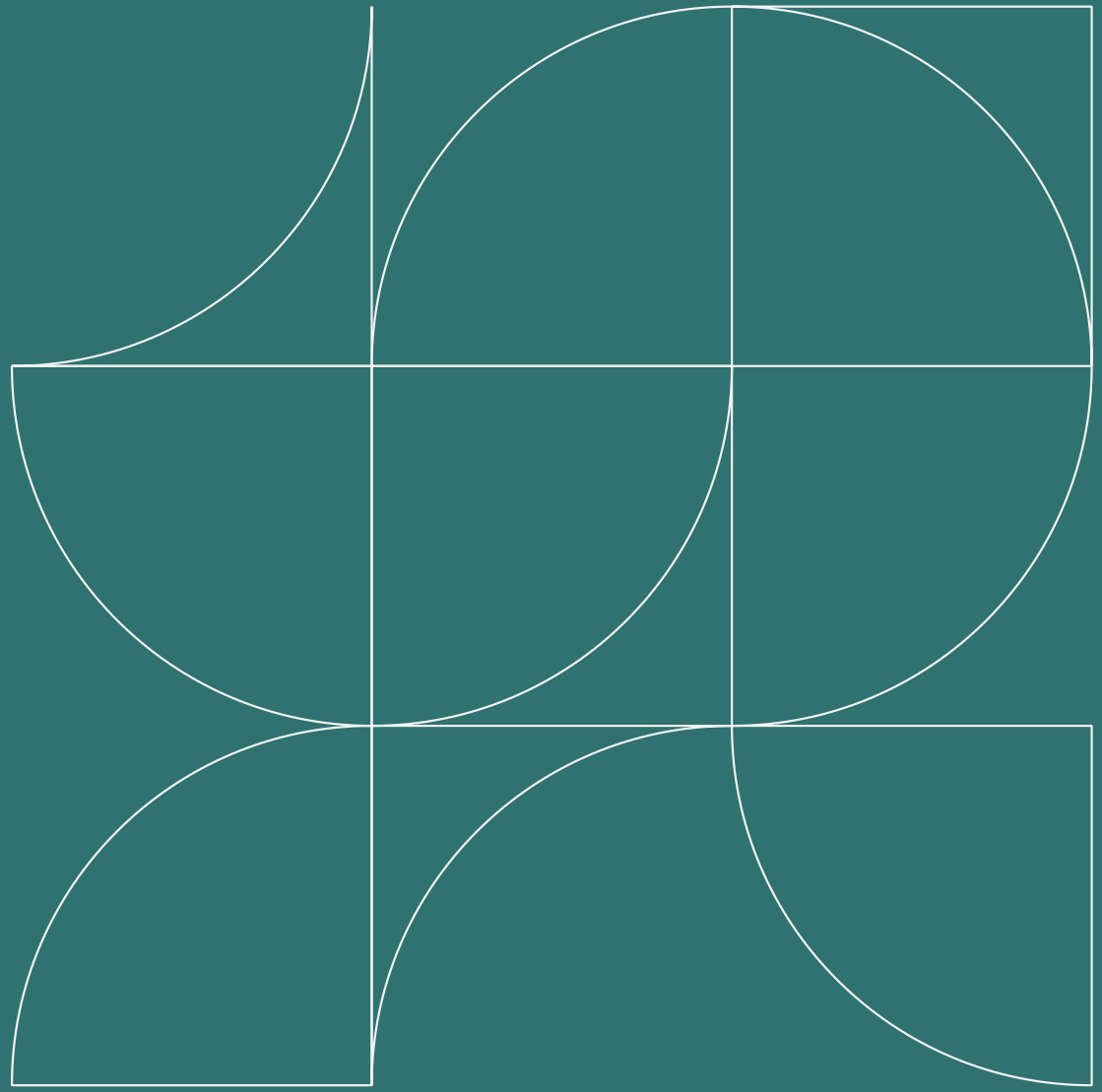
Is SCOTUS Souring on Arbitration?

- *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019):
  - Whether the transportation worker exclusion applies is a question for courts, not arbitrators
  - Exclusion for transportation workers applies to independent contractors

- *Southwest Airlines Co. v. Saxon*, 142 S.Ct. 1783 (2022): airplane cargo loaders were a “class of workers” engaged in interstate commerce when they loaded cargo on and off airplanes; exclusion therefore applies.

- In September 2023, the Supreme Court agreed to review the Second Circuit’s decision in *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.3th 655 (2d Cir. 2022), which found bakery delivery truck drivers were not transportation workers who fell within the FAA exclusion.

California Nuances



Arbitration & PAGA

Pre-*Viking River Cruises:* PAGA waivers unenforceable

Viking River Cruises v. Moriana: PAGA waivers unenforceable but divided PAGA claims into individual and non-individual components

***Adolph v. Uber Technologies*: Arbitration of individual PAGA claim does not automatically divest employee of standing to pursue non-individual claim**

California Peculiarities

- AB 51 (adding Labor Code § 432.6 and Government Code § 12953)
  - Made it unlawful to require arbitration agreements as a condition of employment, continued employment, or receipt of employment-related benefit.
- Code of Civil Procedure §§ 1281.97, 1281.98, and 1281.99
  - Any fees and costs owed before or during arbitration must be paid within 30 days after the due date or there is waiver.
- SB 365 (amending Code of Civil Procedure § 1294)
  - No automatic stay by appealing order denying motion to compel arbitration

Transportation Exemption

Saxon v. Southwest Airlines

Cargo loaders who physically load and unload cargo on and off planes that travel interstate are transportation workers

Carmona v. Domino's Pizza, LLC

Last-mile drivers who transport products to franchisees and do not cross state lines are transportation workers

If FAA Does Not Apply

Class Action Waivers Harder to Enforce

- If FAA doesn't apply, then *Gentry v. Superior Court* is not preempted, and there is a very high bar for class action waivers to be enforceable.

Claims for Unpaid Wages Can Proceed in Court

- Labor Code §229 permits claims for unpaid wages to proceed in court even if there is an arbitration agreement.

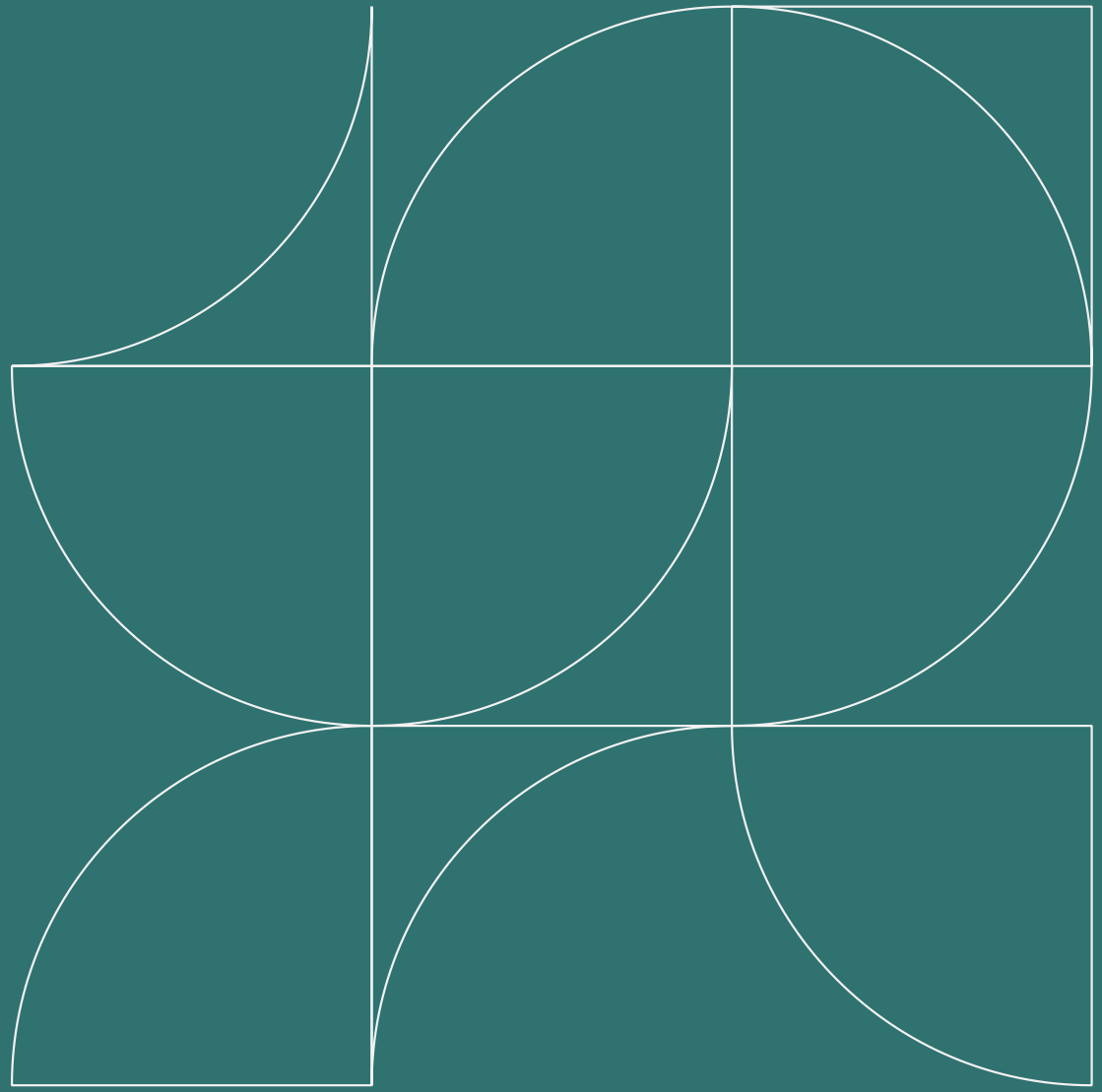
Mandatory Arbitration Agreements Unlawful

- If FAA doesn't apply, then AB 51 is not preempted, and mandatory arbitration agreements are unlawful and subject to penalties.

No Right to Arbitrate Individual PAGA Claims

- If FAA doesn't apply, then *Viking River Cruises v. Moriana* does not apply, and there is no division of individual and non-individual PAGA claims, with the former being arbitrable.

Issuance of Notice to Employees with Arbitration Agreements



Issuance of Notice: District Courts Split

- FLSA Two-Step Certification Process:
  – Courts routinely grant conditional certification and authorize issuance of notice to potential opt-in plaintiffs.

- This creates a dilemma: Do employees who agreed to arbitrate their claims have the right to receive notice of pending litigation?

- Pre-2019, district courts took divergent approaches:
  - Some district courts excluded employees with signed arbitration agreements from receiving notice.
  - Other courts issued notice to plaintiffs with arbitration agreements on the theory that they have a “right to receive notice” of potential FLSA claims filed against their employer.
  - Still other courts issued notice to employees with arbitration agreements on the ground that those agreements might prove to be unenforceable.

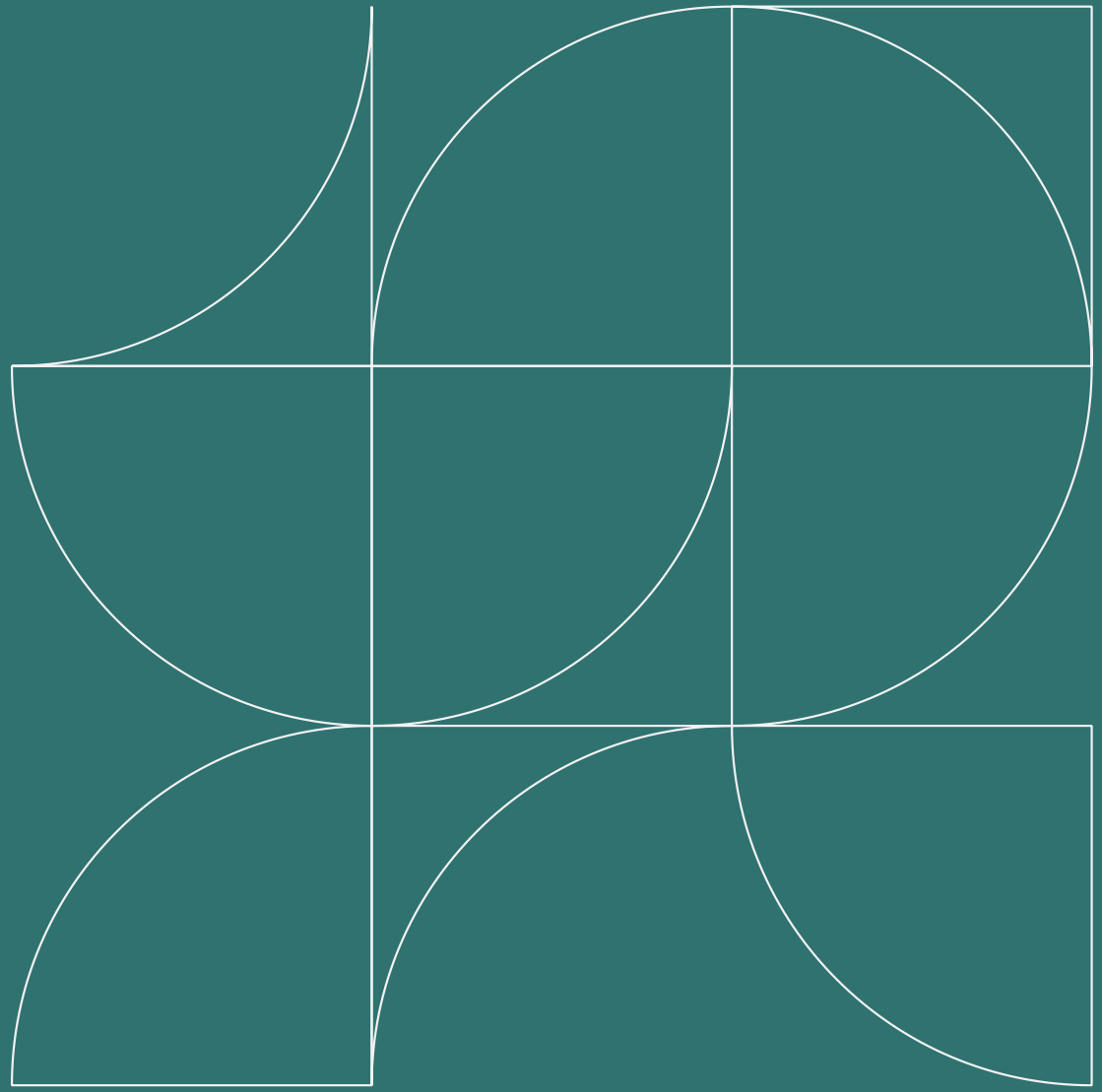
Circuit Courts Begin to Address FLSA Notice Issue

- ***In re JPMorgan Chase & Co.,*** 916 F.3d 494 (5th Cir. 2019):
  - Fifth Circuit becomes first federal appellate court to weigh in.
  - Concludes that courts may not send notice to an employee with a valid arbitration agreement unless the record shows that nothing in the agreement would prohibit the employee from participating in the collective action.
  - Rejects the "right-to-notice" theory; interprets Supreme Court's decision in *Hoffman-La Roche v. Sperling*, 493 U.S. 165 (1989), narrowly, reasoning that *Sperling* "nowhere suggests that employees have a right to receive notice of potential FLSA claims."
  - Where existence of agreement to arbitrate is disputed, employer must prove existence by a preponderance of the evidence.
  - Court should permit submission of additional evidence.
- ***Bigger v. Facebook, Inc.,*** 947 F.3d 1043 (7th Cir. 2020):
  - Similar holding to *JPMorgan*, but different emphasis
  - Concludes that courts may authorize notice to employees with alleged arbitration agreements unless either (1) no plaintiff contests the existence or validity of the arbitration agreement, or (2) after discovery, the employer establishes the existence of a valid arbitration agreement by a preponderance of the evidence.
  - Court may not authorize notice where employer shows existence of valid arbitration agreement.
  - Court must allow submission of evidence to resolve disputes.

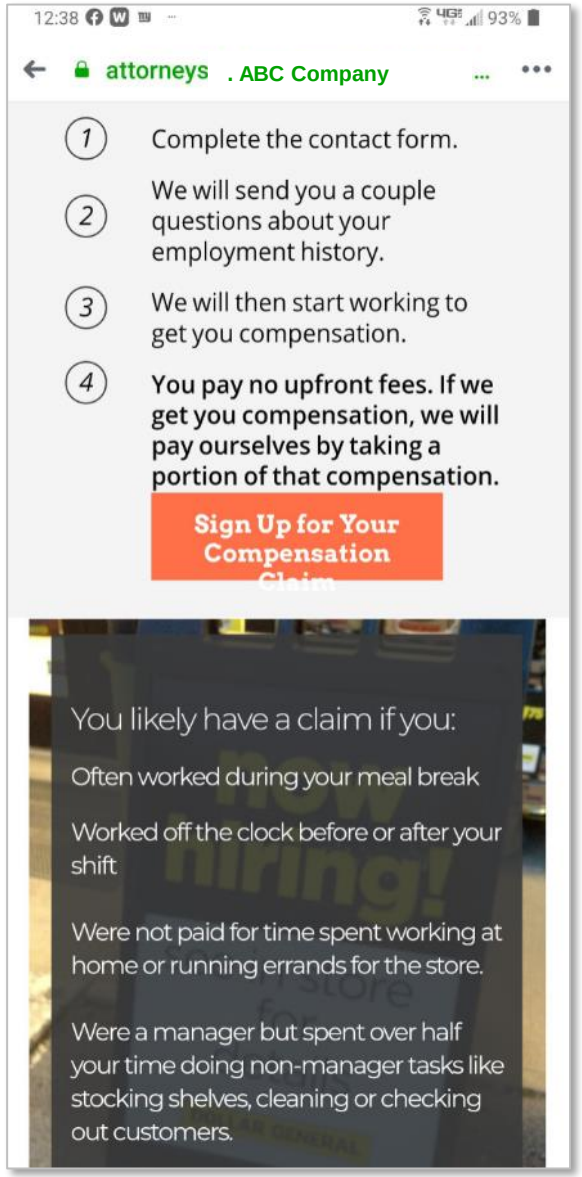
Recent Developments

- ***Clark v. A&L Homecare & Training Ctr., LLC*,** 68 F.4th 1003 (6th Cir. 2023):
  - Court addresses arbitration issue in case deciding what standard should apply to courts' determination of whether to issue notice in FLSA cases.
  - Trial court granted conditional certification but refused to send notice to employees with signed arbitration agreements – both parties appealed.
  - Sixth Circuit rejected notion that courts should determine existence of arbitration agreements by preponderance of the evidence, disagreeing with *JPMorgan* and *Bigger.*
  - Still, held that arbitration agreements must be considered at conditional certification stage just like any other defenses that may impact similarly-situated analysis; rejected argument that arbitration agreements are "off limits."
  - Evidence regarding arbitration agreements should be considered with all other evidence in determining whether plaintiffs have established a strong likelihood of similarity.

Mass Arbitration



Judo from the Plaintiffs' Bar



The Bind

- AAA/JAMS
  - Require payment of filing fees for all cases
  - New fee schedule only slight improvement
  - Under pressure from state AGs
- California
  - SB707: arbitration invoices must be paid promptly or else Draconian penalties

Who Should Worry?

- Companies with
  - Large number of independent contractors
  - Large number of employees in same role
  - Well-known brands

- Retail
- Manufacturing
- Health care
- Hospitality
- Financial services

Solutions?

IMPORTANT CAUTIONS

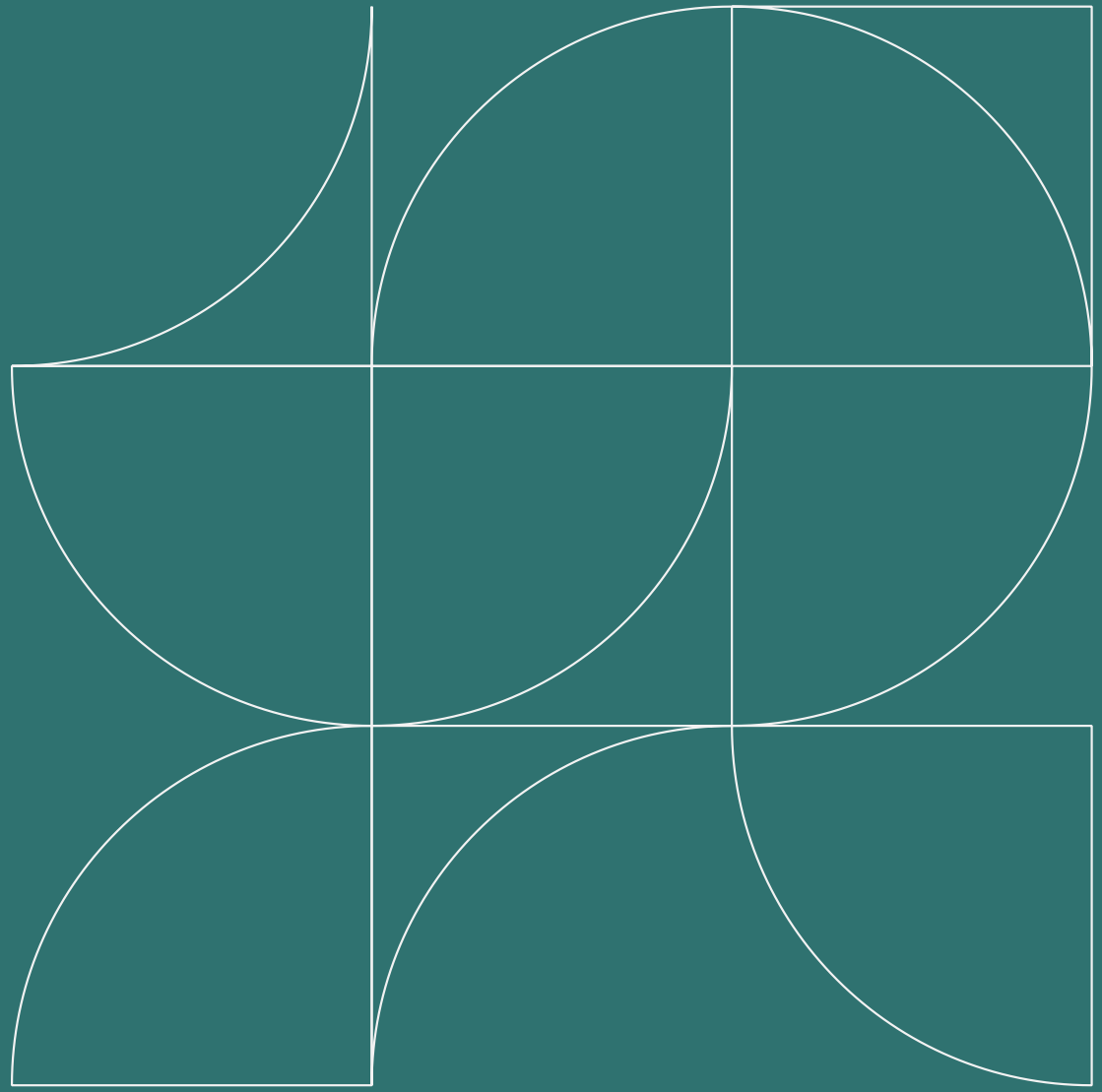
- Potential revisions are legally untested
- Each has benefits and risks
- Some might render entire arbitration agreement unenforceable

Solutions?

Revision options (but see previous slide!!):

1. Require pre-arbitration direct conciliation
2. Forbid cookie-cutter arbitration demands
3. Require special procedures for mass arbitration
4. Use alternative arbitration provider
5. Allow employer to rescind or waive arbitration if faced with a portfolio of claims
6. Increase claimant share of arbitration cost
7. Carve out types of claims most likely to give rise to mass arbitration
8. Carve out small claims

CLE Code




Upcoming Webinars

Webinar Series . . .

1 | Defeating or Limiting Plaintiffs' Motions to Distribute Collective Action Notice

2 | Winning the Battle over Class Action Certification and Collective Action Decertification

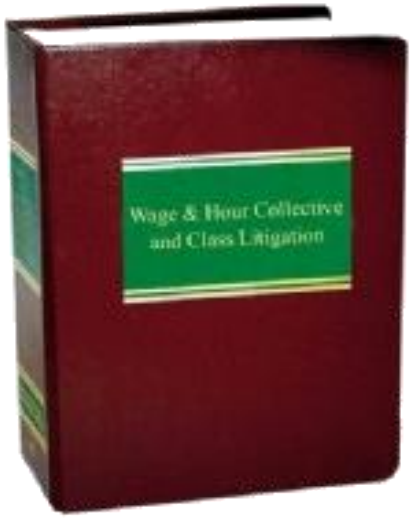
3 | The Rise of Mandatory Arbitration Programs

Still to come…

4 | Developing and Defending Exempt Status Classifications

5 | The Shifting Concept of Employment

6 | What is "Work?"



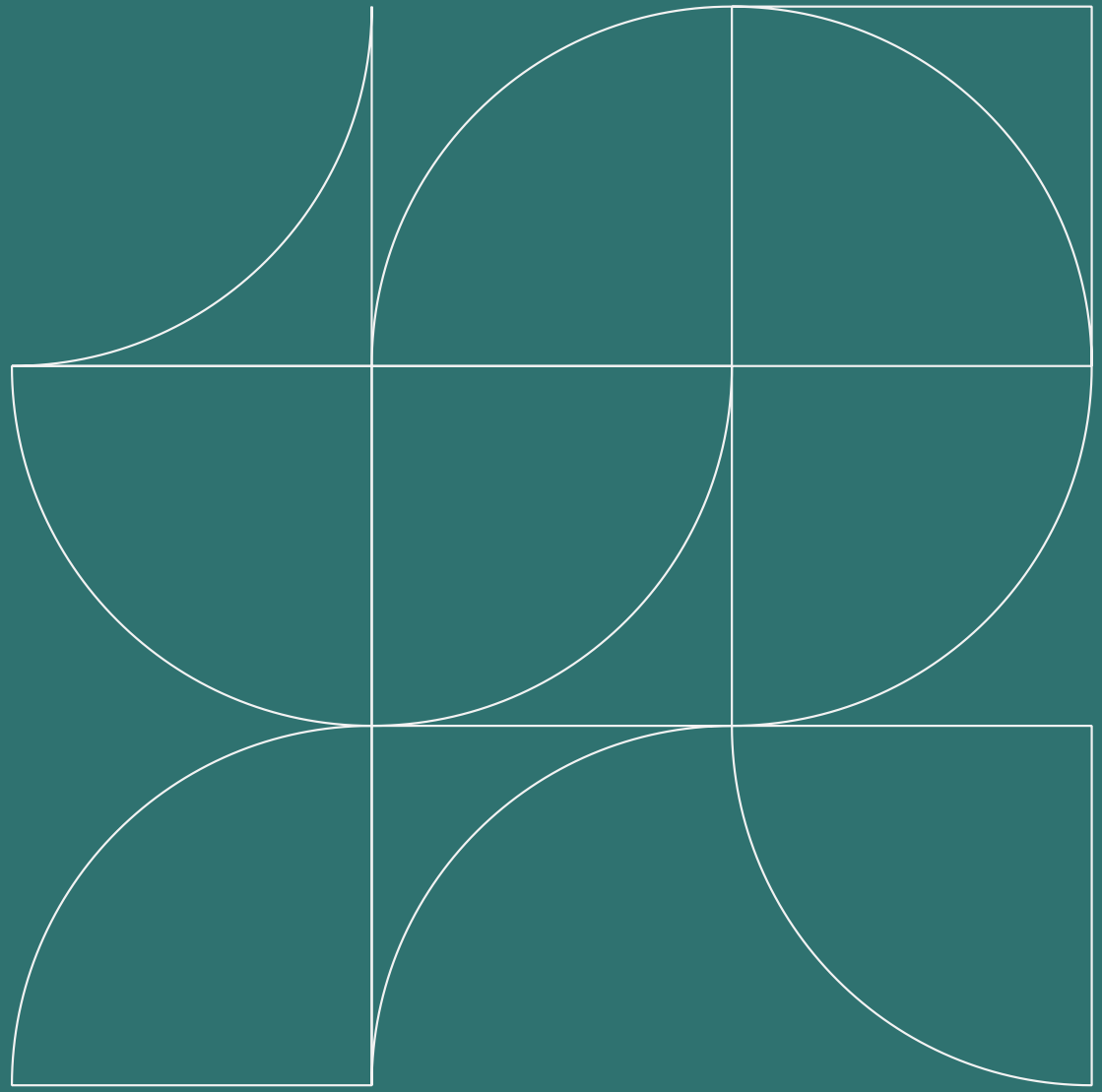
The Authoritative Wage & Hour Litigation Treatise

If you don't already have a copy of the treatise, the book can be purchased here:

https://www.lawcatalog.com/wage-hour-collective-and-class-litigation.html

The order link will be provided in our webinar follow up materials, or please reach out to your favorite Seyfarth attorney to order a copy.

Questions?



Thank You

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