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ADR UPDATE

AUTHOR*

Hon. Michelle R. Rosenblatt (Ret.)

COURT MUST DETERMINE WHETHER FAA APPLIES BEFORE ARBITRATION

***Orr v. U.S. District Court for the Central District of California, Riverside*, 178 F.4th 525 (9th Cir. 2026)**

Rebecca Orr brought several claims against the United Parcel Service (UPS) on behalf of three putative classes, as well as individual claims. UPS moved to compel arbitration of her individual claims.

The district court granted the motion to compel arbitration without ruling on the disputed issue of whether the Federal Arbitration Act (FAA)[1] or the California Arbitration Act (CAA)[2] applies. Orr brought a writ of mandamus. In determining whether to grant the writ, the panel weighed the three factors set out in the 1977 case of *Bauman v. U.S. District Court*;[3] the third factor in that case was whether the court had committed a clear error of law.

New Prime Inc. v. Oliveira[4] held that a district court, not the arbitrator, must decide whether the exclusion in 9 U.S.C. § 1 applies to an agreement before ordering arbitration.

The Ninth Circuit held that by compelling arbitration before deciding whether the FAA or state law applies, the district court improperly delegated its authority to the arbitrator and committed a clear error of law. The court determined that Orr would be prejudiced in a way that would not be correctable on appeal should she have to proceed in arbitration and have a full hearing on her claims when the outcome in arbitration could depend on whether state law or the FAA, and the section 9 exemption, applied.

The Ninth Circuit returned the matter to the district court to first determine whether the FAA and the exclusion apply before ruling on the motion to compel arbitration.

TIMING PROVISIONS OF THE EFFA CLARIFIED

***Combs v. Netflix, Inc.*, No. 25-3164 (9th Cir. July 8, 2026)**

Jessica Combs alleged that she experienced sexual harassment while working in Netflix's "sexually degrading culture." She repeatedly complained to Netflix between 2017 and 2021, and was terminated December 2021.

In August 2023, Combs filed administrative complaints with Netflix and the California Department of Fair Employment and Housing. She received a right to sue letter on August 3, 2023, and filed a state court complaint on July 29, 2024. Netflix removed the case to federal court and moved to compel arbitration.

The district court granted the motion, concluding that Combs' claims arose before the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA)[5] took effect on March 3, 2022. The EFAA allows plaintiffs alleging sexual assault or sexual harassment to proceed in court, notwithstanding any arbitration agreement in effect. The timing provision of the EFAA was an issue of first impression before the Ninth Circuit.

The Ninth Circuit held that for the purpose of the EFAA, a claim accrues when the plaintiff has a "complete and present cause of action" and a dispute arises "when an employee registers disagreement, either through an internal complaint, external complaint or otherwise, with his or her employer and the employer expressly or constructively opposes that position."[6]

When the dispute arose is a fact-specific inquiry in every case. The Ninth Circuit determined from the allegations of Combs' complaint that her dispute arose and her claims accrued before the effective date of the EFAA. Therefore, her claims must proceed in arbitration.

EFFA APPLIES TO HARASSMENT BASED ON SEXUAL ORIENTATION

***Decloedt v. RadNet Management Inc.*, 2026 Cal. App. LEXIS 411 (July 7, 2026)**

Trevor Joseph Decloedt alleged that he suffered from harassment by his employers because of his sexual orientation and filed a complaint alleging several violations of the Fair Employment and Housing Act (FEHA)[7]—including hostile work environment and sexual harassment. The allegations included that a coworker repeatedly informed Decloedt that his sexual orientation was an abomination and a sin, frequently expressed anger by stating she could kill him, and alternately caressed and pulled his hair several times—once very forcefully after he offered to assist her with client interactions.

The RadNet defendants moved to compel arbitration, and asserted that the FAA applies. Decloedt argued that he alleged a claim of sexual harassment, triggering the EFAA's exemption to the FAA for a case relating to a "sexual harassment dispute."

The defendants argued that sexual orientation harassment is not sexual harassment, but even if it is, the conduct alleged was not severe or pervasive because there were only a few comments made. The trial court denied the motion to compel, ruling that discrimination based upon sexual orientation is sexual harassment. The defendants appealed.

In its de novo review, the court of appeal made several observations.

First, it noted the FEHA expressly proscribes harassment because of sexual orientation."[8]

Second, the court underscored that Title VII of the federal Civil Rights Act of 1964[9] bars an employer from discriminating against any individual because of the individual's sex. In *Bostock v. Clayton County*,[10] the U.S. Supreme Court reasoned: "When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies)."

Third, because the antidiscrimination objectives of Title VII and the FEHA are the same, California courts may rely on federal decisions to interpret analogous parts of the FEHA. The logic of *Bostock* applies "when determining whether an employer who has harassed an employee because of his or her homosexuality has engaged in harassment because of the employee's sex."[11]

Fourth, the appellate court again quoted Supreme Court precedent that: "It is the disparate treatment of an employee on the basis of sex—not the mere discussion or sex or use of vulgar language—that is the essence of a sexual harassment claim."

Finally, RadNet had argued that the oral statements were not severe or pervasive and claimed that the anti-gay comments were separate from the anger directed toward Decloedt when he offered to assist her with client interactions. The court of appeal rejected the argument that the oral statements constituted the only form of harassment asserted in the complaint.

NO BRIGHT LINE RULE DELIMITING 'ENGAGED IN INTERSTATE COMMERCE'

***Flowers Foods v. Brock*, 146 S. Ct. 1358 (2026)**

Flowers Foods, Inc. is a large producer of packaged baked goods in 19 states. To get products to market, Flowers depends partially on franchisees who purchase the right to distribute its products in particular geographical areas. Angelo Brock, a franchisee in the Denver area, picks up products that were delivered from out of state to a Colorado warehouse and delivers them to local stores, never leaving the state.

Brock filed a wage and hour case in federal district court, alleging he and other distributors had been underpaid in violation of state and federal laws. Flowers filed a motion to compel arbitration pursuant to the parties' written distribution agreement. The district court denied the motion, and the Tenth Circuit Court of Appeal affirmed, finding that the fact that Brock never crosses state lines, or interacts with workers who do, is not dispositive of whether he is engaged in interstate commerce. The panel stated that the proper consideration is whether Brock's "intrastate route formed a constituent part of the goods' interstate journey or an entirely separate local transaction."

In its application for certiorari, Flowers asked the U.S. Supreme Court to decide only a single issue: Whether a worker who never crosses state lines and never interacts with vehicles that do can qualify as engaging in interstate commerce under section 1 of the FAA.

The U.S. Supreme Court declined Flowers' request to adopt a bright line rule that an individual can *never* qualify for a section 1 exemption unless the worker crosses state lines or interacts with vehicles that do.

In a unanimous opinion, the Court noted that as a number of cases illustrate, individual workers can be "direct," "necessary," and "active" participants in moving goods from one state to another without crossing state lines or interacting with vehicles that do, and thus qualify for the exemption. It underscored that historical precedent does not support Flowers' proposed bright line rule, even though some of the cases are based upon the Commerce Clause rather than section 1 of the FAA. The Court concluded that "whatever other limits section 1 may or may not contain, "we do not see how the statutory text can support that one."

FINAL MILE WORKER DEEMED 'ENGAGED IN INTERSTATE COMMERCE'

***Betanco v. Living Spaces Furniture, LLC*, 121 Cal. App. 5th 411 (2026)**

Living Spaces is a chain of retail furniture stores operating in multiple states, including California. It manufactures furniture both in and outside of California and Mexico before shipping it to Living Spaces retail stores. The company has two distribution centers in California. Living Spaces has delivery service contracts with multiple providers including OF Services, for which Luis Betanco worked—delivering furniture from the California warehouses to retail customers within the state. Betanco signed an arbitration agreement with OF, specifying that arbitration is governed by the FAA.

When Betanco filed both a class action and a PAGA claim against Living Spaces and OF, the defendants filed an omnibus motion to compel arbitration in both cases. Betanco argued that arbitration is improper because he is a transportation worker and thus exempt pursuant to section 1 of the FAA.

The appellate court delayed argument until the U.S. Supreme Court issued its opinion in *Flowers Foods v. Brock*,[12] then permitted supplemental briefing.

Respondents likened Betanco's job to that of local food delivery drivers, who courts of appeal have found are not subject to the section 1 exemption. In those cases, the raw ingredients were delivered from out of state to a restaurant, which prepared the food; the food was then delivered within the state. In those fact patterns, the delivery drivers are not part of the continuation of movement of goods from out of state as the product they deliver is a finished product made from the ingredients provided to the restaurant. Here, however, the furniture delivered to the distribution centers from out of state is the same furniture delivered by Betanco to the retail customers within the state.

Citing *Flowers*, the court of appeal held that Betanco is a transportation worker since he was actually engaged in the transportation of goods in their interstate journey to customers. It noted: "He played a 'direct, 'necessary,' and 'active' role in moving goods across borders by loading and unloading furniture that was in the stream of commerce."

NOTE: This case is also summarized in the discussion of wage & hour cases on page 14.

FAA EXEMPTION APPLIES TO 'YARD HOSTLERS'

***Doss v. Tesla*, 121 Cal. App. 5th 81 (2026)**

Tesla employs workers known as "yard hostlers" to move auto parts within its factory grounds that have been shipped there from out of state. They move and position a 53-foot trailer on factory grounds to receive the parts. Yard hostlers then move the trailers to a warehouse, where the goods can be safely and efficiently unloaded. The auto parts are later incorporated into assembled vehicles at the same factory site.

This wage and hour dispute was brought by Kenneth Doss on behalf of himself and a putative class of yard hostlers. When Tesla moved to compel arbitration, Doss argued that yard hostlers are engaged in interstate commerce and exempt under section 1 of the FAA. The parties did not dispute the fact that the workers "directly handle out of state goods and do so exclusively within the confines of the factory grounds."

Citing *Flowers Foods v. Brock* and other cases, including *Southwest Airlines Company v. Saxon*[13]—in which airline ramp supervisors and cargo loaders were held to be exempt under 9 U.S.C. section 1—the court of appeal held that yard hostlers are transportation workers engaged in interstate commerce because their movement and positioning of the trailers is a necessary step in completing the "interstate journey" of the auto parts. The court noted that the proper focus must be on whether the "actual work" being performed plays a direct and necessary role in the interstate commerce of goods and is part of a "continuous interstate transportation."

The court of also distinguished the facts of this case from *Betancourt v. Transportation Brokerage Specialists, Inc.*,[14] in which the court held that drivers delivering prepared food from restaurant to customer were not exempt

transportation workers even though the raw ingredients to make the food were part of interstate transportation.

NOTE: This case is also summarized in the discussion of wage & hour cases on page 14.

AGREEMENT LIMITED TO EMPLOYMENT NOT 'SUBSTANTIVELY UNCONSCIONABLE'

***Cocom v. ABM Aviation, Inc.*, 179 F.4th 1168 (9th Cir., June 23, 2026)**

Robert Cocom filed a putative wage and hour class action against ABM Aviation, Inc., which offers janitorial services at airports. ABM moved to compel arbitration. The parties' agreement provided that arbitration would be the exclusive remedy for covered claims—defined as any claim that the company has against the employee and any claim the employee has against company, as well as "its past, present, and future parent(s), subsidiaries, affiliates" and their officers, directors and employees—"including but not limited to claims arising and/or relating in any way" to hiring, employment, compensation, and ending employment.

The agreement also specifies: "Covered claims include, but are not limited to any claim for breach of contract, for any provision of federal or state labor code or a wage order, for unpaid fees, expenses, wages, or overtime, for unpaid compensation or penalties for missed meal or rest breaks, for wrongful termination, for unfair competition, for discrimination, harassment, or unlawful retaliation," as well as violations of federal and state labor-related statutes, after application of the FAA preemption principles.

The district court found the arbitration agreement to be both procedurally and substantively unconscionable, relying on *Cook v. University of Southern California*,[15] and determined that the scope of the agreement was so broad, along with the lack of mutuality, that the entire agreement was tainted.

The Ninth Circuit reversed. It relied on the interpretive principle of ejusdem generis: when a list of specific items follows the general words in a contract, the general words are construed to embrace only those of the same nature as the specific words. In *Cocom*, the words "any claims, including but not limited to" were narrowed by specific terms that all related to Cocom's employment.

The panel further relied on California contract interpretation that where a contract is susceptible to two interpretations, one of which renders it invalid and the other valid, the court should rely on the interpretation that makes it valid. Further, a contract should be analyzed as a whole.

ABM's arbitration agreement includes that arbitrations are to be governed by the AAA Employment Rules and Mediation Procedures. In terms of duration, since the claims would only relate to the employment relationship, they would inherently stop accruing once the employment ended.

The Ninth Circuit also addressed the claim of lack of mutuality, noting that the agreement covers only employment claims, which have a "natural symmetry" since an employee is more likely to sue the employer and third parties rather than the other way around. It found that any lack of mutuality in the agreement did not rise to the level of substantive unconscionability.

AGREEMENT HELD OVERBROAD LACKING MUTUALITY

***Phan v. Knight Sacramento SU Inc.*, 121 Cal. App. 5th 641 (2026)**

Knight Sacramento SU Inc. operates auto dealerships throughout California. Michelle Phan was intermittently employed by Elk Grove Subaru and Elk Grove Volkswagen between 2022 and 2024. Each dealership had an identical arbitration agreement. The agreements required Phan to arbitrate "any claim, dispute or controversy" that the parties have against each other arising out of employment or "any other interaction in the future" against Knight and third party beneficiaries.

In 2024, Phan filed wage and hour claims individually and on behalf of a class of current and former employees against Knight. Knight moved to compel arbitration.

The trial court denied the motion.

The court of appeal affirmed. Following *Cook v. University of Southern California*,[15] it held that any claims that may arise "currently or in the future" is overbroad, that unconscionability in an arbitration agreement is to be evaluated at the time the contract is made, and that post-contract requests by third parties to arbitrate Phan's claims are not relevant to the consideration of unconscionability.

Further, it found the arbitration agreement also lacked mutuality "without justification," and was tainted with illegality, so the trial court did not abuse its discretion by refusing to enforce it.

CCP § 1281 IS AMENDED TO RECOGNIZE FAA EXCEPTIONS

AB 2155, signed by Governor Gavin Newsom in June 2026, renders arbitration agreements that are unenforceable under the FAA also unenforceable under state law, the CAA. California Code of Civil Procedure section 1281(2) takes effect January 1, 2027 and states that the purpose of the statute is to incorporate into state law any and all exclusions under the FAA—specifically, the transportation workers exemption and the EFAA.

ENDNOTES

* Hon. Michelle R. Rosenblatt (Ret.), ADR Services, Inc., serves as a mediator and arbitrator on a wide range of civil disputes, including labor and employment. Previous to working as a neutral, she served for 23 years as a judge in Los Angeles, and for five years as editor of the California Judges Association magazine, *The Bench*. During her last nine years on the Los Angeles Superior Court, she presided over a general jurisdiction civil calendar, where she facilitated numerous settlements and presided over numerous jury and bench trials. She can be reached at judgerosenblatt@adrservices.com.

1. 9 U.S.C.§§ 1-14.
2. Cal. Code of Civ. Proc. §§ 1280-1294.2.
3. *Bauman v. U.S. District Court*, 557 F.2d 650, 654-655 (9th Cir. 1977).
4. *New Prime Inc. v. Oliveira*, 586 U.S. 105, 111 (2019).
5. 9 U.S.C. §§ 401-402.
6. Citing *Cornelius v. CVS Pharmacy, Inc.*, 133 F.4th 240, 247 (3d Cir. 2025).
7. Cal. Gov't Code §§ 12900-12996.
8. Cal. Gov't Code § 12940 (j)(1)).
9. 42 U.S.C. § 2000e.
10. *Bostock v. Clayton County*, 590 U.S. 644 at 649-652,683 (2020).
11. See also, *Quilala v. Securitas Security Services USA, Inc.*, 117 Cal. App. 5th 75 (2025).
12. *Flowers Foods, Inc. v. Brock*, 146 S. Ct. 1358 (2026).
13. *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022).
14. *Betancourt v Transportation Brokerage Specialists, Inc.*, 62 Cal. App. 5th 552 (2021).
15. *Cook v. University of Southern California*, 102 Cal. App. 5th 312 (2024).

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