

## ***Employment Arbitration: Law and Practice***

**Berkeley Law**

**Syllabus - Law 227.11 [Fall 2023]**

**Instructor: Barry Winograd**

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**Office Hours: Available after class for questions, or by email to set up a time to talk.**

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### **Course Description:**

This two-unit course, offered in four Saturday sessions, will study the law and practice governing mandatory employment arbitration proceedings affecting the statutory rights of millions of workers. The classes are scheduled from 9:00 am to 4:00 pm, with a lunch and other brief breaks, on Saturdays August 26, and September 9, 16, and 23. Enrollment is limited to 20 students in Berkeley Law programs and other Berkeley graduate students.

As a principal course objective, employment arbitration will be examined through a series of case and practice readings, in-class simulation exercises, and student writing assignments. Students will be assisted with an Arbitration Practice Guide and a set of Supplemental Readings prepared specially for this class. In the final class session, students will work in teams to present a case to professional arbitrators presiding at an employment arbitration hearing. Students also will hear from practitioners in the field offering insight about arbitration practice. There are no prerequisites for the class. Past or current courses on labor and employment law, and evidence, could be helpful, but they are not essential. Professional experience in employee relations and human resources could be helpful as well, but is not essential.

For nearly 50 years, few subjects in U.S. civil law have been as contested as mandatory arbitration, also described as forced or compulsory arbitration. The Federal Arbitration Act (FAA), enacted in 1925 and originally intended to govern commercial and business disputes, is at the heart of continuing legal conflict. Individuals at work and in a wide variety of other everyday settings are subject to FAA-enforced contract terms. These terms require, as a condition of the relationship, submission of all disputes to arbitration instead of recourse to a judicial proceeding.

No subject has been affected by the arbitration debate more than the employment relationship in the non-union workplace, in part because personal and business stakes are high, and in part because extra-judicial forces - business and advocacy groups - are well-organized and funded. The direction the law has taken has been affected by federal and state laws, arbitration rules promulgated by private organizations, and hundreds of appellate decisions and scholarly articles. In the Supreme Court's 2021-22

term, it decided four employment arbitration cases under the FAA. A recent federal law bans mandatory arbitration of claims alleging sexual assault and harassment. In the public realm, law students successfully organized against mandatory plans for law firm employees, and journalists have drawn attention to arbitration for newscasters, sports figures, and those working in the gig economy.

The instructor has been an arbitrator and mediator of workplace and other civil disputes since 1988. For over 35 years, he has been on the adjunct faculty at Berkeley Law teaching labor law and arbitration. He also has taught on the adjunct law school faculty at the University of Michigan and at the University of Pennsylvania. The instructor has served as president of the National Academy of Arbitrators, was a senior editor of a treatise on employment law and dispute resolution, has written articles for professional journals in the field, and has contributed to amicus filings on arbitration cases in the Supreme Court. Previously, he was an administrative law judge for the California Public Employment Relations Board and an attorney for the United Farm Workers Union.

*Class No. 1 [August 26]: Introduction - What is Arbitration, Who are the Parties and How Does a Dispute Get to Arbitration?*

Few aspects of the American legal system are as common and yet mysterious as arbitration. Is it one thing or many? What are its origins? Are there statutes and rules governing arbitration? Who are arbitrators? And what is the difference between arbitration of labor union disputes under collective bargaining agreements and mandatory proceedings in non-union settings? These are some of the questions to consider as we begin our study. To introduce the subject, we will examine key source material, including the FAA and two important Supreme Court cases, the *Perry* and *Gilmer* decisions. These cases set employment arbitration on a path that continues to this day. During an in-class exercise, students will argue for or against the dismissal of an employee.

This class session also will consider the procedural steps taken when there is an arbitration agreement and an employee files a lawsuit alleging violation of a statutory civil right. Will arbitration be compelled or will it remain in court? What contract rules apply or will statutory procedures govern? And who decides - a judge or an arbitrator - if there is a dispute over whether there is consent to arbitrate, a fundamental tenet of the process, or whether independent state law precludes arbitration? The *Nitro-Lift* and *Rent-A-Center* decisions will shed light on these questions, as will the *Armendariz* case from California considering contract principles of unconscionability. Complicating resolution of these issues, what if the employer delays seeking arbitration and the Supreme Court's *Sundance* decision is invoked? In the end, will the general rule apply holding that standards for judicial review are more protective of arbitration rulings than those for trials in court, including disputes over statutory rights? The recent *Badgerow* decision will guide parties as they assess the ultimate outcome in a case.

### Class No. 2 [September 9]: What is Covered and Not Covered?

One of the most difficult issues in employment arbitration is spelling out the range of claims that are covered and those that are not. The Supreme Court has stated that arbitration is a change in forum, not a change in substantive law. Some employees, however, are excluded by statute as transportation workers, an issue that arose in the *Circuit City* case. How has this case been applied to airline ramp agents who do not cross any borders, as in *Southwest Airlines*? And what about workers in the gig economy when deciding whether they are required to arbitrate?

Questions of arbitration coverage also arise in determining whether remedies available in separate administrative proceedings are limited, an issue that arose for a discrimination case in *Waffle House*. The FAA also may affect the disposition of some state law remedies for resolving wage disputes, as in *Preston*. Another complication, considered in *Pyett*, involves the circumstances under which a union and an employer can agree that individual civil rights claims for unionized employees must be arbitrated. Beyond individual claims, can arbitration agreements prohibit class and collective actions, even if, as in *Epic Systems*, other federal labor laws might govern, or if, as in *Viking River Cruises*, state law would stand in the way? Millions of dollars may be at stake in answering these questions.

### Class No. 3 [September 16]: What Procedures Apply in Arbitration?

Is employment arbitration really a substitute for litigation, but with more limited procedures and more relaxed standards for conducting a hearing and issuing decisions? What role is played by case management conferences in regulating the pre-hearing process, including pleadings, discovery and motion practice? A model scenario will be used as the basis for students to act as advocates offering arguments on case management problems, with particular attention to the case-handling rules developed by arbitration business organizations. A series of evidence problems also will be analyzed to highlight the range of disputes that can arise at a hearing.

In this class session, using the same model scenario, students will have an opportunity to practice for the mock arbitration hearing planned for Class No. 4. This includes experience making opening statements, conducting direct and cross-examinations, and offering closing arguments. At the end of class, team assignments will be set for the mock arbitration hearing.

### Class No. 4 [September 23]: Mock Arbitration Hearing

For the final class session, student teams using a model scenario will present an employment arbitration case before professional arbitrators. In doing so, students will craft opening and closing statements, argue preliminary motions, examine witnesses, and introduce exhibits. At the conclusion of the hearing, the arbitrators will render decisions and offer comments about the student presentations.

## **General Course and School Policy Information:**

### *Learning Outcomes:*

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system;
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession; and,
- (e) Using the law to solve real-world problems.

Students in the course are expected to achieve these Learning Outcomes. Overall, students who complete the course should be ready for “real world” positions and arbitration assignments. This includes, sooner rather than later, serving as advocates.

### *Course Policies:*

*Grading/Evaluation:* The course is graded, although there is no final examination. Grades will be based on the following assessments: (a) 15 percent on each of two writing assignments; (b) 60 percent on the final arbitration presentation, including team planning and execution; and, (c) 10 percent on class preparation and participation, including readiness to analyze assigned cases and practice scenarios, responding to questions, and contributing insights and comments on issues being considered. This component also will be used to break any ties that must be broken due to the law school’s curved grading system. All grading components are intended to improve effective analytical skills, among them your ability to articulate your views, to advocate for a position, and to listen and respond to opposing perspectives.

*Attendance:* Attendance at all class sessions is a law school requirement for this condensed course. Students will be dropped from the course for failing to attend each session. Wait-listed students are encouraged to attend the first session in order to substitute for enrolled students who are not present. Subsequently, attendance at all sessions is important even if you are unprepared as there is much to be learned simply by being present.

*Class attendance is required by Rule 7 of the Academic Rules, which states in part: In accordance with ABA accreditation standards, Berkeley Law requires regular and punctual class attendance in order to receive course credit. To meet these standards, students may not enroll in courses that have overlapping meeting times. Further, instructors have the discretion to announce more specific and/or restrictive attendance requirements than this at the beginning of the semester.*

*The remainder of the law school’s academic rules can be found here:*

<https://www.law.berkeley.edu/academics/registrar/academic-rules/>. \_

The applicable law school guidance on the use of laptops or other electronic devices is the following: *You may use a laptop or other device to access reading assignments during class. However, we strongly encourage you to take hand-written notes. (Research shows that students absorb information better this way.) Further, accessing the internet (or apps) during class—except for class-related activities—is prohibited. You cannot check your Facebook page and successfully make meaningful contributions to class.*

#### *School-wide Policies:*

1) A “credit hour” at Berkeley Law is an amount of work that reasonably approximates three to four hours of work per week for the length of the course, including: a) classroom time, b) time spent preparing for class, c) time spent studying, d) time spent researching, writing, and revising written work, and e) time spent preparing for and completing any other project or presentation. For the purposes of these calculations, 50 minutes of classroom instruction counts as one hour. You can expect to spend this amount of time per unit per week on in-class and out-of-class, course-related work as described above.

2) Students who need classroom accommodations or want to discuss implementation of their accommodations in this class are advised to contact Kyle Valenti, Director of Student Services at [kvalenti@law.berkeley.edu](mailto:kvalenti@law.berkeley.edu) as soon as possible. Any student who seeks an accommodated or rescheduled class activity for documented medical reasons or for religious observance should contact Student Services in 280 Simon Hall, 510-643-2744.

3) The Academic Honor Code governs the conduct of all students in all academic and pre-professional activities at Berkeley Law.

4) If you need economic, food or housing support, you can find help at [basicneeds.berkeley.edu](http://basicneeds.berkeley.edu). You may be eligible for money to buy groceries via [calfresh.berkeley.edu](http://calfresh.berkeley.edu) or our Food Assistance Program. If you are in need of food immediately, please visit our UC Berkeley Food Pantry at [pantry.berkeley.edu](http://pantry.berkeley.edu).