

UNITING LEGAL COMMUNITIES TO RECOGNIZE EXCELLENCE

Employment  
Arbitration  
Agreements: New  
Strategies After the  
Supreme Court Spoke

By Lori A. Bowman, Esq.  
Ogletree Deakins (Los Angeles)



# Employment Arbitration Agreements

- Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018)
  - Arbitration agreements providing for individualized proceedings and waiving the right to participate in class/collective actions are enforceable and are not barred by Section 7 of the NLRA.
  - FAA mandates the enforcement of arbitration agreements and the NLRA does not override that mandate.
  - “Concerted activity” in the NLRA simply refers to the ability of workers to exercise their rights to free association in the workplace.



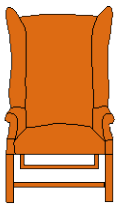
# Employment Arbitration Agreements

- Class Action Waivers: Now What?
  - Add waivers to arbitration agreements.
  - Consider adopting arbitration agreements by weighing the benefits of avoiding risk of class/collection actions with the downsides of arbitration.
  - Consider removing opt-out provisions from agreements.
  - Plan for claims under state statutes such as California's PAGA which deputize private parties to enforce state wage laws through quasi-class actions that seek to recover penalties.



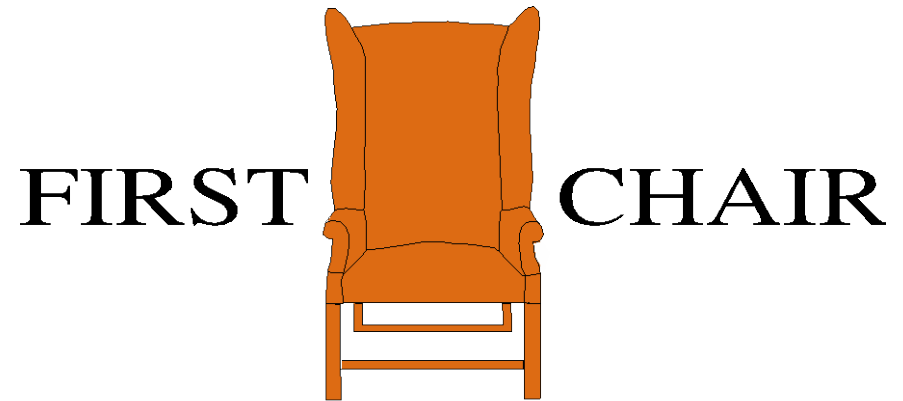
# Employment Arbitration Agreements

- Plan for cases mixing ordinary employment claims with PAGA-type claims; for example, staying all claims not subject to arbitration.
- Arbitration and #metoo
  - Federal Ending Forced Arbitration of Sexual Harassment Act of 2017
  - Proposed state regulation of employment arbitration
- Planning for other challenges to Arbitration Program
  - Confidentiality
  - Selection of neutral arbitrator
  - Adequate discovery



# Employment Arbitration Agreements

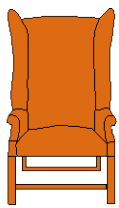
- Written award
- All relief available in court
- No additional fees and costs
- No shortened statute of limitations
- Ability to demonstrate employees received and agreed to arbitration agreements and amendments



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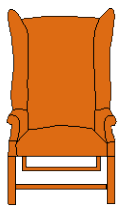
# Sexual Harassment: What Should Employers Do Now?

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# Sexual Harassment: What Should Employers Do Now?

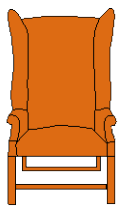
- Recent explosion in high profile sexual harassment scandals
- Increased attention from EEOC; 2016 Task Force findings:
  - Remains persistent problem
  - Goes unreported
  - Is a compelling business case to stop and prevent
  - Starts at top
  - Must change traditional, legally focused training: respectful workplaces



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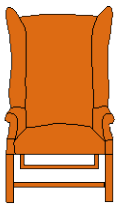
- Examples of statutory changes
  - New Jersey and other states considering bans or limits on secret settlements
  - California proposing to extend statute of limitations, broaden definition of employer to include “producer, director investor;” make supervisors personally liable for retaliation
  - Washington enacted prohibition on non-disclosure agreements





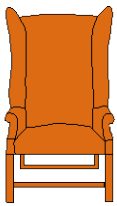
# Sexual Harassment: What Should Employers Do Now?

- Best Practices
  - Set proper tone in workplace.
  - Maintain workable sex harassment policy with at least two avenues of complaint.
    - tEQuitable, Callisto, Vault, etc.
  - Train senior leaders, managers and employees.
    - Avoid cheap, off-the-shelf training videos and software.
    - Have small-group sessions, deep look at organizational culture and frequent follow-up.



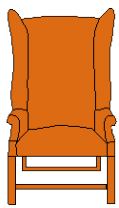
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- Key Features of Investigative Process
  - Timeliness
  - Fairness
  - Thoroughness



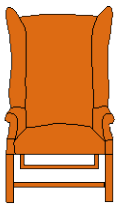
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- Events that trigger investigation
- Respond adequately to complaints against senior managers and top producers
- Planning Investigation
  - Identify issues
  - Dissemination of information
  - Appointment of Investigator
  - Temporary remedial measures



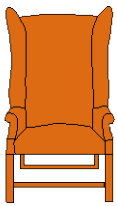
# Sexual Harassment: What Should Employers Do Now?

- Commencement of investigation
- Employee Interviews
  - Preparation
  - Who should be present?
  - Where should they be conducted?
  - Disclosures to persons being interviewed
  - Confidentiality



# Sexual Harassment: What Should Employers Do Now?

- Interview techniques
- Dealing with uncooperative employee
- Documenting interviews
- Evaluating evidence



# Sexual Harassment: What Should Employers Do Now?

- Documenting investigation
- Assessing results and determining appropriate action
- Communicating results
- Do not retaliate