Podcast

# MYR 2024: Trends + Developments in the Arbitration Space

By Scott P. Jang & Corey Donovan Tracey

July 24, 2024

## Meet the Authors


### Scott P. Jang
Principal
(415) 394-9400
Scott.Jang@jacksonlewis.com



### Corey Donovan Tracey
(She/Her)
Principal
(216) 750-0404
corey.tracey@jacksonlewis.com


## Details

July 24, 2024

**By almost any measure, 2024 is a memorable year for employment and labor law — and it's only halfway done. Our timely report, Mid-Year 2024: Now + Next, takes a closer look at the recent rules, regulations and rulings affecting employers today, the rest of the year and beyond.**

## Transcript

*Welcome to Jackson Lewis's podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?*

*No matter the month or year, employers can count on one thing, changes in workplace law. Having reached the midway point of the year, 2024 has proven to be no exception, with many significant changes and potential challenges ahead for employers. What follows is one of a collection of concise programs as We get work™; the podcast provides the accompanying voice of the Jackson Lewis 2024 Mid-Year Report, bringing you up-to-date legislative regulatory and litigation insights that are taking place now and what you can expect next in the second half of this year. We invite you and others at your organization to experience the report in full on JacksonLewis.com or listen to the podcast series on whichever streaming platform you turn to for compelling content. Thank you for joining.*

**Scott P. Jang**
***Principal, Arbitration Advice and Counsel Core Group***

We're here to discuss trends and developments that we're seeing in the arbitration space. And I think that we can distill them down to three areas of particular focus:

One is whether to stay or dismiss a case after a motion to compel arbitration has been granted.

A second is the contours of the so-called transportation worker exemption to the Federal Arbitration Act.

And a third area, which is determining when a dispute arises for the purposes of determining whether or not the ending force arbitration of sexual assault and sexual harassment act has been triggered.

With that said, Corey, do you want to kick us off and start us with a discussion of the *Smith v. Spizzirri* case?

**Corey Donovan Tracey**
***Principal, Arbitration Advice and Counsel Core Group***

Yes, thanks Scott. So, we have a Supreme Court decision that came out this year in May. Interestingly, as compared to a lot of the other decisions that came out of the Supreme Court this year, this was a unanimous decision. And this dealt with the first topic that Scott was just mentioning, which the court held unanimously that the Federal Arbitration Act requires courts to stay and not to dismiss actions subject to valid arbitration agreements.

This case involved misclassification claims by current and former delivery drivers against their employer. In response to the defendant's motion to compel arbitration and dismiss the complaint, the plaintiffs agreed that the claims were subject to an enforceable arbitration agreement. However, they argued that the FAA required the court to stay rather than dismiss the action. And the district court rejected these arguments and dismissed the complaint. On appeal, the Ninth Circuit affirmed this decision as well, explaining that the decision was based on binding circuit precedent that essentially allowed court's discretion to decide whether to stay a case or claims pending arbitration or whether to dismiss them.

Writing for the unanimous Supreme Court, Justice Sonia Sotomayor stated that the plain language of Section 3 of the FAA requires that a court stay the proceedings in this situation after a motion to compel arbitration has been granted rather than dismiss the case, noting the clear language of the FAA that says that courts shall, on application of one of the parties, stay the trial of the action. And that means that they shall do that, that a stay must be issued and that there isn't this discretion for courts to decide whether or not to stay or to dismiss. So that was a pretty clear statement in the *Smith* case as to how these situations should be handledgoing forward.

**JANG**

Now, Corey, is there any practical consequence with respect to parties litigating this issue between a stay or dismissal that you see?

**TRACEY**

That's one of the issues that Justice Sotomayor discussed in the opinion on behalf of the court was that if a case is dismissed, there is a right to appeal that decision because of the dismissal. Whereas if the case is stayed, the FAA provides that there is not a right to that appeal in that moment.

And so Justice Sotomayor for the court essentially stated that if we were to say that a dismissal was proper in these instances, that would be granting this right to appeal that is not what the FAA has set forth in its provision. So that was just another reason why the court was finding that a stay is the proper action here and must be provided and not that the case should not be dismissed.

So, any other questions about that, Scott, or do you want to move on to discussing the exciting area of transportation exemption?

**JANG**

As Corey mentioned, one of the key issues with respect to arbitration agreements that we've been seeing is the contours of the so-called transportation worker exemption to the Federal Arbitration Act. Whether an arbitration agreement is exempt from the Federal Arbitration Act is often an important topic because absent the application of the FAA, arbitration agreements are subject to enforcement under state law. And state law can sometimes be hostile to arbitration and even, in certain circumstances, preclude enforcement of all or part of an arbitration agreement.

Now the U.S. Supreme Court laid down some groundwork with respect to the scope of the transportation worker exemption in two cases, one being *Southwest Airlines v. Saxon* and the second case being *Bissonette v. LePage Bakeries.*

- In *Southwest Airlines,* the U.S. Supreme Court held that a ramp supervisor who physically loaded and unloaded cargo from a cargo plane could be deemed a transportation worker who was exempt from the Federal Arbitration Act.

- In the second case, *Bissonnette*, the US Supreme Court held that a company need not be engaged in the so-called transportation industry before an employee could be considered exempt under the transportation worker exemption to the Federal Arbitration Act.

So, with that groundwork, courts, both at the Court of Appeal level and at the district court level, have been wrestling with respect to what are the further contours of the transportation worker exemption to the Federal Arbitration Act. And in an opinion decided earlier this year, the Ninth Circuit dealt with that same exact issue with respect to an employee who worked in a warehouse. Although this employee did not actually move goods onto a truck or a plane that was going across state lines, this employee rather moved goods within a warehouse floor itself.

And the question presented in that case was whether this worker could be deemed a so-called transportation worker exempt from the Federal Arbitration Act.

The Ninth Circuit applied a two-step framework outlined by the U.S. Supreme Court's decision in *Saxon v. Southwest Airlines.* The first part of the test was to determine the specific nature of the worker's job duties. And then the second part was to analyze whether the worker's job duties had a sufficiently close relationship to transporting goods or people through interstate commerce. And the worker's job duties must play a direct and necessary role in being actively engaged with or be intimately involved with the transportation of goods or people in the flow of interstate commerce in order to be deemed a transportation worker subject to the FAA's exemption.

The Ninth Circuit reviewed the employee's job duties and, notwithstanding the fact that this worker only moved goods on the warehouse floor itself, the Ninth Circuit in its view concluded that this was sufficiently connected with the ultimate transportation of goods through interstate commerce that it was sufficient to trigger the transportation worker exemption to the FAA.

Now this is an important case to follow in that it is another data point in terms of the potential further contours of the Federal Arbitration Act exemption and therefore

employers with arbitration agreements, especially in those states that may have state law hostile arbitration agreements, are going to want to follow developments in this area.

**TRACEY**

Scott, doesn't this open up the question for any employer that's involved in transporting goods across state lines; that any of their employees will have to be put to this test you were just talking about as far as what their job duties are and what their role is in this process?

**JANG**

That's exactly right. And it's difficult for employers in the sense that, at least historically, this transportation worker exemption has always been thought of as a pretty narrow exemption that covered only a specific classification of employees, those that actually transported and moved goods across state lines. And that was a pretty bright line that seemed to have been established by the U.S. Supreme Court in cases like *Circuit City*. But now with its more recent jurisprudence, it does seem like that the courts are going to require employers to really take a more nuanced analysis with respect to the various employee classifications who work for the employer and really determine if there's a so-called direct and necessary nexus with respect to transporting goods through interstate commerce and across state lines. And, you know, there isn't any clean, clear guidance as to what is so-called "direct" or what is so-called "necessary."

**TRACEY**

Those are issues that are going to be flushed out in subsequent case law. And that's case law that employers who even tangentially might have employees who might fall within this exemption are going to have to play close, careful attention to — even down to the point of what circuit their employees are in at this point, since we have this broader guideline, as you said, from *Saxon* and *Bissonnette*, but each circuit is going to be pondering those particular terms, as you said.

**JANG**

Yes. I have to anticipate that whether the U.S. Supreme Court wanted to do so or not, this issue is not going to go away and it's going to percolate back up there and they're going to have to decide whether or not to establish a clearer, more bright line rule such that employers will be able to more readily determine whether an employee is subject to the FAA exemption.

All right, well, should we turn to talking about how the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act has been interpreted by courts lately?

**TRACEY**

I think I can jump in on that topic. Scott and I lovingly refer to this act as E. F. A. S. A. S.H. A. because it's easier to say. So I'll refer to it as that.

We have a case that came out of the Eighth Circuit. It's not been decided yet. It was an oral argument that occurred in May, so something to watch for the future is *Eniola*

*Famuyide v. Chipotle Mexican Grill, Inc*. This case dealt with the issue of when a dispute or claim relating to sexual assault or harassment arose or accrued, which is relevant to E. F. A. S. A. S.H. A. because E. F. A. S. A. S.H. A. became law as of March 3rd, 2022. So, it becomes important to be able to pinpoint when the dispute arose, when the claim arose. And so that's what the court was looking at in this particular case, which dealt with a Chipotle worker who the plaintiff was allegedly sexually assaulted. She reported the assault to the company and claimed that no further investigation happened. And so, she got an attorney involved on her behalf and that attorney contacted Chipotle in February of 2022 to note that these allegations had been made and were being looked into and requested the company preserve evidence and send the employee's file.

But it wasn't until July of 2022 that the plaintiff actually initiated a lawsuit against Chipotle in court. And so, the question became in this instance, when did the claim or dispute arise? With E. F. A. S. A. S.H. A. applying only as of March 3rd, the court really looked into whether or not these initial sort of notices of the plaintiff to the company about the claim in and of itself, the fact that this incident happened, the time when the dispute arose or whether it was perhaps later when the attorneys got involved and sent the letters indicating their involvement, or sometime later.

And so, the district court for the District of Minnesota declined to compel arbitration, finding that the dispute only arose when she filed her lawsuit in July of 2022, which was two months after the effective date of E. F. A. S. A. S.H. A. so the plaintiff was able to take her option of bringing her claims related to the sexual assault and harassment in court, as opposed to in arbitration under her agreement.

And so that decision was appealed to the Eighth Circuit. And again, the court really dug into this issue of when really a dispute arose. If we say the dispute arises when the company first learns of the incident even happening, does that really even make the term dispute under E. F. A. S. A. S.H. A.? When does a dispute arise? Does that basically wipe that entire term out? Because it's the same time as the claim accruing essentially.

But they didn't go that route. The circuit didn't seem to be going that route in their questioning at the oral argument. They did express particular interest as to whether the exchange of the attorney letters pre-litigation was sufficient to trigger a dispute under E. F. A. S. A. S.H. A. and so that would obviously make a difference in this case because that occurred in February of 2022 before E. F. A. S. A. S.H. A. became law.

So, a decision on this case is expected sometime this summer. As you may all know, the Eighth Circuit has jurisdiction over sort of a middle swath of the U.S., and so it'll be interesting to see how that one turns out.

**JANG**

Corey, a lot of courts have been dealing with this issue, including a court case in my neck of the woods in California named *Kader v. Southern California Medical Center*, which was decided earlier this year in which the Court of Appeal for the second district in California dealt with this exact same issue about when exactly a dispute arise for the purposes of triggering an E. F. A. S. A. S.H. A. and like the Eighth Circuit in *Eniola Famuyide*, the *Kader* Court in California really emphasized the fact that a

dispute only really arises in its view when a party asserts a rights claim or demand and the other side expresses some disagreement or take some kind of adversarial position to that right claim or demand.

In the *Kader* case, the court concluded that a dispute only arose when the plaintiff filed a agency charge with the California Civil Rights Department regarding the alleged harassment and obtained a right to sue notice. And so, we're seeing a lot of courts tack a different direction in terms of just not assuming that E. F. A. S. A. S.H. A. comes into play only when a claim accrues, but focusing on whether there is a different date at issue as to when a dispute arises.

Again, that was a decision in the California Court of Appeal. We'll probably see other California courts grapple with this issue as the issue of whether an E. F. A. S. A. S.H. A. applies to conduct becomes litigated more.

**TRACEY**

Thanks, Scott.

In the first case we talked about,*Smith*, we seem to have some pretty decided landscape there from the Supreme Court of the U.S. But in these other areas that we've talked about today, it looks like there's more to come. So, we will be watching that. And employers will want to be mindful of that as it comes to their arbitration agreements and how they're using them and implementing them with their employees.

*Thank you for joining us on We get work™. Please tune into our next program where we will continue to tell you not only what's legal, but what is effective.*

*We get work™ is available to stream and subscribe on Apple Podcasts, Libsyn, SoundCloud, Spotify, and YouTube.*

*For more information on today's topic, our presenters, and other Jackson Lewis resources, visit JacksonLewis.com. As a reminder, this material is provided for informational purposes only. It is not intended to constitute legal advice, nor does it create a client-lawyer relationship between Jackson Lewis and any recipient.*