Podcast

Live from Workplace Horizons 2025: Arbitration — Still the First Line of Defense for Workplace Claims?

By Douglas J. Klein, Scott P. Jang & Jeffrey W. Brecher

June 5, 2025

Meet the Authors

Douglas J. Klein

(He/Him)
Office Managing Principal
(212) 545-4020
Douglas.Klein@jacksonlewis.com

Scott P. Jang

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

Details

June 5, 2025

Welcome to a special edition of We get work®, recorded live from Workplace Horizons 2025 in New York City, Jackson Lewis' annual Labor and Employment Law Conference. Over 500 representatives from 260 companies gathered together to share valuable insights and best practices on workplace law issues impacting their business today. Here's your personal invitation to get the insights from the conference, delivered directly to you.

YouTube

Transcript

INTRO

You're listening to a special edition of We get work®, recorded live from Workplace Horizons 2025 in New York City, Jackson Lewis' annual Labor and Employment Law Conference. Over 500 representatives from 260 companies gathered together to share valuable insights and best practices on workplace law issues impacting their business today. Here's your personal invitation to get the insights from the conference delivered directly to you. We'll see you in 2026.

CONTENT

Alitia Faccone
Senior Director, Business Development

Welcome, and thank you for joining us live from Workplace Horizons at the We get work® podcast studio. I'd like to welcome to the studio this afternoon, Jeff Brecher, principal in Jackson Lewis' Long Island office, Doug Klein, office managing principal of the New York City office and Scott Jang from the West Coast in Jackson Lewis' San Francisco office.

I'm going to first ask you just a quick question. Scott, starting with you, tell us a little bit about your practice and what you're hearing from employers in 2025.

Scott Jang
Principal, San Francisco

My practice primarily covers complex litigation, so wage and hour class actions, as well as a little bit of single plaintiff work and of course, a lot of advice and counsel, especially when it comes to arbitration agreements. That's been a big focus, not only

Jeffrey W. Brecher
(Jeff)
Principal and Office Litigation Manager
(631) 247-4652
Jeffrey.Brecher@jacksonlewis.com

in California, but especially for my practice. There have been a lot of developments, as I'm sure we'll talk about here, and that has pretty much been a big focus that I've been seeing from my clients and employers.

Faccone

Doug, what about you, New York City?

Doug Klein

Office Managing Principal, New York City

My practice is split 50-50 between litigation defense and advice and counsel. On the litigation side, a lot like Scott, I defend a lot of class and collective action cases, particularly wage and hour cases. These arbitration agreements, which we'll talk about in class action waivers, continue to be the subject of intense litigation. On the advice and counsel side, a lot of leave management issues continue to crop up. Something else we've talked about in other sessions here, issues of mental health and leave issues with sensitivity considerations, continue to be a very hot topic that I presented on.

Faccone

Jeff?

Jeffrey Brecher
Principal, Long Island Office

I'm the litigation manager for the Long Island office and also head of our Wage and Hour Group nationally. I spend a lot of time litigating wage and hour cases and also giving advice on wage and hour issues, but I also handle a wide variety of other cases, including litigation involving discrimination cases. Recently, we've seen an uptick, I would say, in independent contractor misclassification cases. That's taking some of our time as well.

Faccone

The title of your presentation today was, 'Arbitration Still the First Line of Defense? What is the answer, and can you provide a brief summary of your presentation?

Brecher

We had a jam-packed hour and covered a lot of the emerging topics. We first discussed the pros and cons of arbitration and whether or not it still is a good strategy for employers to implement arbitration agreements, primarily due to the class waiver. We also discussed some emerging issues relating to exclusions from the Federal Arbitration Act, including the transportation worker exception, which has been expanded by the Supreme Court, as well as an amendment to the Federal Arbitration Act that excludes sexual harassment and sexual assault cases from being arbitrable. Those cases are now excluded, so how to draft agreements to reflect that change and what impact that could have.

We addressed issues relating to very practical advice on drafting arbitration agreements, like which provisions to include and exclude. Also, very practical advice

on how to roll out arbitration agreements to ensure that the agreement is going to be enforceable and that you'll be able to find it. A lot of times, we talked about when the employer implements an arbitration agreement, and they have this beautiful arbitration agreement that the employee signed, but they just can't find it. We talked all about just a lot of practical issues, ensuring that once it is executed properly, we can find it and what strategies we can have for enforcing it.

Faccone

Doug, Jeff just told us that the session was jam-packed, and it certainly sounds like it was. You guys were preparing for the session. How did you decide what to cover, given all the change that's happening and what's going on?

Klein

The issues that Scott, Jeff and I are confronted with are similar. Scott brings a unique perspective in California because it is a place unto itself and always presents particular consideration. We wanted to be sure to add a California hint to the conversation, which we certainly did.

Just to piggyback off of what Jeff said a little bit, trying to make it practical. Workplace horizons, we've talked about looking ahead and what's to come. The landscape with arbitration agreements is far from settled. We wanted to be sure to put issues on folks' radar. What to be thinking about, how often to be thinking about updating agreements and what to be on the lookout for. What are the plaintiff's lawyers', for example, new tricks that they are pulling out of their hat to try to avoid arbitration, which is often what a plaintiff will try to do. The employer's goal often is to compel arbitration, so the push and pull there. It was a very practical conversation.

Faccone

Did you bring your crystal ball for that one?

Klein

We did. We were clear to say, though, that there are no guarantees. We are at the forefront of litigating these issues. Jeff and I here in New York, and across the country in some other cases, Scott, primarily in California, with his perspective. There's a lot going on in the arbitration space, so it was a good conversation.

Faccone

There's a lot going on in the arbitration space. What issues really resonated with the attendees, would you say, Scott?

Jang

Well, Doug's zingers against Jeff were a particular hit with the audience; there were many, and they were good. On a substantive level, there are two areas that I saw our attendees light up when we discussed. One was the practical aspect of it. We're talking to professionals who are dealing with arbitration agreements, not on an abstract legal aspect, but really on a day-to-day basis in terms of how they are

supposed to draft and roll out these agreements, and what does it look like when these agreements are challenged? A lot of our advice was in terms of ways to craft and roll out your arbitration agreement, and the anecdotes that we had with respect to what that looks like and the stories of how that plays out resonated with our attendees. Especially, since a lot of them had similar experiences and laughed in sympathy when we were talking about some of the pitfalls that one might see when rolling out an arbitration agreement.

The other area that really resonated with the group was the transportation worker exemption, because this is a new area of arbitration law that we're starting to see a lot of development in. Unless you're on the front lines like Jeff, Doug, and I, litigating these types of issues on a day-to-day basis, that transportation worker exemption seems very abstract. We were able to show and pivot that there is this growing trend, an area of law that employers need to pay attention to and will increasingly play a larger role in terms of class and collective action litigation. Whether a good face or a bad face, I can't tell, but some faces lit up when we're talking about the transportation worker exemption.

Faccone

Jeff, we've sat across the podcast table for a couple of Workplace Horizons now. Scott just talked about a change, a new trend in arbitration law. What would you say are some of the real significant changes since we met last year, across the table?

Brecher

The rise of mass arbitrations is something that has made a lot of headlines. A mass arbitration is where a company has an arbitration agreement that has a class action waiver, so the employees can't bring a class action. To avoid that or sidestep that, they bring multiple arbitrations on behalf of hundreds or potentially thousands of workers, so there is no class action, but there is a mass arbitration. We talked about the cost of those, like the filing fees. That is certainly something that's grabbed a lot of headlines, some big cases where there were mass arbitrations.

A lot of it is also in the consumer context. We talked a lot about what a mass action is, recent amendments to the American Arbitration Rules and the JAMS rules to address mass arbitrations and whether to incorporate those in your arbitration agreement. That's definitely one of the emerging issues, in addition to what Doug said about the transportation exemption.

The last one is the end of forced arbitration of sexual assault and harassment cases. There have been a lot of developments, just even in the last six months, about what types of claims are covered and whether or not a case that includes a sexual harassment case but other claims means the entire case can't be arbitrated. There's a growing body of case law that's very much in dispute at the moment. There are differing views on whether, for example, gender discrimination is covered by the prohibition because sexual harassment is a form of gender discrimination, or is gender discrimination something different than sexual harassment, in which case a standard gender discrimination case would not be covered.

Those are the emerging issues. It was fun.

Faccone

Scott, covered a lot of ground as you and your colleagues have just described. What would you say are some of the key takeaways you'd want people to know, especially for our podcast audience that didn't get the benefit of seeing you live here at the conference?

Jang

That's a great question. I would say, and this is not a gratuitous self-promotion on our part, but the main takeaway from our presentation is that you really need to have your arbitration agreements updated regularly. As we just discussed, the case law and the laws with respect to arbitration agreements are constantly evolving and being challenged, so an employer really needs to keep up to date with respect to the arbitration agreements. It's not one of these situations where you can spend a lot of time developing your arbitration agreement, throw it on the shelf, and it has a shelf life of 10 years. You're going to have to regularly update those arbitration agreements if you want to make sure that they're enforceable.

That's not just with respect to the arbitration agreement itself. You want to make sure that with respect to your rollout process and your HRIS systems, you really do a thorough due diligence in terms of what it actually looks like when you're rolling out these arbitration agreements to employees. We often see that that is an area ripe for challenge to the enforceability of arbitration agreements. Be just as vigilant with respect to updating arbitration agreements, and an employer needs to be vigilant with respect to knowing what its HRA system is in terms of rolling out these arbitration agreements.

Faccone

Doug, last question. How are Jackson Lewis, Jeff, Scott and you helping employers deal with a multitude of issues in this space?

Klein

We talked a lot about the applicability of the federal law, the FAA, the Federal Arbitration Act in these agreements. However, we talked a lot about exceptions now and challenges to the enforceability, which means that we're in a state law world at that point. We talked a lot during the program about state law implications because many states' laws are hostile to arbitration, class action waivers and to arbitration of certain types of employment claims. Jackson Lewis is incredibly well-suited, given our geographic footprint, to provide advice and counsel on a nationwide basis.

I talk to Scott often, including just this past week, on behalf of a client with some particular California considerations on their agreement, likewise, in other states where we need to account for state law considerations. Our geographic view allows us to take a holistic approach, which is practical and efficient.

Faccone

Jeff, Doug, Scott, thank you so much for sharing the highlights of your presentation with us here today and for presenting to our attendees at Workplace Horizons.

Enjoy the rest of the conference.

OUTRO

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 to on Apple Podcasts, Spotify and YouTube. For more information on today's topic, our presenters and other Jackson Lewis resources, visit jacksonlewis.com.