



Half an Hour for Health Care

Part 4: Best Practices in Arbitration Agreements for Health Care Employers

October 30, 2025

Seyfarth Shaw LLP

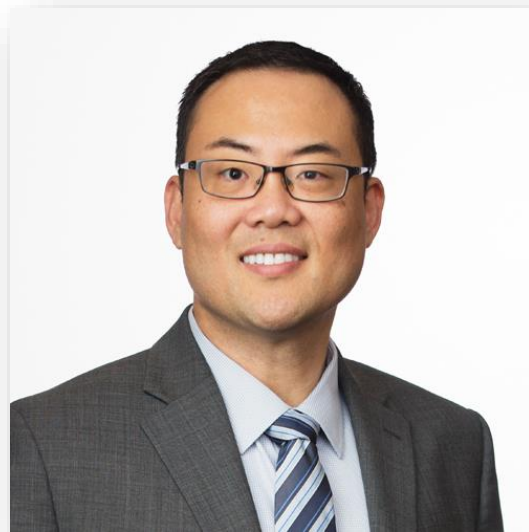
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Speakers



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Agenda

- 1 | Advantages and disadvantages of arbitration agreements in the health care context;
- 2 | Essential terms to include in arbitration agreements; and
- 3 | Roll-out considerations for new or revised agreements



A close-up photograph of a medical stethoscope with a black tube and silver chest piece, resting on a brown canvas medical bag. The bag has several metal buckles and straps. In the background, a white lab coat is visible, and a portion of a black dial with white markings is seen in the upper right corner. The lighting is soft, creating gentle shadows.

Pros and Cons of arbitration agreements

Advantages of arbitration agreements

- Reduce exposure to multi-plaintiff wage and hour suits
 - *Epic Systems Corp. V. Lewis* held mandatory arbitration agreements with class and collective action waivers are enforceable
 - Practical effect is that employers can prevent employees from bringing wage and hour class/collective actions altogether
- Faster, more efficient decisions
 - Quicker resolution
 - Less formal discovery
 - Less motion practice
- Confidentiality
- More predictable outcomes, as decisions are made by the arbitrator rather than unpredictable juries

Disadvantages of arbitration agreements

- Risk of legislative or legal change
 - Plaintiff’s counsel and California courts are hostile to arbitration
 - Asserting “headless” / representative-only PAGA actions
 - Unconscionability challenges
 - Disputing execution of agreement
 - “Me Too” laws limit arbitration of complaints that allege sexual harassment
 - California attempted to ban employers from mandating arbitration, but this attempt was preempted by the Ninth Circuit in *U.S. Chamber of Commerce v. Bonta*
- Potential for many individual actions instead of single class action
- Substantial arbitration costs
- Reduced chance of prevailing on a dispositive motion
- Limited appellate review
- Morale risk (unions/employees may perceive arbitration as “unfair”)
- PAGA claims cannot be waived



Essential terms

Enforceability Requirements

- Numerous requirements imposed by California courts in *Armendariz*
 - The employee can not bear any costs above that which he or she would have to pay in court.
 - Arbitration must provide for “adequate” discovery.
 - Provide for all types of relief that would otherwise be available in court.
 - Require a written arbitration award.
 - Provide a neutral arbitrator.
 - Mutual obligations to arbitrate claims.
 - etc...

Class / Collective Action Waiver

- Main benefit of arbitration agreement is to waive class or collective actions
 - We strongly recommend including a comprehensive waiver of class and collective actions
 - Employer may still face liability for “representative” PAGA actions, but individual PAGA claims can be arbitrated.
 - California Supreme Court granted review of *Leeper v. Shipt*, which will decide whether a Plaintiff can bring a “headless” or representative-only PAGA claim.

Roll-out considerations

Implementation Considerations

- Determine scope of arbitration program
 - Which categories of employees will be covered?
 - Will the agreement be mandatory or voluntary?
- Develop a communication plan to explain the change to current employees.
 - Provide FAQs, trainings, and/or webinars.
 - Focus on fairness, neutrality, and access to relief
- Integrate arbitration agreement with existing policies and agreements
 - *E.g.*, collective bargaining agreements, staffing agency contracts, travel nurse contracts, etc..

Consider How to Prove Employees Signed the Agreement

- Increasingly, Plaintiffs are challenging the validity of the signature on the arbitration agreement.
- If employee challenges the authenticity of the signature, the employer must present evidence (in the form of a declaration and/or witness testimony) that
 - the employee signed the agreement; and
 - the employee understood they were signing an arbitration agreement.



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