ECKERT SEAMANS
ATTORNEYS AT LAW

EMPLOYMENT ARBITRATION

Presented by:

Clare M. Gallagher
Member and Vice Chair of Labor & Employment

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

(412) 566-2069
cgallagher@eckertseamans.com

Michael D. Jones
Member

Eckert Seamans Cherin & Mellott, LLC
Two Liberty Place
50 South 16th Street, 22nd Floor
Philadelphia, PA 19102

(215) 851-8461
mdjones@eckertseamans.com

Clare M. Gallagher

MEMBER
VICE CHAIR, LABOR & EMPLOYMENT

Clare Gallagher concentrates her practice in traditional labor law, employment law, and litigation.

Prior to joining Eckert Seamans, Clare served as legal counsel and director of human resources for a large title agency in the real estate services industry. There she managed legal matters, including class action litigation and oversight of outside counsel, acquisitions, corporate finance, governance, and employment-related legal matters. As director of human resources, Clare supervised all aspects of human resources management, including payroll and benefits administration; employee orientation and training; legal compliance in employee recruitment and selection, compensation, discipline, and discharge; reduction in force planning and implementation; employee retention programs; employee safety and security; and workers' compensation cost containment.

REPRESENTATIVE MATTERS

- Counseling clients on a variety of labor and employment issues.
- Chairing labor negotiations ranging from traditional collective bargaining, concessionary negotiations and effects bargaining.
- Advising on employment and employee benefit issues, employment litigation, executive employment agreements, non-competition agreements, discrimination and harassment issues and labor and employment issues involved in merger and acquisition projects.
- Representing clients in jury and non-jury trials, appellate advocacy and practice before state and federal courts, the U.S. Equal Employment Opportunity Commission (EEOC), National Labor Relations Board, U.S. Department of Labor (Wage and Hour), Occupational Safety and Health Administration, Office of Federal Contract Compliance Programs, and various state human relations commissions.
- Conducting management training in the areas of sexual harassment, diversity, union avoidance, FMLA administration, and ADA compliance.

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PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.2069

F: 412.566.6099

cgallagher@eckertseamans.com

TROY, MICHIGAN

Liberty Center, Suite 200
100 W Big Beaver Rd.
Troy, MI 48084

P: 248.526.0571

cgallagher@eckertseamans.com

PRACTICE AREAS:

Labor & Employment

Litigation

Hospitality

STATE ADMISSIONS:

Pennsylvania

Michigan

EDUCATION:

J.D., cum laude, George Washington University Law School, 1986

B.S., summa cum laude, University of Pittsburgh, 1983

PROFESSIONAL AFFILIATIONS

- Pittsburgh Human Resources Association
- Society for Human Resource Management
- Pennsylvania Bar Association

COMMUNITY INVOLVEMENT

- Reading is FUNdamental Pittsburgh, elementary school reading mentor

NEWS AND INSIGHTS

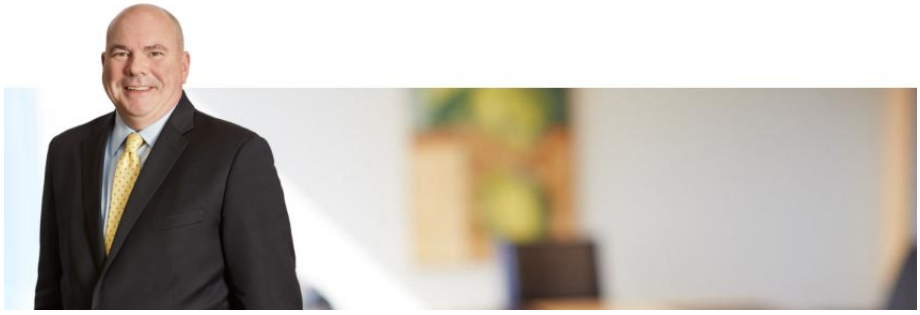
PUBLICATIONS

- "Is It OK To Fingerprint Your Employees?" *Engineering News-Record*, May 2017.
- "Assessing the viability of biometric technology as a new method of timekeeping in the construction industry," *Eckert Seamans' Construction Law Update,* Fall 2016.
- "Lilly Ledbetter Fair Pay Act Could Change Employment Litigation Landscape for Years to Come," *Eckert Seamans' Legal Update*, November 2009.

SPEAKING ENGAGEMENTS

- "Show Me the Money: What You Need to Know to Survive the New FLSA Overtime Regulations and Some Recent Court Decisions Affecting Employees' Break Time and Restrictive Covenants," presenter, Eckert Seamans' Continuing Legal Education Seminar, August 2016.
- "Pittsburgh Hotels: Why So Many New Ones and Who Employs All These People?" co-presenter, Eckert Seamans' Continuing Legal Education Seminar, August 2016.
- "The Potholes, Pitfalls, and Perils of Employment Policies, and How to Avoid Them," co-presented at Eckert Seamans' Human Resources Forum, May 2015.
- "News You Can Use: A review of recent judicial, legislative, and regulatory developments of significance to employers," co-presented at Eckert Seamans' Human Resources Forum, January 2015.
- "News You Can Use: A review of recent judicial, legislative, and regulatory developments of significance to employers," co-presented at Eckert Seamans' Human Resources Forum, January 2013.
- "News You Can Use: A review of recent judicial, legislative, and regulatory developments of significance to employers," co-presenter, at Eckert Seamans' Human Resources Forum, May 2012.
- "Who's Knocking at Your Door?" co-presenter, Eckert Seamans Human Resources Forum, December 2010.
- "ADA Amendments Act Update: A Discussion of the EEOC's Proposed Regulatory Roadmap to the New Landscape of Disability Law," co-presenter, Eckert Seamans Human Resources Forum, December 2009.

- “The Anatomy of a Unionization Attempt,” co-presenter, Association of Corporate Counsel, Western Pennsylvania Chapter, January 2009.
- “FMLA Update: A discussion of legislative and judicial developments,” Eckert Seamans Human Resources Forum, November 2008.



Michael D. Jones

MEMBER

Michael Jones practices exclusively in the field of labor and employment law. His 25 years of diverse experience includes litigating cases involving collective/class wage-and-hour claims under the Fair Labor Standards Act and state laws, race, age, disability, gender discrimination, sexual harassment, retaliation, whistleblower, and employee benefits (ERISA) cases. Mike has defended various employment-related and breach-of-contract claims in federal and state courts, the NLRB, labor arbitration and before administrative agencies. Mike also has extensive experience litigating claims in mandatory employment arbitration tribunals under the Federal Arbitration Act.

Along with his litigation work, Mike provides clients with day-to-day counseling needs, as well as drafting and negotiating employment agreements, restrictive covenant and confidentiality agreements, severance packages, other employment-related agreements and contracts, employee handbooks, and employer policies and procedures.

Mike counsels both public and private sector clients in a myriad of industries and sectors, with deep industry experience in health care and long-term care, hospitality, financial services, telecommunications, waste management, nonprofits, life sciences, and the transportation/logistics sectors.

Mike is experienced in conducting employment investigations and management training on a variety of employment issues for corporations and government agencies, and is a frequent lecturer on the topics of discrimination, sexual harassment, ADA, FMLA, internal and EEOC investigations, and workplace privacy.

REPRESENTATIVE MATTERS

- Obtained Rule 12 dismissal of a putative nationwide wage and hour class action against a Fortune 50 employer.
- Obtained dismissal of wage and hour class action based on individual arbitration agreements.
- Successfully enforced mandatory arbitration agreements in Federal Circuit and District Courts and State Trial Courts.
- Obtained defense verdicts for a nationwide hospital system in age, race, wage and hour, national origin and FMLA cases.
- Negotiated several multi-million dollar executive compensation packages.

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PHILADELPHIA, PENNSYLVANIA

50 S 16th St.
22nd Floor
Philadelphia, PA 19102

P: 215.851.8461

F: 215.851.8383

mdjones@eckertseamans.com

PRACTICE AREAS:

Labor & Employment

STATE ADMISSIONS:

Pennsylvania

New Jersey

COURT ADMISSIONS:

U.S. Supreme Court

U.S. Court of Appeals for the Third Circuit

U.S. Court of Appeals for Veterans Claims

U.S. District Court for the Eastern District of Pennsylvania

U.S. District Court for the Middle District of Pennsylvania

U.S. District Court for the District of New Jersey

U.S. District Court for the Eastern District of New York

U.S. District Court for the Southern District of New York

Pennsylvania Supreme Court

New Jersey Supreme Court

EDUCATION:

LL.M., Trial Advocacy, Temple University Beasley School of Law, 2002

J.D., University of Pennsylvania Law School, 1992

B.A., Political Science and Psychology, Duke University, 1989

- Obtained summary judgment in a whistleblower case for a healthcare institution.
- Obtained multiple mass picketing injunctions on behalf of a nationwide telecommunications provider.

COMMUNITY INVOLVEMENT

- Philadelphia FIGHT
- Support Center for Child Advocates
- National Veterans Legal Services Program
- Amnesty International
- Camden Legal Services
- Philadelphia VIP
- Big Brothers Big Sisters
- Disciplinary Board of the Supreme Court of Pennsylvania, appointed Hearing Examiner

NEWS AND INSIGHTS

PUBLICATIONS

- "Supreme Court Doubles Down on Employment Arbitration", *Eckert Seamans' Labor and Employment Alert*, May 2018.

MEDIA COVERAGE

- "Treat 'Vent Letters' Like Exit Interviews," *HR Daily*, April 2018.

SPEAKING ENGAGEMENTS

- "Employment Arbitration," Richmond HR Forum, March 2018.
- "The NLRB Under the Trump Administration," Labor and Employment Relations Association Annual Meeting, December 2017.

HR FORUM

Employment Arbitration:
Is it right for your organization?

Presented by:
Clare M. Gallagher, Esq. and Michael D. Jones, Esq.

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Arbitration Agreements

- Agreements that require the parties to a contract to bring their legal claims in an arbitration proceeding rather than in a court of law.
- A class action waiver is an agreement, or a section in a broader agreement, that restricts an individual's right to bring a class action in a court of law.

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Gilmer Decision and the Explosion of Employment Arbitration

- In *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991), the Supreme Court held that claims brought by an employee pursuant to the Age Discrimination in Employment Act ("ADEA") were subject to arbitration.
- The Court stated that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28.

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Labor Arbitration Distinguished

- Different arbitrators; some overlap.
- Much more discovery in Employment Arbitration.
- Definitely more expensive.
- No cost splitting in Employment Arbitration.
- Some hostility at "forced" nature of Employment Arbitration.

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Class Waivers

- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).
- NLRA Section 7 Rights.
- Supreme Court found class waivers permissible and not in conflict with protected concerted activity for mutual aid and protection under the NLRA.

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Background of the FAA

Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*

- Enacted in 1925.
- To reverse long-standing judicial hostility towards arbitration agreements.
- To put agreements to arbitrate on equal footing with contracts generally.

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Transportation Industry Employees

- Section 1 of the FAA prohibits application of the statute to certain employment contracts.
- "Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."
- The Supreme Court interpreted this exception narrowly to apply only to contracts of employment of seamen, railroad employees or transportation workers. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

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Independent Contractors

- *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 536 (Jan. 15, 2019), the Supreme Court ruled that Section 1 exemption covers both employees and independent contractors of a trucking company.
- Court also found the meaning of "contracts of employment" at the time of the FAA's enactment to require a broad interpretation.
- "'Workers' . . . easily embraces independent contractors." *Id.* at 541.

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Enforcement

- Motion to compel arbitration under the FAA. 9 U.S.C. § 4.
- FAA grants interlocutory appeal of an order denying motion to compel arbitration. 9 U.S.C. § 16.
- FAA does not provide interlocutory appeal of order compelling arbitration. 9 U.S.C. § 16.
- FAA does not create independent federal question jurisdiction. 9 U.S.C. § 4.

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Preemption of State Arbitration Laws

- State laws that single out arbitration clauses for heightened scrutiny are preempted by the FAA. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (finding that FAA preempted Montana statute requiring arbitration notices to be typed in underlined capital letters on the first page of contract).
- In *Southland Corp. v. Keating,* 465 U.S. 1(1984), the Supreme Court held that the FAA applies even in state court proceedings.
- State agency adjudication must yield to arbitration. *Preston v. Ferrer*, 552 U.S. 346 (2008).

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Enforceability

- The FAA does not contain specific requirements for an enforceable arbitration agreement.
- Arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
- Ordinary state contract law defenses, including failure to establish offer and acceptance, lack of mutuality, duress and unconscionability apply.
- ***Arbitration agreement must pass scrutiny under law of every state in which it is utilized.***

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Enforceability Issues

- **Offer and Acceptance:** Acceptance can be signature, accepting employment, remaining employed, etc.; as a practical matter, you want a signature.
- **Consideration:** Employment; continued employment; or additional consideration (state specific).
- **Mutuality:** Employer's agreement to be bound/carve out issue. Warning: handbook disclaimers.
- **Fraud:** Employee must show that a misrepresentation was made regarding the terms of the agreement; not enough to have an incomplete explanation of the agreement.
- **Duress:** Difficult to prove (*e.g.,* signed under such oppressive conditions as the proverbial "gun to the head").

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Enforceability Issues cont'd

- **Unconscionability.** Most jurisdictions recognize two elements:
  1. Procedural
     - Procedural unconscionability relates to the process by which an agreement to arbitrate is reached and the form of the agreement itself.
     - This may include the use of fine print, lack of opportunity to review or confusing language.
  2. Substantive
     - Substantive unconscionability refers to terms of the agreement that are unreasonably or grossly favorable to one side.
     - To the extent attempts are made to restrict discovery or damages, validity of the arbitration agreement may be subject to challenge.

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Substantive Unconscionability

- **Notice Limitations:** Provisions that require an employee to bring his or her statutory claims within a short time period have been declared unconscionable.
- **Costs and Fees:**
  - Provisions requiring employees to pay their own costs, expenses and attorney's fees.
  - Provisions requiring an employee to pay all or part of arbitration costs.
  - When an employee demonstrates an inability to pay all or part of the costs associated with arbitration, courts have found such provisions unconscionable.

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Substantive Unconscionability cont'd

- **Fee Shifting:** Arbitration agreements that conflict with federal or state statutes which provide for an award of costs, expenses or attorney's fees to prevailing plaintiffs will usually be deemed unconscionable.
  - "Loser pays" provisions conflict and are unconscionable.
- **Limitation on available relief:** Provisions which purport to limit the type of relief available to successful plaintiffs have been deemed unconscionable.
  - Restrictions on reinstatement, pain and suffering and punitive damages.

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Effect of Unconscionable Terms

- If a court finds one or more provisions of an arbitration agreement unconscionable, it should generally sever the offending term and enforce the remainder of the agreement.
- However, when an agreement to arbitrate has multiple offending terms, a court may decide that the agreement is incapable of enforcement if the unconscionable provisions impose an arbitration scheme designed to discourage an employee's resort to arbitration or to produce results biased in the employer's favor.
- Practically speaking, any unconscionable term gives a hostile judge the hook to deny arbitration.

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Limitations on the use of Mandatory Employment Arbitration

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Does Not Bind the EEOC

- Even though an employee may be prevented from filing a discrimination suit if they have signed an arbitration agreement, the EEOC may bring an enforcement action in federal court against the employer based on discrimination against the employee and, in that action, the EEOC may seek remedies that are specific to the employee. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

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Collective Bargaining Agreements

- Arbitration clauses are a common feature in collective bargaining agreements ("CBAs").
- However, arbitration of statutory discrimination claims is viewed differently than arbitration of labor disputes arising under the terms of a CBA.
- *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) requires clear language.
- Most unions don't want to be responsible for statutory claims.
- Carve out may be the best you can get.

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Subpoena Power

- In some jurisdictions, arbitrators may lack the power to subpoena documents in advance of a hearing.
- Primarily a concern with third parties. Can usually be worked around with an advance hearing.

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FLSA Claims

- Fair Labor Standards Act ("FLSA").
- Concern over judicial approval requirement.
- FLSA claims are subject to arbitration. *Rodriguez-Depena v. Parts Authority, Inc.,* 877 F.3d 122 (2d Cir. 2017).
- How about settlements?
- Consent Order.
- Motion to confirm award.

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Careful with Carve Outs

- Some agreements carve out injunctive relief to enforce restrictive covenants.
- Most employment laws provide for injunctive relief.

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California's PAGA Claims

- Private Attorneys General Act ("PAGA")
- Supreme Court passed again.
- Difficult issue to resolve, *Waffle House* suggests that you cannot bind a state agency, yet PAGA delegates right to sue on behalf of the California Attorney General to private parties.
- Could be a huge loophole.

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Ongoing Litigation

- Courts generally refuse to enforce arbitration agreements entered into by individuals in the midst of class litigation. *See e.g., Dasher v. RBC Bank (USA)*, 882 F.3d 1017 (11th Cir. 2018).
- Bad facts make bad law.
- Judicial approval and carve outs likely make for a different outcome.

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The Good

- Cheaper.
- Less formal process – exhibit binders.
- Slightly relaxed evidentiary rules.
- No jury.
- Eliminates many costly litigation elements (pre-trial memo, motions *in limine*, jury instructions, etc.)
- Client willingness to take cases to a decision.
- Less defensive lawyering.
- Reduced settlement value.
- Control over scheduling.
- Eliminate class litigation entirely.

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The Bad

- Doesn't eliminate agency proceedings.
- Summary judgment all but gone.
- Arbitrator/Administrative costs.
- More discovery than there should be.
- No appeal.
- Challenges to policy/clause – making your own precedent.

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Implementation

- Applications/failure to hire.
- Handbook/Stand alone.
- Morale/messaging.
- Additional consideration? Bonus/Raise/Vacation.
- Mandatory term of employment/Opt-Out.
- Union employees.

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Practical Observations

- The *Pro Se* problem.
- Arbitrator selection is key.
- It isn't labor arbitration.
- It isn't exactly litigation either.
- Some of the better labor arbitrators won't do it.
- Scope of discovery is biggest challenge to control cost.

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Practical Observations cont'd

- Agreement must be written under FAA.
- Signature demonstrates acceptance and/or notice.
- Electronic signatures add a layer of complexity.
- Serial filers.
- The runaway arbitrator.

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Me Too

- Push back on arbitration.
- State laws specific to arbitration likely pre-empted.
- Arbitration does not necessarily equal confidentiality.
- No public docket for media.
- Some employers (Google and Facebook, for example) have announced that they will carve out sexual misconduct claims from their arbitration agreements.

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Questions?

Clare M. Gallagher, Esq.
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Michael D. Jones, Esq.
(215) 851.8461 | mdjones@eckertseamans.com

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