3 Employer Strategies To Streamline Mass Arbitrations

By **Michael Strauss** (November 20, 2023)

Michael Strauss

Even in the law, every action has an equal and opposite reaction.

Employees started a chain of events by filing class actions to recover unpaid wages. Employers reacted by having their employees enter into arbitration agreements that precluded them from maintaining class actions. In response, employees began filing hundreds — sometimes thousands — of identical arbitration actions for unpaid wages.

Mass arbitrations are now having their moment in the spotlight, but their costly and unwieldy nature guarantees another reaction by employers.

Arbitration providers are also adapting to the brave new world of mass arbitrations. On Aug. 1, the American Arbitration Association, or AAA, put into effect supplementary rules governing mass arbitration.[1] Other providers of alternate dispute resolution have implemented new processes for handling mass claims in the context of employee — and consumer — actions.[2]

Mass arbitrations have shifted the dispute resolution landscape so significantly that an entirely new playbook may be required.

The Rise of Arbitration Agreements

Although not as certain as death and taxes, arbitration agreements as a condition of employment are almost a certainty in today's world. Companies large and small routinely require workers to waive their rights to trial by jury when they have claims against their employers and, with limited exceptions, those waivers are ironclad.

The U.S. Department of Labor reported in March of this year that more than 60 million workers are now subject to mandatory arbitration.[3] The Economic Policy Institute predicts that by 2024 almost 83% of the country's private, nonunionized employees will be subject to mandatory arbitration.[4]

The rise in arbitration for employment disputes coincides with a line of U.S. Supreme Court decisions chipping away at employees' right to maintain class actions when arbitration agreements are in place. After the 2018 opinion in Epic Systems Corp. v. Lewis, the surefire way for employers to avoid class actions has been to require employees to sign arbitration agreements.[5] The only option for employees seeking damages for wage and hour violations is to pursue their claims in arbitration.

Mass Arbitration Emerges

It is no surprise, therefore, that industrious plaintiffs attorneys, deprived of the option of filing class actions, are increasingly pursuing their clients' claims in arbitration. And they are doing so en masse.

In 2020, the New York Times reported that plaintiffs attorneys had found a way to "flood

the system with claims," turning arbitration into employers' worst nightmare.[6] Last year, Uber Technologies Inc. lost its bid to wipe out $92 million in AAA mass arbitration fees,[7] and this September, Samsung was ordered to pay $4M in arbitration fees after 50,000 claimants demanded arbitration before the AAA.[8]

It is not just the cost of filing fees for mass arbitrations that is daunting to employers. Mass arbitrations pose the risk of having to repeatedly litigate the same set of facts, potentially thousands of times, over the course of many years.

The same corporate witnesses would, potentially, need to be deposed for each case. The same corporate policy documents would have to be produced. And, to top it all off, the arbitrator for each case would expect hourly payment for their services.

Mass arbitration is thus flipping the employment arbitration playbook. Instead of facing an individual action for a negligible amount, a company might now find itself confronted with hundreds of near-identical arbitration claims for a collectively huge sum. Employers, who relied on arbitration to give them an edge, are finding themselves at a distinct disadvantage.

Strategies

Given the potential cost and complexity of mass arbitration, parties and counsel must approach any such action thoughtfully, structuring the process to reduce risk and achieve the desired result. For employers, the primary goals will be to streamline proceedings and reduce costs; for employees, the objective is to attain the highest possible award.

Ironically, the resolution of a mass arbitration may involve a class action settlement.

1. Streamlining the Proceedings

Most arbitration agreements state that the claimant may only pursue an individual arbitration and that the arbitrator may not consolidate two or more persons' claims in a single proceeding. As noted in the Supreme Court's June ruling in Coinbase v. Bielski, two key benefits of arbitration over litigation are efficiency and less expense,[9] but the requirement that each claimant's case be individualized can make a mass arbitration neither efficient nor cost-effective.

Given that there are a finite number of arbitrators in the country, it is highly likely that many arbitrators will be assigned multiple — maybe even dozens of — cases in the same mass arbitration. For such arbitrators, finding a way to streamline the proceedings and yet maintain the individualized nature of each arbitration will be very important.

Surely, the arbitrator will not want to hear the same corporate witness testify about company policy in each case. Arbitrators are trained to be fair and evaluate each witness before them, but there is no need to evaluate the same witness dozens — perhaps even hundreds — of times. Once will likely be enough. The same is true with briefing. No arbitrator wants to read 100 nearly identical closing briefs.

Given these considerations, despite contractual limitations on keeping each claimant's arbitration separate, there are potential efficiency measures to which an arbitrator may agree.

The arbitrator may be open to hearing common evidence only once. Perhaps counsel may

submit corporate documents once, and then refer to them in future arbitrations. The arbitrator may also decide purely legal questions upfront, such as whether the employer correctly included bonus wages in the regular rate of pay or whether a time-rounding policy is lawful.

With the common evidence out of the way, the parties can provide evidence regarding each claimant's individual situation, one after another. The parties may then call their experts to summarize or contest the damages claimed by each claimant. At the conclusion of the evidentiary hearing, the parties can agree to submit a single closing brief or opposition on behalf of all claimants.

In the end, each claimant will still have an individual arbitration, as required by the arbitration agreement, but the efficiencies adopted by the arbitrator will greatly reduce the cost and complexity of the mass arbitration.

The AAA's new supplementary rules adopt many of these types of streamlining procedures. The rules apply when 25 or more claimants file similar demands for arbitration against the same defendant, whether or not they are filed simultaneously.[10] Among other things, the supplementary rules allow the parties to appoint a single arbitrator who may issue one scheduling order setting forth deadlines across multiple cases; put limits on briefs, motions and discovery requests; and issue a single award.

There is no doubt that mass arbitration, even utilizing these sorts of streamlining rules, can be extremely costly for an employer. Counsel for the employee-claimants in a mass arbitration may be tempted to use the increased costs of wholly separate arbitration proceedings — by demanding that each case be heard separately — to leverage a settlement on behalf of their clients. But counsel must give due consideration to the interests of their clients.

Assuming, as in the Samsung case, there were 50,000 individual arbitration actions filed by the same lawyers against the same employer, it would take the law firms many dozens of years to get through all the cases. Counsel for employees in a mass arbitration must recognize this reality; they may best help their clients by agreeing to streamline the proceedings.

2. Bellwether Arbitrations

The parties may consider using the bellwether arbitration process as a way of assessing the merits of their claims and defenses. Under this approach, they decide that the first case or set of cases to go to the evidentiary hearing will set a sort of merits precedent.

Perhaps the employees in these bellwether cases all end up prevailing and being awarded something in a range between $X and $Y. Or perhaps the employer and employee each win a certain number of the bellwether cases, or the employer prevails in every action. The information gained during the bellwether process can guide settlement discussions for the remaining claimants who have not yet gone to hearing.

Parties should, however, be cognizant of recent decisions that found arbitration providers' bellwether rules may deny claimants their due process rights.

In the U.S. District Court for the Northern District of California's August decision in Skot Heckman v. Live Nation Entertainment Inc.,[11] the court denied a company's motion to compel arbitration because the arbitration provider identified in the parties' agreement —

New Era — had its own unique procedure for bellwether arbitrations. The court found those rules substantively unconscionable because the decisions from the bellwethers could be used as precedent for future hearings.

In MacClelland v. Cellco Partnership, a similar issue is now before the U.S. Court of Appeals for the Ninth Circuit with respect to another set of arbitration rules.[12]

3. Resolving Mass Arbitrations

After some arbitrations have gone to final award, the strengths and weaknesses of the parties' claims and defenses are more apparent, and counsel have a better sense of what it will take to resolve remaining cases. If the employer won all bellwether arbitrations, it may make no sense for the remaining claimants to keep litigating. If, however, employees won the first few arbitrations with an average of $X in damages and $Y in fees, it will be more likely that future claimants will also prevail and receive similar awards. This information will drive the value of a global settlement.

When settling a mass arbitration, consider competing interests. Some claimants may have already taken their cases through the final award, while others may have had depositions taken or may have only filed demands for arbitration. Other potential claimants may be waiting in the wings, without retained counsel.

A settlement may address the differing stages of these cases by allocating each group a different percentage recovery from the settlement fund. The employer will want a broad release that addresses every claimant and potential claimant, even those who have demonstrated no interest in filing a claim.

Claimants' counsel will want to maximize the amount of the settlement, but they must be wary of how rules of professional conduct may apply.

Under California rules, counsel for multiple clients may not enter into an aggregate settlement of client claims unless each client gives informed written consent.[13] If counsel for employees in a mass arbitration represent 10,000 claimants, every client must sign off on the deal, a potentially large obstacle. Because the rule does not apply to "class action settlements subject to court approval," settling a mass action in California may require removing the cases from arbitration and invoking class action settlement procedures in court.

Turning a mass arbitration into a class action may sound counterintuitive, but it can benefit both sides by side-stepping professional conduct rules and ensuring the employer a full release against future claims. By resolving the cases of individual claimants collectively, a court proceeding is far more streamlined and cost-effective than thousands of individual arbitrations.

Conclusion

Every action has an equal and opposite reaction. With the advent of mass arbitrations, are we now coming full circle? Will employers ditch arbitration agreements altogether and turn to class actions to settle multiple wage and hour claims? Only time will tell.

For now, arbitration providers and counsel will keep innovating and adapting to the new realities of mass arbitration.

Michael Strauss is an employment mediator at Alternative Resolution Centers and an employment arbitrator for the American Arbitration Association.

[1] American Arbitration Association Mass Arbitration Supplementary Rules, effective Aug. 1, 2023 (Supplementary Rules); https://www.adr.org/sites/default/files/Supplementary_Rules_Mass_Arbitration.pdf.

[2] https://www.reuters.com/legal/legalindustry/new-adr-development-mass-arbitrations-2021-12-22/.

[3] https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law.

[4] https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

[5] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018); https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf.

[6] https://www.nytimes.com/2020/04/06/business/arbitration-overload.html.

[7] Uber Technologies Inc. v. American Arbitration Association Inc., No. 15732, 2022 WL 1110550 (N.Y. App. Div. April 14, 2022); https://www.reuters.com/legal/litigation/uber-loses-appeal-block-92-million-mass-arbitration-fees-2022-04-18/.

[8] Wallrich v. Samsung Electronics America Inc., No. 22 C 5506, 2023 WL 5934842 (N.D. Ill., Sep. 12, 2023); https://casetext.com/case/wallrich-v-samsung-elecs-am.

[9] Coinbase Inc. v. Bielski, 599 U.S. 736, 743 (2023); https://www.supremecourt.gov/opinions/22pdf/22-105_5536.pdf.

[10] Supplementary Rule MA-1(c).

[11] Skot Heckman, et al. v. Live Nation Entertainment Inc. et al., CV 22-0047-GW-GJSx, August 10, 2023; https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2023/08/Heckman.pdf.

[12] MacClelland v. Cellco Partnership, 609 F. Supp. 3d 1024 (N.D. Cal. 2022); https://casetext.com/case/macclelland-v-cellco-pship.

[13] California Rules of Professional Conduct, Rule 1.8.7(a).