Journal of Dispute Resolution

Volume 2020 | Issue 1 Article 15

2020

State Legislative Update

Juvan Bonni

Jonathan Ence

Lauren Smith

Jackson Tyler

State Legislative Update

Juvan Bonni, Jonathan Ence, Lauren Smith, & Jackson Tyler[*]

The State Legislative Update is compiled and written annually by Journal of Dispute Resolution Associate Members under the direction of the Associate Editor In Chief. It is designed to provide readers with a listing of pertinent legislation affecting the field of alternative dispute resolution ("ADR") and a more detailed look at certain bills because of their importance or novelty within the field.[1]

I. THE RISE OF ADR IN HOUSING DISPUTES

Bill Number:	California Assembly Bill 1820 California Senate Bill 384
Summary:	California Assembly Bill 1820 amends personal rights to Section 12930 of the California Government Code, which previously established the Department of Fair Employment and Housing. California Senate Bill 384 creates an environmental review process for housing in California that largely consists of mediation sessions.
Status:	California Assembly Bill 1820 was amended and substituted as of June 25, 2019, while California Senate Bill 384 was amended and substituted as of June 9, 2019.
Bill Number:	Colorado House Bill 1309 Colorado Senate Bill 180
Summary:	Colorado House Bill 1309 provides a new set of rules to mobile homes and mobile home parks. Moreover, this bill provides an avenue for mobile homeowners and mobile home park owners to mediate their disputes. Colorado Senate Bill 180 aims to prevent possible evictions using ADR, in addition to creating a low–cost legal assistance program to those at risk for eviction.

* Juvan Bonni, J.D. Candidate, University of Missouri School of Law, 2020. I would like to thank my parents for encouraging me to always do my best, my professors for teaching me to write with clarity, and the Journal of Dispute Resolution for this opportunity.

Jonathan Ence, J.D. Candidate, University of Missouri School of Law, 2020. I would like to thank my parents, professors, and the Journal of Dispute Resolution.

Lauren Smith, J.D. / M.H.A. Candidate, University of Missouri Schools of Law and Medicine, 2020. I would like to thank my parents, fellow contributors to this piece, and the entire Journal of Dispute Resolution Editorial Board for the much–needed guidance and support.

Jackson Tyler, J.D. Candidate, University of Missouri School of Law, 2020. I would like to thank my parents for pushing me to pursue education and my wife, Lauren, for continually supporting my endeavors.

1. If you have comments or suggestions about the annual Legislative Update, please feel free to e–mail the Journal of Dispute Resolution Editorial Board at umclawjournal@missouri.edu.

Status:	Colorado House Bill 1309 was introduced on April 22, 2019, and it was subsequently signed into law in May 2019. Colorado Senate Bill 180 was adopted in May 2019 and enrolled as of June 9, 2019.
Bill Number:	Connecticut Senate Bill 768
Summary:	Connecticut Senate Bill 768 calls for the creation of an Office of the Property Rights Ombudsman to arbitrate and mediate disputes arising between property owners and government agencies.
Status:	Connecticut Senate Bill 768 was introduced on January 29, 2019 and remains so as of June 2019.
Bill Number:	Hawaii Senate Bill 551 Hawaii Senate Bill 306
Summary:	Hawaii Senate Bill 551 requires condominium associations to provide condominium unit owners a chance to mediate if owners are served a notice of default with an intention to foreclose. Hawaii Senate Bill 306 establishes a pathway for condominium associations and condominium unit owners to resolve more general conflicts that may arise through ADR.
Status:	Hawaii Senate Bill 551 became law without the governor's signature in July 2019. Hawaii Senate Bill 306 was introduced in January 2019.

A. Introduction

Recently, a number of states have begun to employ ADR methods to resolve housing disputes.[2] Using the laws put in place by state legislatures, non–profit organizations also play a role in helping resolve housing disputes using ADR methods.[3] Regarding disputes arising from manufactured homes, the United States

2. *California Governor Gavin Newsom Proposes New Permanent Funding to Help Californians Fight Evictions & Foreclosures*, SIERRA SUN TIMES (Aug. 8, 2019), https://goldrushcam.com/sierrasuntimes/index.php/news/local-news/19681-california-governor-gavin-newsom-proposes-new-permanent-funding-to-help-californians-fight-evictions-and-foreclosures; ALTERNATIVE DISPUTE RESOLUTION, FLA. COURTS, https://www.flcourts.org/Resources-Services/Alternative-Dispute-Resolution (last visited Aug. 10 2019); *Dispute Resolution*, TENANTS UNION OF WASH. STATE, https://tenantsunion.org/rights/dispute-resolution (last visited Aug. 10, 2019); Michael Geheren, *Navigating Affordable Housing in Sioux Falls*, KELOLAND TELEVISION (July 24, 2019), https://www.keloland.com/keloland-com-original/navigating-affordable-housing-in-sioux-falls/.

3. Jason Tashea, *Nonprofits' Legal & Tech Support Help Resolve Housing Disputes*, A.B.A. J. (July 1, 2017), http://www.abajournal.com/magazine/article/tenant_pro_se_housing_court; *Housing Mediation Services*, WHAT WORKS FOR HEALTH, http://whatworksforhealth.wisc.edu/program.php?t1=109&t2=126&t3=89&id=348 (last visited Aug. 10, 2019).

Department of Housing and Urban Development ("HUD") recently created a website allowing manufacturers, retailers, and installers to submit complaints should they find themselves in a conflict.[4] Traditionally, ADR consists of arbitration, mediation, and negotiation.[5] In the context of housing disputes, mediation and arbitration are the primary ADR methods utilized.[6] There are many types of housing disputes, each with their own set of nuances, but this Update focuses primarily on recent state legislative acts addressing conflicts between landlords and tenants and between property owners through . Specifically, this Update explores California, Colorado, Connecticut, and Hawaii legislatures.

B. California

Currently, the California Department of Fair Employment and Housing ("DFEH") is authorized to receive, investigate, conciliate, mediate, and prosecute complaints alleging civil rights violations.[7] The DFEH provides avenues for the citizens of California to file civil complaints for wrongful discrimination in such housing activities as renting and leasing and subsequently provides ADR mediums, such as mediation, to resolve these conflicts.[8] The following is a possible pathway through which a dispute can be resolved via the infrastructure the DFEH creates: an intake form is submitted; a complaint is created; an investigation then occurs; both disputants utilize an ADR process; and a settlement is subsequently reached.[9]

The California Assembly introduced a bill that would enhance the aforementioned ADR pathway for housing disputes.[10] Assembly Bill Number 1820 ("AB 1820") was introduced on March 6, 2019 by the Committee on Judiciary.[11] AB 1820 amends personal rights to section 12930 of the California Government Code ("Section 12930"), which establishes the DFEH.[12] The bill reiterates that the DFEH has the power "to appoint attorneys, investigators, conciliators, mediators, and other employees as it may deem necessary, fix their compensation within the

4. *Manufactured Home Dispute Resolution Program*, U.S. DEP'T OF HOUS. & URBAN DEV., http://www.huddrp.net/ (last visited Aug. 10, 2019); *HUD Launches Dispute Resolution Website*, ILL. MANUFACTURED HOUS. ASS'N, https://www.imha.org/news/hud-launches-dispute-resolution-website (last visited Aug. 10, 2019).

5. *Alternative Dispute Resolution*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/alternative_dispute_resolution (last visited Sept. 4, 2019).

6. *Housing Mediation Services*, TENANT RES. CTR., http://www.tenantresourcecenter.org/ (last visited Aug. 10, 2019); *Dispute Resolution*, *supra* note 2; *Fair Housing/Landlord–Tenant*, VOLUNTEERS OF AM., https://www.voaww.org/fairhousing (last visited Oct. 27, 2019); Amy Alkon, *30–Year Dispute Resolution Program: Latest Victim of LA's Idiotic Bureaucratic Ax*, CITY WATCH (June 20, 2019), https://www.citywatchla.com/index.php/2016-01-01-13-17-00/los-angeles/17897-30-year-dispute-resolution-program-latest-victim-of-la-s-idiotic-bureaucratic-ax.

7. A.B. 1820, Reg. Sess. (Cal. 2019); *Mediation FAQs*, CAL. DEP'T OF FAIR EMP'T & HOUS., https://www.dfeh.ca.gov/resources/frequently-asked-questions/mediation-faqs/ (last visited Aug. 10, 2019).

8. *State Law Prohibits Discrimination in Housing*, CAL. DEP'T OF FAIR EMP'T & HOUS., https://www.dfeh.ca.gov/Housing/ (last visited Aug. 10, 2019); Olivia Solon, *Airbnb Host Who Canceled Reservation Using Racist Comment Must Pay $5,000*, THE GUARDIAN (July 13, 2017), https://www.theguardian.com/technology/2017/jul/13/airbnb-california-racist-comment-penalty-asian-american.

9. *Complaint Flowchart*, CAL. DEP'T OF FAIR EMP'T & HOUS., https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/04/DFEH-A03PComplaintFlowchart-GeneralEnglish.pdf (last visited Aug. 10, 2019).

10. A.B. 1820, Reg. Sess. (Cal. 2019).

11. *Id.*

12. *Id.*; CAL. CODE REGS. tit. 2, § 12930 (1982).

limitations provided by law, and prescribe their duties."[13] It further outlines more ways in which the Department has the power to conciliate and mediate disputes that can be brought to the DFEH, including housing disputes.[14] Additionally, the bill authorizes the DFEH to bring civil actions for violations of "specified federal civil rights and antidiscrimination laws."[15] Because AB 1820 seeks to amend Section 12930, AB 1820 continues the trend of bills introducing possible ADR solutions to housing–related conflicts.

Prior to the introduction of AB 1820, State Senator Mike Morell introduced Senate Bill Number 384 ("SB 384") on February 20, 2019.[16] SB 384 has been marketed by Senator Morell and his staff as a way to spur growth in the housing market of California, in addition to establishing "a streamlined enviro[nmental] review process for housing."[17] A closer look at the bill's language reveals that this environmental review process largely consists of mediation sessions.[18] SB 384 states that a request for a mediation session must identify all areas of the environmental housing dispute.[19] Moreover, the bill stipulates the necessary qualifications for the mediators: "retired judges or recognized experts with at least five years' experience in land use and environmental law or science, or mediation."[20] SB 384 also affirms that the mediation resolution process is a nonbinding one, thus neither party must ultimately accept the outcome of such a mediation session.[21] Although SB 384 is somewhat esoteric in that it addresses a very specific aspect of housing conflicts—environmental housing disputes—the fact that mediation is described in such a detailed manner illustrates California's general trend towards ADR in housing–related disputes.[22]

C. Colorado

Colorado's state judicial branch has an Office of Dispute Resolution dedicated to using ADR methods to resolve various disputes, including housing–related ones, amongst its citizens.[23] Specifically, Colorado's judicial branch has an online portal that explains the process of mediation and allows citizens to select a mediator for their dispute.[24] Additionally, Colorado's Department of Local Affairs ("DLA"), which oversees the state's Division of Housing, has an ADR mechanism in place to

13. A.B. 1820, Reg. Sess. (Cal. 2019).
14. A.B. 1820, Reg. Sess. (Cal. 2019); CAL. CODE REGS. tit. 2, § 12930 (1982).
15. *Id.*
16. S.B. 38, Reg. Sess. (Cal. 2019).
17. *California Needs Homes. Let's Build Them*, SENATOR MIKE MORRELL, https://morrell.cssrc.us/content/california-needs-homes-lets-build-them (last visited Aug. 10, 2019); @MikeMorrellGOP, TWITTER (Apr. 9, 2019, 12:30 PM), https://twitter.com/i/web/status/1115668259557134336.
18. S.B. 38, Reg. Sess. (Cal. 2019).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Office of Dispute Resolution*, COLO. JUDICIAL BRANCH, https://www.courts.state.co.us/Administration/Unit.cfm?Unit=odr (last visited Aug. 11, 2019); *What is Mediation & How Do I Prepare?*, COLO. JUDICIAL BRANCH, https://www.courts.state.co.us/Administration/Section.cfm?Section=prepmed (last visited Aug. 11, 2019).
24. *Id.*

solve potential disputes that arise in general land use matters.[25] Some cities, such as Boulder, also have local municipal ADR resources that provide mediation services to settle landlord/tenant disputes.[26]

On April 22, 2019, Colorado House Bill 1309 ("HB 1309"), which provides a new set of rules to mobile homes and mobile home parks, passed the House and moved to the state Senate.[27] HB 1309 was carried through the state Senate by Senators Pete Lee and Steve Fenberg.[28] It was subsequently signed into law in May 2019.[29] Although most mobile home parks are located in unincorporated parts of the counties across the state, the bill attempts to navigate around Colorado counties with their own regulations on mobile homes.[30] HB 1309 establishes ADR mechanisms that disputants in mobile home conflicts can utilize to come to a possible settlement.[31] Specifically, the bill gives the option for the disputants—the mobile home owners and the park owners—to engage in mediation sessions.[32] Should those mediations sessions fail, either side has the option to take the case to an administrative law judge, which is still less costly than going to court.[33] In addition to the landlord/tenant disputes that already have ADR processes in place throughout Colorado, there are now ADR options specifically related to mobile homes.

Colorado's state Senate also seeks to prevent possible evictions using ADR mechanisms and a low–cost legal assistance program for those at risk for eviction.[34] State House Representative Julie McCluskie and State Senator Faith Winter are the prime sponsors of Senate Bill Number 180 Eviction Legal Defense Fund ("SB 180").[35] The bill was adopted on May 30, 2019 and will cost approximately $750,000.[36] Through this fund, SB 180 seeks to "provid[e] mediation services for disputes between a landlord and tenant that could prevent or resolve the filing of an eviction."[37] Moreover, the bill would create clinics designed to "educate and assist indigent tenants in eviction proceedings, including providing information related to

25. *Land Use Dispute Resolution*, COLO. DEP'T OF LOCAL AFFAIRS, https://www.colorado.gov/pacific/dola/land-use-dispute-resolution (last visited Aug. 11, 2019).

26. *Community Mediation Service*, CITY OF BOULDER COLO., https://bouldercolorado.gov/community-relations/mediation-program (last visited Aug. 11, 2019).

27. Marianne Goodland, *Colorado House Passes New Rules for Mobile Home Parks; Bill Advances to Senate*, THE GAZETTE (Apr. 22, 2019), https://gazette.com/news/colorado-house-passes-new-rules-for-mobile-home-parks-bill/article_756c1ed4-6558-11e9-bafc-2f85a8786bef.html.

28. *Id.*

29. Anthony Hahn, *Polis Signs Bill Expanding Protections for Mobile Home Residents*, DAILY CAMERA (May 23, 2019), https://www.dailycamera.com/2019/05/23/polis-signs-bill-expanding-protections-for-mobile-home-residents/; Goodland, *supra* note 27; *Colo. Expands Protections for Mobile Home Residents*, FOX 31 NEWS (May 24, 2019), https://kdvr.com/2019/05/24/colorado-expands-protections-for-mobile-home-residents/.

30. Goodland, *supra* note 27.

31. H.B. 19–1309, 72d Sess., 1st Reg. Sess. (Colo. 2019).

32. H.B. 19–1309, 72d Sess., 1st Reg. Sess. (Colo. 2019); Goodland, *supra* note 27.

33. Goodland, *supra* note 27.

34. Joey Bunch, *Polis Signs Bills to Aid Renters, Seniors & Coloradans With Disabilities*, THE GAZETTE (May 21, 2019), https://gazette.com/news/polis-signs-bills-to-aid-renters-seniors-and-coloradans-with/article_13b0073a-9fac-531f-b060-12547a757073.html; Eviction Legal Defense Fund, S.B. 19-180, 72d Sess., 1st Reg. Sess. (Colo. 2019).

35. Eviction Legal Defense Fund, S.B. 19–180, 72d Sess., 1st Reg. Sess. (Colo. 2019).

36. *Id.*; Faith Miller, *Eviction Assistance Available*, COLO. SPRINGS INDEP. (Aug. 6, 2019), https://www.csindy.com/TheWire/archives/2019/08/06/eviction-assistance-available.

37. S.B. 19–180, 72d Sess., 1st Reg. Sess. (Colo. 2019).

the rights and responsibilities of landlords and tenants."[38] Because SB 180 seeks to assist indigent persons at risk of eviction through mediating disputes between these tenants and their landlords, this bill is an example of not only how ADR can be applied to housing–related disputes, but also how ADR can accelerate social progressive change.

D. Connecticut

The state of Connecticut is no stranger to eminent domain conflicts. Consider, for example, the well–known Supreme Court case *Kelo v. New London*.[39] Because the ruling in *Kelo* was against individual property owners, the decision has had a lasting effect on how state courts and legislatures navigate the controversial issue of eminent domain.[40] In fact, more than forty states have tightened their eminent domain laws since the *Kelo* decision.[41] Moreover, polls show that eighty percent of the American public disapproved of the *Kelo* outcome.[42] Representative Douglas Dubitsky nicely summarized the problematic aftermath of the Supreme Court decision in a recent article in *The Connecticut Mirror*: "The shock of the *Kelo* decision . . . has never really subsided in many communities, that the government can just take your house, that you're using, that you're taking care of, and give your property to a shopping center."[43]

To address this issue, Senator George S. Logan introduced Senate Bill Number 768 ("SB 768") on January 29, 2019.[44] Specifically, SB 768 calls for the creation of an Office of the Property Rights Ombudsman to arbitrate and mediate disputes arising between property owners and government agencies.[45] SB 768 also requires government agencies to attempt negotiate purchase of the property in question *before* it may be obtained via eminent domain.[46] Additionally, the bill calls for "state agencies to pay the maximum benefits provided pursuant to the state and federal Uniform Relocation Assistance Acts."[47] Therefore, SB 768 would provide an alternative route to settle potential disputes between individual property owners and the government that would otherwise be completely and unequivocally subject to eminent domain precedent set by the Supreme Court in *Kelo*.[48] The bill also utilizes three common ADR methods: negotiation, arbitration, and mediation.[49] By trying to mitigate the negative effects of *Kelo*, SB 768 echoes America's trend toward using ADR to resolve housing–related disputes.

38. *Id.*
39. Kelo v. New London, 545 U.S. 469 (2005) (holding that New London's exercise of eminent domain in furtherance of economic development satisfied constitutional "public use" requirement).
40. Richard A. Epstein, *Kelo v. City of New London: Ten Years Later*, NAT'L REVIEW (June 23, 2015, 8:00 AM), https://www.nationalreview.com/2015/06/kelo-eminent-domain-richard-epstein/.
41. Keith M. Phaneuf, *Bill to Limit Eminent Domain Advances—For Now*, THE CONN. MONITOR (Mar. 29, 2019), https://ctmirror.org/2019/03/29/bill-to-limit-eminent-domain-advances-for-now/.
42. Ilya Somin, *The Political & Judicial Reaction to Kelo*, THE WASH. POST (June 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/.
43. Phaneuf, *supra* note 41.
44. S.B. 768, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019).
45. *Id.*
46. *Id.*
47. *Id.*
48. Phaneuf, *supra* note 41.
49. S.B. 768, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019).

E. Hawaii

Yet another context in which housing–related disputes may arise is between a condominium unit owner and the corresponding condominium association. In some states, such as Florida, ADR mechanisms such as arbitration and mediation are required before either a condominium unit owner or a condominium association commences an action in court.[50] In Hawaii, there are a couple of legislative acts underway that address this particular type of disputes.[51]

State Senators Stanley Chang and Rosalyn Baker introduced Senate Bill Number 551 ("SB 551") on January 18, 2019.[52] The bill notes that due to the decision reached in *Sakal v. Association of Apartment Owners of Hawaiian Monarch*, many condominium associations have lost authority in the foreclosure process.[53] SB 551 would require condominium associations to "offer mediation with a notice of default and intention to foreclose."[54] In an article featured in the *Honolulu Civil Beat*, Blaze Lovell reports that if the condominium owner requests mediation, the condominium association would be unable to immediately pursue nonjudicial foreclosure.[55] However, if the mediation sessions are not completed within the subsequent sixty days, then the foreclosure could proceed. The bill therefore clarifies the powers condominium associations have with regard to foreclosure on individual units within the association's purview.[56] Although mediation is integral to SB 551, it is troubling to individual condominium owners that associations do not necessarily need to spell out the power to foreclose in their bylaws.[57] Despite the fact that SB 551 is controversial, it illustrates the wide–spread use of ADR mechanisms in housing–related disputes.

The Hawaii Senate has also introduced a bill that establishes a pathway for condominium associations and condominium unit owners to resolve more general conflicts that may arise by using ADR. Senate Bill Number 306 ("SB 306") denotes the Real Estate Commission of Hawaii as the receiver of "any complaints regarding disputes between a condominium association and a unit owner or any complaints referred to mandatory mediation, mandatory arbitration, or voluntary binding arbitration."[58] Additionally, the Hawaii state government provides an online pamphlet detailing the logistics behind this mediation process, which essentially reaffirms the bill's overall goals.[59] This pamphlet outlines the advantages to

50. Steven J. Adamczyk, *Condo Column: Mediation, Arbitration Sometimes Required Before Lawsuits*, TCPALM (Aug. 8, 2019, 9:27 AM), https://www.tcpalm.com/story/life/community/2019/08/08/condo-column-mediation-arbitration-sometimes-required-before-lawsuits/1876159001.

51. *See, e.g.*, S.B. 551, 30th Leg., Reg. Sess. (Haw. 2019); S.B. 306, 30th Leg., Reg. Sess. (Haw. 2019).

52. S.B. 551, 30th Leg., Reg. Sess. (Haw. 2019).

53. *Id.*; Sakal v. Ass'n of Apartment Owners of Haw. Monarch, 426 P.3d 443 (Haw. Ct. App. 2018) (holding that "condominium property regime statutes do not authorize an association to conduct a nonjudicial or power of sale foreclosure.").

54. S.B. 551., 30th Leg., Reg Sess. (Haw. 2019).

55. Blaze Lovell, *Condo Association May Be on Verge of Gaining More Foreclosure Power*, HONOLULU CIVIL BEAT (May 13, 2019), https://www.civilbeat.org/2019/05/condo-associations-may-be-on-verge-of-gaining-more-foreclosure-power/.

56. *Id.*

57. *Id.*

58. S.B. 306, 30th Leg., Reg. Sess. (Haw. 2019).

59. Haw. Real Estate Comm'n, *Mediation of Condominium Disputes*, STATE OF HAW. (2015), https://cca.hawaii.gov/reb/files/2015/06/mediate.0615.pdf.

condominium associations and individual unit owners of seeking mediation, as well as describes the differences between facilitative and evaluative mediation.[60] Combined with SB 551, SB 306 is yet another indication that ADR mechanisms—namely, mediation and arbitration—are becoming increasingly common in solving housing–related disputes.

F. Conclusion

There are a variety of housing–related disputes, including the traditional landlord/tenant disputes, but also disputes that involve condominium associations, individual property owners, and eminent domain. The continued rise of ADR in housing–related disputes seems to be apolitical. Some bills incorporate progressive solutions such as new ways to curb evictions, while others controversially give more power to homeowners associations.[61] Regardless, time will tell whether ADR mechanisms will continue to become more popular in settling housing–related disputes and reveal if they subsequently become more politicized.

II. PRIVATE ATTORNEYS GENERAL ACTS: AN ATTEMPT TO CURB MANDATORY ARBITRATION AGREEMENTS

Bill Number:	Vermont Senate Bill 139 Vermont House Bill 483
Summary:	Vermont Senate Bill 139 and Vermont House Bill 483 work in tandem to allow whistleblowers to bring actions on behalf of the state for violations of workplace protections.
Status:	Vermont Senate Bill 139 was committed to Committee on Economic Development, Housing and General Affairs on March 22, 2019. Vermont House Bill 483 was referred to the Committee on Judiciary on February 28, 2019, the same day it was introduced.
Bill Number:	Washington House Bill 1965
Summary:	Washington House Bill 1965 allows whistleblowers to bring actions on behalf of the state for violations of workplace protections.
Status:	Washington House Bill 1965 has been referred to Rules Committee as of March 21, 2019.

60. *Id.*
61. *Id.*

A. Introduction

Mandatory arbitration clauses are often included employment contracts.[62] When an employee wishes to bring a legal claim against his or her employer, mandatory arbitration clauses prohibit the employee from taking claims to the court system and instead place the claim in a forum that weighs in favor of the employer.[63] Arbitration can be more favorable for the parties than litigation because it speeds up the resolution process and reduces attorney fees.[64] However, employees have more difficulty winning their cases in arbitration than in the courts.[65] Many arbitration agreements contain provisions that support the employer, such as a lack of meaningful discovery, a shortened statute of limitations, alterations to the burdens of proof, and limits on a party's presentation of his or her case.[66] Moreover, many of these provisions are boilerplate, leaving employees no meaningful opportunity to negotiate the terms of the arbitration clauses.[67] Generally, provisions in arbitration agreements restricting the filing of claims with federal or state agencies have been found unlawful.[68]

Criticism of mandatory arbitration has been on the rise since the Supreme Court of the United States began expanding the scope of the Federal Arbitration Act ("FAA") in the 1980s.[69] In 1991, the Supreme Court expanded the FAA to employment cases in *Gilmer v. Interstate/Johnson Lane Corp*.[70] Since that time, state legislatures have attempted to place limits on the FAA that have repeatedly been struck down by the Supreme Court and held to be preempted as inconsistent with the provisions and objectives of the FAA.[71]

B. Federal Supremacy

On May 21, 2018, the Supreme Court handed down *Epic Systems Corp. v. Lewis*, which held that arbitration agreements with class action waivers requiring individual arbitration are enforceable under the FAA.[72] In her dissenting opinion, Justice Ginsburg noted that "[c]ongressional correction of the Court's elevation of

62. Garen Dodge & David Alvarez, *New Federal Legislation Seeks to Eliminate Mandatory Arbitration Agreements*, LEXOLOGY (Mar. 21, 2019), https://www.lexology.com/library/detail.aspx?g=eeefa043-fff4-4f4d-a798-f31e0672b9ba.

63. Katharine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.

64. Barbara Kate Repa, *Arbitration Pros & Cons*, NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html (last visited July 16, 2019).

65. Dodge & Alvarez, *supra* note 62.

66. *Id.*

67. *Id.*

68. Chad M. Horton, *Arbitration Agreement May Not Restrict Access to NLRB Processes*, LABOR & EMP'T REPORT (June 19, 2019), https://www.laboremploymentreport.com/2019/06/19/arbitration-agreement-may-not-restrict-access-toF-nlrb-processes/.

69. Stone & Colvin, *supra* note 63.

70. *See generally* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

71. *See* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017) ("The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim.'") (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)); *see also* DirectTV Inc. v. Imurgia, 136 S. Ct. 463, 468 (2015) ("The Federal Arbitration Act is a law of the United States. . . . [C]onsequently, the judges of every State must follow it.").

72. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

the FAA . . . is urgently in order."[73] Consequently, legislation to curb the effects and scope of the FAA must come from Congress as opposed to state legislatures. In response to *Epic Systems*, Democratic members of Congress, Representative Hank Johnson of Georgia and Senator Richard Blumenthal of Connecticut, introduced "The Forced Arbitration Injustice Repeal Act" ("FAIR Act") on February 28, 2019.[74] This Senate bill would prohibit pre–dispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes, as well as agreements and practices that interfere with rights to participate in a joint, class, or collective action related to employment.[75] Because of the current political climate, the FAIR Act is likely dead on arrival, as opinions on the topic are typically split across party lines.[76] Thus, given the inaction of Congress, state governments have returned to proposals that restrict mandatory arbitration even though such legislation may run contrary to federal law.[77]

C. Private Attorneys General Act

In 2004, California passed what is known as the Private Attorneys General Act ("PAGA"), which permits employees to act on behalf of California's Labor and Workforce Development Agency by bringing cases as private citizens.[78] "Private attorney general" is a term for a private attorney that brings a lawsuit considered to be in the interest of the public.[79] These claims are known as *qui tam* actions and provide that a private party may bring an action on the government's behalf.[80] "The government, not the relator, is considered the real plaintiff."[81] In essence, an employee of the company can bring a lawsuit for workplace violations and recover civil penalties on behalf of themselves, other employees, and the State of California.[82] The state and employee(s) split the winnings from the suit 75/25 in favor of the state.[83] In 2014, the California Supreme Court held that PAGA waivers, typically added to arbitration agreements, are unenforceable.[84] Since that time, litigation under PAGA has increased, and PAGA has received more attention.[85] Because of the success of PAGA, Vermont and Washington state legislators have proposed bills to model California's PAGA.[86]

73. *Id.* at 1633 (Ginsburg, J., dissenting).
74. S.B. 610, 116th Cong., 1st Sess. (2019).
75. *Id.*
76. Dodge & Alvarez, *supra* note 62.
77. *Id.*
78. CAL. LAB. CODE § 2698–2699.6 (West 2004).
79. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968).
80. *Qui Tam Action*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/qui_tam_action (last visited Aug. 8, 2019).
81. *Id.*
82. Dodge & Alvarez, *supra* note 62.
83. *Id.*
84. Iskanian v. CLS Transp. L.A. LLC, 327 P.3d 129 (2014).
85. Jathan Janove, *More California Employers are Getting Hit with PAGA Claims*, SHRM (March 26, 2019), https://www.shrm.org/resourcesandtools/hr-topics/pages/more-california-employers-are-getting-hit-with-paga-claims.aspx.
86. S.B. 139, Gen. Assemb., Reg. Sess. (Vt. 2019); H.B. 877.1, 1965 Leg., 66th Reg. Sess. (Wash. 2019).

1. Vermont

On March 1, 2019, State Senator Alison Clarkson and State Representative Selene Colburn introduced Vermont's version of the Private Attorneys General Act: Vermont Senate Bill 139 ("SB 139").[87] While the act would function similarly to California's PAGA, the distribution of winnings is typically 70/30 in favor of the state but 80/20 in favor of the state in cases where the Commissioner of Labor gets involved.[88] Additionally, the act provides a mechanism for whistleblowers to pursue actions against employers.[89] This act would also help reduce the caseload of the Labor Relations Board, which is approximately half grievances under the State Employees Labor Relations Act.[90]

In order to bring a claim, the relator—the aggrieved party bringing the claim—must pay a $75.00 filing fee and file a notice of grievance with the Commissioner of Labor.[91] At that point, the Commissioner has sixty days to determine whether to investigate the claim.[92] If the Commissioner decides not to investigate the claim or does not respond to the notice, the relator would then be permitted to commence a public enforcement action in relation to the claim.[93] Additionally, if the relator files the action, the Commissioner has thirty days to intervene or more than thirty days if good cause is shown.[94] The act also provides a prohibition against employer retaliation, such as discharge.[95]

Additionally, the act provides for a community outreach and workforce education fund that would take twenty–five percent of the proceeds awarded to the Commissioner and make it available to "provide grants to labor or nonprofit organizations for activities to assist workers in enforcing their employment rights."[96] SB 139 was committed to the Committee on Economic Development, Housing and General Affairs on March 22, 2019.[97] House Bill 483, another act relevant to the creation of Vermont's PAGA, was referred to the Committee on Judiciary on the same day it was introduced.[98]

2. Washington

On February 8, 2019, Washington State Representative Drew Hansen introduced House Bill 1965 ("HB 1965"), which "[a]llow[s] whistleblowers to bring actions on behalf of the state for violations of workplace protections."[99] This proposed legislation is slightly different from both the proposed Vermont PAGA

87. S.B. 139, Gen. Assemb., Reg. Sess. (Vt. 2019); H.B. 483, Gen. Assemb., Reg. Sess. (Vt. 2019).
88. S.B. 139, Gen. Assemb., Reg. Sess. (Vt. 2019).
89. *Id.*
90. State of Vt. Labor Rel. Bd., *Grievances*, VT. (2019), https://Vlrb.Vermont.Gov/Grievances.
91. S.B. 139, Gen. Assemb., Reg. Sess. (Vt. 2019).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id*.
97. *S.139*, VT. GEN. ASSEMB., https://legislature.vermont.gov/bill/status/2020/S.139 (last visited Oct. 29, 2019).
98. H.B. 483, Gen. Assemb., Reg. Sess. (Vt. 2019).
99. H.B. 877.1, 1965 Leg., 66th Reg. Sess. (Wash. 2019).

and California PAGA as it applies to *qui tam* actions or whistleblower suits.[100] HB 1965 states that "[t]he legislature finds that while most employers pay their workers wages owed, provide safe conditions, provide a workplace free from discrimination, and otherwise follow the law, violations of workplace protections persist."[101] As the law in Washington currently stands, "private enforcement is limited by arbitration requirements and workers are restricted from acting collectively."[102]

Because of a lack of state resources, many claims made to the Department of Labor and Industries are backlogged or not prosecuted, leaving whistleblowers without meaningful access to justice outside of arbitration.[103] HB 1965 would provide whistleblowers with greater access to the judicial system instead of limiting them to arbitration or a delayed grievance process.[104] Under this bill, whistleblowers could bring a suit for violations of laws on minimum wage, payment of wages, wage rebates, gender equal pay opportunities, and discrimination.[105]

The relator must first file the claim with the Department of Labor and Industries and send notice to the employer.[106] The agency would have sixty days to respond to the claim with a decision not to investigate or 180 days to respond with a decision to investigate.[107] At the 180 day mark, the relator would then be able to commence the *qui tam* action.[108] If the agency does not intervene, the penalty distribution is 60/40 in favor of the agency, whereas if the agency intervenes the split is 80/20 in favor of the agency.[109] HB 1965 also provides for an employer retaliation prohibition.[110] Similar to the Vermont PAGA, proceeds from the penalties may be used for enforcement of the bill as well as education about employment rights and obligations.[111]

Opponents of the bill note that it does not add any new protections and simply adds costs.[112] Further, they allege that California PAGA has not seen success but, rather, an abuse of the process.[113] If HB 1965 passes, the bill would take effect ninety days after signing.[114] The bill has received some amendments and passed through several committees. This activity is a good sign that Washington's Democratic majority legislature will pass the legislation.[115]

D. PAGA Outside the Scope of the FAA

Because of the Supreme Court decision in *Epic Systems*, arbitration agreements cannot be displaced by class–action lawsuits brought by employees.[116] The opinion

100. H.B. 2216.1, 66th Leg., 2019 Reg. Sess. (Wash. 2019); H.B. REP. 1965 (Wash. 2019).
101. H.B. 2216.1, 66th Leg., 2019 Reg. Sess. (Wash. 2019).
102. H.B. REP. 1965 (Wash. 2019).
103. *Id.*
104. *Id.*
105. H.B. ANALYSIS 1965 (Wash. 2019).
106. H.B. 2216.1, 66th Leg., 2019 Reg. Sess. (Wash. 2019).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. H.B. REP. 1965 (Wash. 2019).
113. *Id.*
114. *Id.*
115. *See generally id.*
116. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018).

also stated that class and collective waiver provisions in arbitration agreements that employees must sign as a condition of employment do not violate the National Labor Relations Act.[117] This gives rise to the question of whether a mandatory arbitration agreement should be enforced against the collective action of a Private Attorneys General Act—a question recently addressed in *Correia v. NB Baker Electric, Inc*.[118] In *Correia*, former employees sued their employer, NB Baker Electric, Inc., alleging wage and hour violations and seeking civil penalties under PAGA.[119] Baker Electric petitioned the trial court for arbitration pursuant to the parties' arbitration agreement, which provided that arbitration would be the exclusive forum for any dispute and prohibited employees from bringing "any class action or representative action" in any forum.[120]

The trial court granted Baker Electric's petition to compel arbitration on all causes of action, except for the PAGA claim.[121] On the PAGA claim, the trial court followed two prior California Supreme Court decisions, *Iskanian v. CLS Transportation*[122] and *Tanguilig v. Bloomingdale's, Inc*.[123] Baker Electric appealed and argued that *Iskanian* was no longer binding as it was inconsistent with the United States Supreme Court's decision in *Epic Systems*.[124] The Court of Appeals affirmed the trial court's ruling and determined that it remained bound by *Iskanian.*[125]

According to the Court of Appeals, *Epic Systems* did not address the same issues as *Iskanian—s*pecifically, it did not address a claim for civil penalties brought on behalf of the state and the enforceability of an agreement barring a PAGA action in any forum.[126] Therefore, the Court of Appeals concluded that the waiver of representative claims in any forum is unenforceable.[127] The court also determined that *qui tam* actions fall outside the reach of the FAA and the decision in *Epic Systems*.[128] While this reasoning is similar to *Iskanian*, it runs counter to federal court interpretations of PAGA.[129]

E. Observations

While *Correia* is merely an appellate decision, it certainly carves out a new way states can circumvent the protections FAA provides for mandatory arbitration clauses. As noted in *Correia*, one of the distinctions between a class action lawsuit with an existing arbitration agreement and an employee filing a PAGA claim is that in a PAGA claim the employee, or relator, is deputized by the state and acting on

117. *Id.*
118. Correia v. NB Baker Elec., Inc., 244 Cal. Rptr. 3d 177, 179 (Cal. Ct. App. 2019).
119. *Id.*
120. *Id.* at 180–81.
121. *Id.* at 179.
122. *Id.* (holding as unenforceable agreements to waive the right to bring PAGA representative actions in any forum).
123. *Id.* (holding "a PAGA claim cannot be compelled to arbitration without the state's consent.") (citing Tanguilig v. Bloomingdale's, Inc., Cal. Rptr. 3d 352, 360 (Cal. Ct. App. 2016)).
124. *Correia*, 244 Cal. Rptr. 3d at 179.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 185.
129. *Id.* at 179.

its behalf.[130] These interpretations of California's PAGA as it conflicts with the FAA will influence future legislation of PAGA and state attempts to undermine mandatory arbitration clauses. Nevertheless, criticisms of PAGA abound as small businesses struggle with flexibility, such as requiring employees to take a lunch break instead of being able to work through lunch if they desire.[131] Even simple mistakes, such as typos on a paystub, can lead to PAGA violations.[132] Furthermore, concerns exist that PAGA has been exploited by attorneys seeking a payday while plaintiffs earn little and small businesses are forced to pay.[133] It remains unclear what decision the Supreme Court of the United States would make regarding these PAGA laws, but given past decisions that have expanded their scope, it is likely that arbitration clauses would prevail.[134]

Moreover, the Washington legislature appears likely to pass HB 1965 as the bill has been read numerous times, received an amendment, been substituted twice, and currently sits with the Rules Committee as of March 21, 2019.[135] The attempts to amend and rewrite are a sign that HB 1965 is up for consideration. However, if this bill does not make any movement to the state Senate soon, the 2019 regular session will likely come to a close without passing this HB 1965. Vermont's PAGA has a much less stimulating history, as the House and Senate versions were introduced on February 28, 2019, and March 1, 2019, respectively, with no action since that time.[136] The Vermont PAGA was essentially dead on arrival.[137]

F. Conclusion

According to the holding in *Correia*, PAGA, or *qui tam* actions, are a legitimate mechanism for circumventing the stringent protections that mandatory arbitration agreements have under the FAA. While it may seem PAGA is on the rise, opposition to California's statute is increasing.[138] What happens with Washington and Vermont may help determine whether state legislatures will ignore or embrace the trend. Whether California overhauls PAGA or more states attempt to incorporate the labor protections against mandatory arbitration is yet to be determined.

130. *Correia*, 244 Cal. Rptr. 3d at 188.

131. Ken Monroe, *Op–Ed: Frivolous PAGA Lawsuits are Making Lawyers Rich, but They Aren't Helping Workers or Employers*, L.A. TIMES (Dec. 6, 2018, 3:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-monroe-paga-small-businesses-20181206-story.html.

132. *See Private Attorney General Act*, CALCHAMBER ADVOCACY, https://advocacy.calchamber.com/policy/issues/private-attorneys-general-act/ (last visited Nov. 12, 2019) ("For example, the Labor Code requires that a paystub state the legal entity which is the employer. So, if an employee's paycheck says 'XYZ, Inc.,' but the employer's name is really 'XYZ, LLC,' the employee can recover PAGA penalties even though the employee suffered no harm because of this simple mistake.").

133. *Id.*

134. *See, e.g.*, Joshua R. Welsh, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts*, 86 MARQ. L. REV. 581 (2002).

135. H.B. REP. 1965 (Wash. 2019).

136. S.B. 139, Gen. Assemb., Reg. Sess. (Vt. 2019); H.B. 483, Gen. Assemb., Reg. Sess. (Vt. 2019).

137. *Id.*

138. *See Private Attorney General Act*, *supra* note 132.

III. MISSOURI REWORKS ARBITRATION

Bill Number: Missouri Senate Bill 154

Summary: Missouri Senate Bill 154 provides that in an arbitration agreement between an employer and employee, the arbitrator will decide all initial issues of arbitrability, including whether the parties have agreed to arbitrate, whether the arbitration agreement is enforceable, and whether specific claims are arbitrable.

Status: Missouri Senate Bill 154 was offered on January 9, 2019, by State Senator Tony Luetkemeyer.

A. Introduction

The use of arbitration agreements in the employment context has boomed since the early 1990s.[139] This increase in arbitration provisions is due, in large part, to a series of United States Supreme Court decisions on the subject.[140] In fact, the share of workers subject to mandatory arbitration agreements imposed by their employers has nearly doubled since the early 2000s to around fifty–five percent.[141] Typically, in such arbitration agreements, employees agree to settle possible claims they may have against an employer outside of a formal court process.[142] Parties instead contract to raise such claims in front of a neutral arbitrator.[143] Employees raise a myriad of different claims against employers, but most often these claims are based on discrimination or wrongful termination.[144] Often, employers themselves must also be bound by arbitration agreements.[145] Arbitrators effectively take on the role of the fact–finder and issue decisions that are binding on all the parties involved.[146]

In the United States, Congress enacted the FAA to make valid and enforceable these written arbitration agreements.[147] The FAA effectively preempts state laws that seek to govern the enforcement, confirmation, and execution of arbitration.[148] However, state laws that govern the procedures of arbitration and not its enforcement are outside the FAA's preemptive scope.[149] Many employers make such arbitration agreements mandatory.[150] Amid pressure from workers' rights activists and organizations, some high–profile employers are beginning to end the

139. Stone & Colvin, *supra* note 63.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *See generally* Stone & Colvin, *supra* note 63.
146. Sage Sepahi, *What is the Role of an Arbitrator?*, SEPAHI LAW GRP. APC (SEPT. 30, 2014), http://sepahilaw.net/role-arbitrator/.
147. *See generally* 9 U.S.C. § 15 (1947).
148. *Id.*
149. Jon Shimabukuro & Jennifer Staman, *Mandatory Arbitration & the Federal Arbitration Act*, CONG. RESEARCH SERV. 5 (Sept. 20, 2017), https://fas.org/sgp/crs/misc/R44960.pdf.
150. Stone & Colvin, *supra* note 63.

practice of conditioning employment on the acceptance of an arbitration agreement.[151]

There has been much disagreement on what kinds of claims should be arbitrated.[152] Employers argue that arbitration is faster, fairer, less expensive, and less adversarial than litigation.[153] The confidentiality of arbitration can be beneficial to both employee and employer.[154] Employees may prefer to testify in front of an arbitrator as opposed to in open court and possibly in front of a jury, especially in cases of sexual harassment or assault.[155] Employers may prefer the confidentiality of arbitration because it protects other employees and the company as a whole.[156] Opponents of mandatory arbitration agreements, on the other hand, argue that arbitration is often, in reality, less fair to the employee.[157] The main complaint is that because employers are "repeat players" in arbitration, arbitrators retain an unconscious bias in their favor.[158]

The United States Supreme Court has played a crucial role in the increase of mandatory arbitration agreements in the employment context.[159] Specifically, the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane* upheld the enforceability of mandatory employment arbitration agreements.[160] Later Supreme Court decisions expanded the enforceability of these agreements further.[161]

Although use of mandatory employment arbitration agreements has expanded in recent decades, arguments over their enforceability have not subsided, but increased in step.[162] In an attempt to quell such arguments, employers have inserted "delegation clauses" into their arbitration agreements.[163] A delegation clause in the context of arbitration agreements is a clause that states that it is the arbitrator who must decide if a claim is fit for arbitration.[164] The arguments my persist even with such a clause in place, as delegation clauses themselves have often been litigated.[165]

---

151. Lisa Nagele–Piazza, *Google Scraps Mandatory Arbitration Agreements*, SHRM (Feb. 22, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/google-scraps-mandatory-arbitration-agreements.aspx (tech giant Google stopped requiring workers to arbitrate sexual harassment claims against the company after a November 2018 walkout of 20,000 employees; the company will continue to arbitrate claims of former employees, but beginning March 21, 2019, Google stopped enforcing all arbitration agreements for all work–related claims for current and future employees).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo—and Time's Up—Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2659 (2019).

158. *Id.*

159. Stone & Colvin, *supra* note 63.

160. *Id.*

161. *Id.* (the Court's decisions in *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant* upheld the enforceability of class action waivers in mandatory employment arbitration agreements).

162. *See generally* Kendall E. Waters, *Supreme Court Gives Teeth to Delegation Clauses in Arbitration Provisions*, FOLEY LARDNER LLP LABOR & EMP'T LAW PERSPECTIVES (Jan. 28, 2019), https://www.foley.com/en/insights/publications/2019/01/supreme-court-gives-teeth-to-delegation-clauses-in.

163. *Id.*

164. *Id.*

165. *Id.*

Until recently, courts could determine whether they, and not the arbitrator, should hear a case because the assertion of arbitrability is "wholly groundless."[166]

In *Henry Schein, Inc. v. Archer & White Sales, Inc*., the Supreme Court addressed this issue.[167] The Court held that when parties agree to delegate arbitrability, a court must give effect to that intent; a court cannot override a delegation clause even if the court believes the question of arbitrability to be obvious.[168] The Court found questions of arbitrability to be reserved for an arbitrator even when a specific delegation clause does not exist.[169] Parties may simply expressly incorporate the rules of the American Arbitration Association ("AAA") or FAA which delegate questions of arbitrability to arbitrators to successfully remove the matter from the province of formal litigation until arbitrability questions are answered.[170] The Court declined, in *Henry Schein*, to answer the question of whether or not incorporation of the AAA and FAA is, by itself, an "effective, clear and unmistakable" delegation clause.[171]

B. Corporate Response

Amid rising societal pressure, many corporations have done what even state governments have failed to do, either because they were unwilling or because their laws were preempted by the FAA—back away from mandatory arbitration.[172] Google, for example, has done away with mandatory arbitration, but only under the pressure and aftermath of a large–scale walkout by its employees.[173]

Even before the Google walkout, Microsoft endorsed the Ending Forced Arbitration of Sexual Harassment Act.[174] After Google, Microsoft, Uber, Lyft, Facebook, eBay, and Airbnb followed suit.[175] While most companies stopped forced arbitration of sexual harassment claims only, Airbnb ended forced arbitration of all discrimination claims.[176] Eventually, in February 2019, Google announced

166. *Id.*
167. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 526 (2019).
168. *Id.* at 527.
169. *Id.* at 530.
170. *Id.* at 529.
171. *Id.* at 531.
172. *See* Luke Norris, *Google Employees are Leading the Way on Sexual Harassment Reform. The Rest of the Country Should Follow.*, SLATE (Nov. 26, 2018, 8:17 AM), https://slate.com/news-and-politics/2018/11/google-walkout-mandatory-arbitration.html.
173. *Id.* (it should be noted that most companies have only waived enforcement of mandatory arbitration for sexual harassment claims; other claims which often arise between employee and employer are still validly arbitrated).
174. Brad Smith, *Microsoft Endorses S.B. to Address Sexual Harassment*, MICROSOFT ON THE ISSUES (Dec. 19, 2017), https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/.
175. Nagele–Piazza, *supra* note 151.
176. *See* Davey Alba & Caroline O'Donovan, *Square, Airbnb, & eBay Just Said They Would End Forced Arbitration for Sexual Harassment Claims*, BUZZFEED NEWS (Nov. 15, 2018), https://www.buzzfeednews.com/article/daveyalba/tech-companies-end-forcedarbitration-airbnb-ebay; Didi Martinez, *Facebook, Airbnb & eBay Join Google in Ending Forced Arbitration for Sexual Harassment Claims*, NBC NEWS (Nov. 12, 2018), https://www.nbcnews.com/tech/tech-news/facebook-airbnb-ebayjoin-google-ending-forced-arbitration-sexual-harassment-n935451.

that it would no longer force arbitration of *any* dispute with an employee, including temporary staff, contract workers, and vendors.[177]

Thus far, the tech industry stands alone in its move to end forced arbitration of any sort of dispute with employees. That said, law firms have recently felt similar pressure to end the practice and may soon react accordingly.[178]

C. National Legislation

Many jurisdictions have sought to curb the enforceability of delegation clauses and mandatory arbitration agreements in general.[179] One of the reasons cited for this opposition is the *#MeToo* movement.[180] A New York law, which came into effect July 11, 2018, prohibits employers from requiring employees to submit to arbitration in claims of sexual harassment.[181] A similar bill was introduced in Congress in 2016.[182] The Resorting Statutory Rights Act, as it was called, barred mandatory arbitration in a wide range of employee/employer disputes.[183] This act, however, has stalled in committee.[184]

Even earlier than the Restoring Statutory Rights Act, President Obama, in 2009, signed a bill that included strong incentives for government contractors to not mandate arbitration of Title VII or sexual harassment claims.[185] This "Franken Amendment" prohibited the government from providing over one million dollars in federal funding to government contractors and subcontractors who required their employees to arbitrate such claims.[186]

Executive Order 13,673, also known as the "Fair Pay and Safe Workplaces" order, was signed by President Barack Obama in 2014.[187] The order prohibited mandatory arbitration for any government contractor with a valued at over one million dollars.[188] Again, this prohibition only touched mandatory arbitration in Title VII claims or in claims of sexual harassment.[189]

177. Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html.

178. *See* Angela Morris, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses*, A.B.A. J. (June 1, 2018, 12:15 AM), http://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses.

179. Traycee Klein, *Federal Court Declares That a Ban on Mandatory Arbitration of Sexual Harassment Claims is Inconsistent with Federal Law*, THE NAT'L LAW REVIEW (July 8, 2019), https://www.natlawreview.com/article/federal-court-declares-ban-mandatory-arbitration-sexual-harassment-claims.

180. *Id.*

181. *Id.*

182. Moira Donegan, *Why Can Companies Still Silence Us With Arbitration Agreements?*, THE GUARDIAN (Jan. 8, 2019), https://www.theguardian.com/commentisfree/2019/jan/08/forced-arbitration-sexual-harassment-metoo.

183. *Id.*

184. *Id.*

185. McCullough, *supra* note 157.

186. Dep't of Def. Appropriation Act, 2010, PUB. L. No. 111–118, § 8116, 123 STAT. 3409, 3454–55 (2009).

187. EXEC. ORDER NO. 13673, 3 C.F.R. § 283 (2014).

188. *Id.*

189. *Id.*

The most sweeping attempt to limit employers' ability to mandate arbitration is the Arbitration Fairness Act ("AFA").[190] The AFA is a broad ban on mandatory arbitration.[191] First introduced in 2007, the AFA would prohibit mandatory arbitration agreements for employment, consumer, antitrust, and civil rights disputes.[192] Sexual harassment claims are classified as employment disputes.[193] Congress has yet to enact the AFA.[194] However, its proponents often reintroduce the bill in response to Supreme Court rulings strengthening mandatory arbitration.[195] For example, in 2011, the AFA was introduced in response to the Court's decision in *AT&T Mobility LLC v. Concepcion*.[196] Democratic Senator Richard Blumenthal attempted to resurrect the AFA again in 2018 by introducing it the day after *Epic Systems* was decided.[197] Despite having thirty–two cosponsors in the Senate, the AFA again could not make it through Congress.[198]

The most recent iteration of the AFA is the Forced Arbitration Injustice Repeal ("FAIR") Act.[199] The FAIR Act has language identical to that in the AFA and was introduced after Democrats won a majority in the House in 2019.[200] Despite renewed support from legislatures and every single state Attorney General,[201] the FAIR Act still failed to progress through Congress.[202]

Recently, more than thirty states have attempted to enact laws that limit the enforceability of arbitration agreements.[203] These efforts usually take one of two

190. *See, e.g.*, Arbitration Fairness Act of 2018, S.B. 2591, 115th Cong. (2018); Arbitration Fairness Act of 2011, S.B. 987, 112th Cong. (2011); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Stone & Colvin, *supra* note 63 (in *AT&T Mobility LLC v. Concepcion*, which abrogated *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005), the Court strengthened arbitration in finding that the Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts).

197. S.B. 2591, 116th Cong. (U.S. 2019) (in *Epic Sys. Corp. v. Lewis*, in abrogating *National Labor Relations Board v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017), the Supreme Court held first that the FAA's savings clause did not provide a basis for refusing to enforce arbitration agreements waiving collective action procedures for claims under the FLSA and class action procedures for claims under state law, and second that the provision of the National Labor Relations Act ("NLRA"), which guarantees workers the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, does not reflect a clearly expressed and manifest congressional intention to displace the FAA).

198. *Id.*

199. *Id.*

200. *See* Susan Chira & Kate Zernike, *Women Lead Parade of Victories to Help Democrats Win House*, N.Y. TIMES (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/us/politics/women-midterms-historic.html.

201. Nat'l Ass'n of Attorneys General, *Letter to Congress Regarding Mandatory Arbitration of Sexual Harassment Disputes* (Feb. 12, 2018), https://shpr.legislature.ca.gov/sites/shpr.legislature.ca.gov/files/Musell-NAAG%20Letter%20re%20mandatory%20arbitration.pdf (in support of the FAIR Act, every state's Attorney General signed a letter addressed to Congressional leadership stating they were unable to effectively protect the citizens of their states from sexual harassment because of mandatory arbitration agreements arguing that access to the judicial system is a fundamental right, and labeling arbitration agreements that relinquish that right "essentially unconscionable" because they are usually written in fine print within lengthy contracts in a boiler–plate, take–it–or–leave–it fashion).

202. S.B. 2591, 116th Cong. (2019).

203. Porter Wells, *States Take Up #MeToo Mantle in Year After Weinstein*, BLOOMBERG NEWS (Oct. 3, 2018), https://www.bna.com/states-metoo-mantle-n73014482949/.

approaches, challenging the enforceability of an arbitration agreement either directly or indirectly.[204] No matter which strategy is used, these state laws are often struck down due to the preemption of the FAA.[205] The legislative history of such bills usually reflects an awareness that the law will be struck down if enacted.[206] The laws themselves, however, remain in effect until struck down by the courts.[207]

In 2018, Washington passed Senate Bill 6313 ("SB 6313"). Under SB 6313, an "employment contract or agreement is . . . void and unenforceable if it requires an employee to waive the employee's right to publicly pursue a [sexual harassment] cause of action . . . or if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential."[208] Mandatory arbitration is not expressly referenced in SB 6313, but it is clearly covered by the bill's contents.

New York's Senate Bill 7507 ("SB 7507") is an example of how states have explicitly banned mandatory arbitration agreements.[209] The law attempts to avoid the problem of preemption by including that such prohibited clauses are null and void "except where inconsistent with federal law."[210] Because of the preemption by the FAA, it is likely that SB 7507 will not affect companies operating in interstate commerce.[211] However, it is possible that the New York law would still hold up as it applies to companies only operating in intrastate commerce.[212]

California opted to take a slightly different approach. In 2018, the California State Legislature passed Assembly Bill 3080 ("AB 3080").[213] While AB 3080 did not explicitly keep an employer from requiring an employee to submit to arbitration, it did prohibit the employee from being required to "waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act."[214] Sexual harassment and other discrimination claims are covered by the California Fair Employment and Housing Act.[215] The legislative history of AB 3080 reveals that the California legislature specifically considered the implications of both *Concepcion* and *Epic Systems* when writing the bill.[216] Despite the legislature's attempt to avoid any conflict with federal law and the FAA, California Governor Jerry Brown vetoed the bill just one month after it made it through the California legislature.[217] In defense of his veto, Governor Brown stated that the bill "plainly" violated the FAA, citing recent Supreme Court decisions.[218]

204. McCullough, *supra* note 157, at 2677.
205. *Id.*
206. *Id.*
207. *Id.*
208. WASH. REV. CODE § 49.44.085 (2019).
209. S.B. 7507, 241st Leg., Reg. Sess. (N.Y. 2018).
210. *Id.*
211. *Id.* (the FAA was created using the powers of the Commerce Clause, and because of this, the FAA only applies to arbitrations between parties that affect interstate commerce).
212. *Id.* (concluding that it seems unlikely that any company operating in New York will be found not to affect interstate commerce).
213. Assemb. B. 3080, 2017 Reg. Sess. (Cal. 2017).
214. *Id.*
215. *See* Cal. Fair Emp't & Hous. Act, CAL. GOV'T CODE §§ 12900–12996 (West 2019).
216. *See* Office of Senate Floor Analysis, 3d Assemb. B. 3080, 2017–2018 Reg. Sess. 6–7 (Cal. 2018) (concluding that it was a "mischaracterization" to interpret Assemb. B. 3080 as a bill that "prohibits, discriminates against, or discourages arbitration agreements.").
217. *See* Letter from Governor Edmund G. Brown, Jr. to the Members of the Cal. State Assemb. (Sept. 30, 2018), https://www.gov.ca.gov/wp-content/uploads/2018/09/AB-3080- veto-9.30.pdf.
218. *Id.*

The Massachusetts legislature, in 2018, attempted yet another approach to lessen the impact of mandatory arbitration agreements.[219] House Bill 4323 would allow the Massachusetts Attorney General to bring an action against any entity (person or company) on behalf of the state when the state has cause to believe the entity is engaged in sexual harassment.[220] Most importantly, the proceeding must be public.[221] The Supreme Court generally reasons that a third party may bring an action on behalf of an employee.[222] Namely, the Court has held that the Equal Employment Opportunity Commission ("EEOC") is able to pursue a discrimination claim on behalf of an employee even when that employee has signed an arbitration agreement.[223]

D. Relevant Court Rulings

As referenced above, delegation clauses have become an increasingly popular way to prevent an issue from ever reaching a courtroom.[224] Because states have not had and, as long as the FAA remains unchanged, will not have success curtailing the validity of arbitration agreements, parties have started to attack these clauses[225] with varying success.[226]

This varying level of success is mostly due to the United States Supreme Court's decision in *Rent–A–Center, West, Inc. v. Jackson*.[227] In *Rent–A–Center*, the respondent argued that the stand–alone arbitration agreement he had with Rent–A–Center was invalid because it was unconscionable.[228] The agreement, however, contained a provision delegating all questions of validity to an arbitrator.[229] In enforcing the delegation clause, the Supreme Court ruled that in order for the employee to have an unconscionability claim heard in court, he must allege that the delegation clause itself is invalid.[230]

In its ruling, the Supreme Court used the severability doctrine from *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*.[231] In *Prima Paint*, the Supreme Court held that consideration of contract revocation is generally a matter for the arbitrator, unless the challenge is specifically directed at the arbitration clause.[232] This has come to be known as the "severability rule," meaning that when a party

219. H.B. 4323, 190th Reg. Sess. (Mass. 2018).
220. *Id.*
221. *Id.*
222. EEOC v. Waffle House, Inc., 534 U.S. 279, 282 (2002).
223. *Id.* at 297.
224. Tyler Newby & Molly Melcher, *Supreme Court Reinforces Enforceability of Delegation Clauses in Arbitration Agreements*, FENWICK & WEST LLP (Jan. 14, 2019), https://www.fenwick.com/publications/pages/supreme-court-reinforces-enforceability-of-delegation-clauses-in-arbitration-agreements.aspx.
225. Stephen Smerek & Daniel Whang, *Preemption & the Federal Arbitration Act: What Law Will Govern Your Agreement to Arbitrate?*, A.B.A. BUS. LAW SEC., http://apps.americanbar.org/buslaw/newsletter/0051/materials/pp7.pdf (last visited Oct. 29, 2019).
226. *Id.*
227. *See generally* Rent–A–Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010).
228. *Id.* at 2780.
229. *Id.* at 2775.
230. *Id.* at 2780.
231. *Id.* at 2774; *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
232. *Prima Paint Corp.*, 388 U.S. at 395.

challenges a contract and not its arbitration provisions specifically, those provisions are enforceable apart from the remainder of the contract.[233]

The dissent in *Rent–A–Cente*r, written by Justice Sevens, argues the majority took the severability rule too far.[234] The dissenting Justices feared that the ruling in *Rent–A–Center* would make it virtually impossible for a litigant to have a court review the enforceability of an arbitration agreement.[235] They worried of "infinite levels of severability," which would essentially prevent a party from ever being specific enough to effectively challenge a part of a contract.[236] After the ruling in *Rent–A–Center*, practitioners were fearful that the predictions of the dissenting Justices would come to pass.[237] However, judges declined to use a hard–line rule in enforcing delegation clauses shortly thereafter.[238]

It is still true, though, that in the wake of *Rent–A–Center*, courts have routinely ordered arbitration if the party has not challenged a delegation clause specifically.[239] In the year after *Rent–A–Center*, only one litigant successfully kept his case in court by directly challenging a delegation clause.[240] The court ruled, however, that the delegation clause was valid and that "allowing arbitrators [to] determine their own jurisdiction is neither contrary to . . . public policy nor unconscionable."[241]

In 2015, a West Virginia trial court found that a delegation clause in a construction contract was unconscionable.[242] The West Virginia Supreme Court attempted to dodge the issue.[243] In invalidating the delegation clause, the court held that the term "arbitrability" (as used in the delegation clause in this case) was ambiguous and, because delegation clauses must be "clear and unmistakable,"[244] that ambiguity rendered the delegation clause invalid.[245]

The Supreme Court of Kentucky had a similar holding in *Dixon v. Daymar Colleges Group, LLC*.[246] The arbitration agreement in *Dixon* was embedded in a student enrollment form[247] containing a clause specifying that "all determinations as to the scope or enforceability of this arbitration provision shall be determined by the arbitrator, and not by the court."[248] When a student sued, the school moved to compel arbitration.[249] The trial court denied the school's motion, finding the agreement unconscionable.[250]

---

233. *Rent–A–Center, West, Inc.*, 130 S. Ct. at 2774; *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006).
234. *Rent–A–Center, West, Inc.*, 130 S. Ct. at 2781–82 (Stevens, J., dissenting).
235. *Id*. at 2787.
236. *Id.*
237. Liz Kramer, *Has the Parade of Predicted Horribles From Rent–A–Center Come to Pass?*, ARBITRATION NATION (Sept. 1, 2011), https://www.arbitrationnation.com/has-the-parade-of-predicted-horribles-from-rent-a-center-come-to-pass/.
238. *Id.*
239. *Id.*
240. Kramer, *supra* note 237; *see* Howard v. Rent–A–Center, Inc., WL 3009515, at *1 (E.D. Tenn. July 28, 2010).
241. *Id.*
242. Schumacher Homes of Circleville, Inc. v. Spencer, 237 W. Va. 379, 384 (2016).
243. *Id.*
244. *Id.* at 385.
245. *Id.*
246. Dixon v. Daymar Coll. Grp., LLC, 483 S.W.3d 332, 335 (Ky. 2015).
247. *Id.*
248. *Id.* at 340.
249. *Id.* at 332.
250. *Id.*

Though the Kentucky Court of Appeals reversed, finding no unconscionability, the Kentucky Supreme Court found a way out.[251] The Court, while still applying the FAA as necessitated by *Rent–A–Center*, framed the issue as whether the parties had formed an agreement to arbitrate at all.[252] Using Kentucky's Statute of Frauds, the Court ruled that because the student's signature was only on the first page of the contract and the student had been fraudulently induced to sign, the parties were not bound by the agreement.[253]

The state of Missouri, in contrast to West Virginia and Kentucky, has often sought to build upon the ruling in *Rent–A–Center*, as opposed to finding a way around it. There were, however, a couple of early exceptions. In *Baker v. Bristol Care, Inc*., the Missouri Supreme Court used the issue of consideration to invalidate a delegation clause.[254] The Court reasoned that when continued employment is made conditional on the acceptance of an arbitration agreement, continued employment itself is not consideration enough to support the arbitration agreement.[255] Thus, the arbitration agreement was illusory.[256] In *Stubblefield v. Best Cars KC, Inc*., the Missouri Court of Appeals ruled that an arbitration clause did not delegate issues of formation to an arbitrator when a contract contained a provision stating: "Buyer acknowledges that if this box is checked, this agreement contains an arbitration clause."[257] The box was left unchecked.[258]

More recent decisions in Missouri have framed the issue of delegation clauses differently. For example, in *State ex rel. Pinkerton v. Fahnestock*, the Missouri Supreme Court ruled that by clearly referencing the American Arbitration Association's rules in an arbitration agreement, the parties expressed their intent to arbitrate any dispute using those roles, including delegation of threshold issues of arbitrability to an arbitrator.[259] The court echoed the reasoning in *Rent–A–Center* that challenges to an agreement to arbitrate as a whole could not affect enforceability of a provision delegating threshold issues of arbitrability.[260]

In *Soars v. Easter Seals Midwest*, Soars attempted to get around the instruction of *Rent–A–Center* by challenging a lack of mutual obligation in the delegation provision.[261] The Court was not as sympathetic to this argument as it had been in *Pinkerton* and ruled to enforce the delegation clause.[262] First, the Court held that Soars failed to specifically attack the delegation clause under *Rent–A–Center*.[263] Second, the Court decided that even if Soars would have specifically attacked the delegation clause, there was still consideration for the clause in the parties' mutual obligation to arbitrate their claims against each other.[264]

---

251. *Id.* at 338.
252. *Daymar Coll. Grp., LLC*, 483 S.W.3d at 338.
253. *Id*. at 346 (the court specifically ruled that the arbitration agreement was invalid because it appeared *after* the student's signature; had the signature block appeared at the end of the document, the arbitration agreement and delegation clause likely would have been enforceable).
254. Baker v. Bristol Care, Inc., 450 S.W.3d 770, 772 (Mo. 2014).
255. *Id.* at 777.
256. *Id.*
257. Stubblefield v. Best Cars KC, Inc., 506 S.W.3d 377, 378 (Mo. Ct. App. 2016).
258. *Id.*
259. State ex rel. Pinkerton v. Fahnestock, 531 S.W.3d 36, 40 (Mo. 2017).
260. *Id.* at 50.
261. Soars v. Easter Seals Midwest, 563 S.W.3d 111, 116 (Mo. 2018).
262. *Id.* at 117.
263. *Id.*
264. State ex rel. Newberry v. Jackson, 575 S.W.3d 471, 472 (Mo. 2019).

Finally, in *State ex rel. Newberry v. Jackson*, the Missouri Supreme Court again strengthened delegation clauses by ruling that the threshold issue of consideration (as pertaining to a delegation clause) was properly delegated to an arbitrator.[265] The Court reiterated that delegation clauses are severable from arbitration agreements and contracts as a whole under *Rent–A–Center*, so simply raising a challenge to the entire arbitration contract will not suffice.[266]

E. Missouri Legislation

In Missouri, Senate Bill 154 ("SB 154") seeks not to strengthen delegation clauses necessarily, but to ensure that in almost every arbitrable dispute, an arbitrator will decide all matters of arbitrability.[267]

Missouri Senator Tony Luetkemeyer introduced SB 154 on January 9, 2019.[268] The bill was assigned to the Small Business and Industry Committee,[269] which conducted hearings on the proposed bill on February 7, 2019.[270] A week later, on February 14, 2019, SB 154 was voted out of the Committee.[271] Senator Luetkemeyer then offered SB 154 on February 20.[272] On that same day, the bill was placed on the informal calendar.[273]

SB 154 would formally repeal RSMo §§ 435.350, 435.550, and 435.440.[274] Section 435.350 enforces the validity of arbitration agreements in general,[275] "save upon such grounds as exist in law or equity for the revocation of any contract."[276] Section 435.550 relates to proceedings to stay arbitration,[277] stating that whenever a party refuses to arbitrate contrary to an arbitration agreement, the court shall decide the issue before compelling arbitration.[278] The last section to be repealed by SB 154 is 435.440, which relates to appeals.[279]

If passed, SB 154 would provide some clarity for employers, employees, and even courts as to what issues are to be decided by an arbitrator. First, SB 154 contradicts section 435.350 by giving power to an arbitrator to decide all issues of arbitrability.[280] Specifically, the bill reads:

> Except in cases where the agreement expressly and unequivocally delegates the issue of arbitrability to the court, in agreements between an employer and employee to submit to arbitration certain controversies thereafter arising between the parties, the arbitrator, and not the court, shall make all initial decisions as to arbitrability including, but not limited to,

265. *Id.*
266. *Id.*
267. S.B. 154, 100th Cong., 1st Reg. Sess. (Mo. 2019).
268. *Id.*
269. S.B. SUMM. 154 (Mo. 2019).
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. MO. REV. STAT. § 435.350 (2011).
276. *Id.*
277. MO. REV. STAT. § 435.355 (2011).
278. *Id.*
279. MO. REV. STAT. § 435.440 (2011).
280. S.B. 154, 100th Cong., 1st Reg. Sess. (Mo. 2019).

> deciding whether the parties have agreed to arbitrate, whether the agreement is a valid and enforceable contract for arbitration, and whether specific claims must be arbitrated pursuant to the arbitration agreement.[281]

Essentially, this section of SB 154 makes it as though all arbitration agreements contain a delegation clause and imposes that implied delegation clause on almost any threshold issue of arbitrability.[282]

Second, SB 154 provides clear factors for an arbitrator to consider when determining the validity of an arbitration agreement.[283] The bill instructs arbitrators to find arbitration agreements valid and supported by adequate consideration, and not contracts of adhesion, where:

> (1) The agreement requires both the employer and the employee to arbitrate those disputes that are subject to arbitration as set forth in the arbitration agreement;
>
> (2) The employer notifies the employee, in writing, of the terms of the agreement;
>
> (3) The agreement complies with the provisions of this chapter, including but not limited to, the provisions of section 435.460;
>
> (4) The employee so notified acknowledges acceptance of the terms in writing and continues to be employed after the effective date of the arbitration agreement;
>
> (5) The agreement contains a provision that any modifications to the arbitration agreement shall not:
>
> (a) Apply to any claim that has accrued prior to the effective date of any such modifications; or
>
> (b) Allow unilateral modification of the arbitration agreement; and
>
> (6) The agreement requires that the arbitrator or arbitrators shall be selected by mutual agreement of the parties or, in the event that an arbitrator is not mutually agreed upon, through a strike and ranking process.[284]

While SB 154 would completely derail any attempts to quibble over the enforcement of arbitration agreements and who gets to decide their validity, there are some important exceptions.[285] First, SB 154 would not apply to arbitration provisions contained in collective bargaining agreements.[286] Second, SB 154 states that any arbitration agreement between an employer and an at–will employee that

281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. S.B. 154, 100th Cong., 1st Reg. Sess. (Mo. 2019).

requires the arbitration proceedings to be confidential will not be enforceable as to claims of sexual harassment, sexual assault, or claims of discrimination or harassment based upon any protected status under federal or state law.[287]

As of August 2019, there have been two different amendments to SB 154.[288] Neither amendment changed the bill substantively. The first reworded a section about employee notification of an arbitration agreement, dictating that it must be in a document separate from the employee handbook.[289] The second amendment added definitions for the bill.[290]

F. Conclusion

There has been little, if any, public reaction to SB 154. Especially considering the Missouri Supreme Court's decisions leading up to the introduction of SB 154, it should come as no surprise that Missouri is attempting to essentially write delegation clauses into arbitration agreements as a whole.[291] While many states are attempting to lessen the impact of arbitration agreements, it may seem counter–normative that Missouri would like to delegate questions of arbitrability to an arbitrator.[292] However, considering the notable exceptions SB 154 leaves (not enforceable in collective bargaining agreements; not enforceable in disputes arising out of sexual harassment, sexual assault, or discrimination when arbitration proceedings would be confidential), SB 154 seems like a reasonable middle ground.

SB 154 is identical to Missouri House Bill 503 ("HB 503").[293] HB 503 has not made it through as many readings as SB 154 and has been sent to the Judiciary Committee.[294] However, the fact that both bills are still making their way through the chamber and are seemingly extending recent Missouri Supreme Court decisions makes it likely that they will be passed and signed into law.

IV. MARYLAND AND INDIANA'S ADR DEVELOPMENTS

Bill Number:	Maryland House Bill 754
Summary:	Maryland House Bill 754 provides that certain provisions of the Act apply to pharmacy benefits managers that contract with managed care organizations in the same manner as they apply to pharmacy benefits managers that contract with carriers. It also prohibits a certain contract or amendment from becoming effective unless the contract or amendment is filed with the Commissioner for approval or disapproval by a certain

287. *Id.*
288. S.B. 154 Amend. No. 2, 100th Cong., 1st Reg. Sess. (Mo. 2019).
289. *Id.*
290. S.B. 154 Amend. No. 1, 100th Cong., 1st Reg. Sess. (Mo. 2019).
291. Henry Blair, *Missouri Reminds Us Just How Small the Bullseye is for Challenging a Delegation Clause*, ARBITRATION NATION (June 1, 2019), https://www.arbitrationnation.com/missouri-reminds-us-just-how-small-the-bullseye-is-for-challenging-a-delegation-clause/.
292. S.B. 139, Gen. Assemb., Reg. Sess. (Vt. 2019); H.B. 483, Gen. Assemb., Reg. Sess. (Vt. 2019).
293. H.B. 503, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).
294. *Id.*

time. Further, the bill requires that each contract between a pharmacy benefits manager and a contracted pharmacy include a certain dispute resolution process.

Status: Maryland House Bill 754 was passed by the Maryland legislature on March 24, 2019 and approved by the Governor on May 13, 2019.

Bill Number: Indiana Senate Bill 292

Summary: Indiana Senate Bill 292 deals with notice and hearings on child relocation. Specifically, it changes certain procedures governing the relocation of a child in cases in which custody orders are issued following a determination of paternity and in cases heard under statutes governing custody and visitation. The bill also requires parties to share certain contact information (unless a court finds that disclosure of the information creates a significant risk of substantial harm to the individual otherwise required to disclose or to the child)and requires a relocating individual to serve a notice of intent to move on interested parties under the Indiana Rules of Trial Procedure.

Status: Indiana Senate Bill 292 was passed by the Indiana Senate on April 29, 2019 and signed into Public Law 186 by the Governor on May 2, 2019.

A. Introduction

"The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."[295] ADR offers a spectrum of cost–effective alternatives to litigation that allow for more creative and collaborative solutions.[296] As stated above, common types of ADR include arbitration, meditation, and negotiation.[297] The use of ADR has been embedded in standard contracts, and many states are rolling out ADR initiatives.[298] In the 2019 legislative session, many states have introduced legislation to reduce court intervention and implement alternative dispute protections for their constituents.[299] For example, safeguards were recently effected in Maryland through its healthcare

295. *Collaboration, Settlement, Resolution*, BOS. LAW COLLABORATIVE, LLC, https://blc.law/resources/quotes/collaboration-settlement-resolution/ (last visited Oct. 30, 2019) (quoting Justice Sandra Day O'Connor).
296. *What is ADR?*, JAMS, https://www.jamsadr.com/adr-spectrum/ (last visited Sept. 5, 2019).
297. *Alternative Dispute Resolution*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/labor-relations/adr (last visited Sept. 5, 2019).
298. *Id.*
299. *See e.g.*, Unif. Arbitration Act, DEL. CODE ANN. §5701–5725 (2012); Unif. Arbitration Act, IDAHO CODE § 7–901–22 (1975); Unif. Arbitration Act, HAW. REV. STAT. § 658a–1–29 (2002).

reform, and in Indiana, there has been a decrease in court intervention following the state's child custody relocation.

B. Maryland

The thousands of health policy decisions made by all fifty states affect everything from budget appropriations to managed care and insurance.[300] Healthcare policy in Maryland involves the creation and implantation of laws, rules, and regulations for managing the state's healthcare system.[301] When Maryland expanded Medicaid in 2013, it became the Affordable Care Acts' main reducer of the nation's uninsured rate.[302] The state has already covered close to 380,000 Maryland residents, cutting the amount of uninsured persons to about six percent.[303] Maryland continues its proactive and steadfast devotion through its active purchaser exchange, the Maryland Health Connection.[304] In addition to uninsured coverage, the Maryland legislature has taken a stance with a "price–gouging" law[305] that would allow the state's attorney general to challenge big price increases in pharmaceuticals.[306] Though the law was struck down due to a dormant commerce clause violation, Maryland continued its fight against pharmaceutical practices with its 2019 legislative bill House Bill 754: Health Insurance and Pharmacy Benefits Managers ("HB 754").[307]

On February 8, 2019, Delegate Nicholaus R. Kipke sponsored HB 754.[308] This emergency bill requires that pharmacy benefits managers that contract with managed care organizations apply in the same manner as they apply to pharmacy benefits managers that contract with carriers.[309] Pharmacy benefit managers ("PBMs") are third–party administrators that manage the prescription drug benefit on behalf of the insurer in an effort to manage pharmaceutical costs.[310] PBMs' duties range from helping negotiate payment rates with manufacturers to contracting with state Medicaid departments to provide drug coverage for

300. Tashea, *supra* note 3.

301. *See generally Healthcare Policy in Maryland*, BALLOTPEDIA, https://ballotpedia.org/Healthcare_policy_in_Maryland (last visited Sept. 5, 2019).

302. *Maryland & the Medicaid Expansion*, HEALTH INSURANCE.ORG (Apr. 20, 2018), https://www.healthinsurance.org/maryland–medicaid/.

303. Meredith Cohn & Pamela Wood, *Maryland Legislature Passes Laws to Make Health Insurance Enrollment Easier & Create Drug Price Board*, THE BALT. SUN (Apr. 11, 2019), https://www.baltimoresun.com/health/bs-hs-health-laws-pass-20190409-story.html (open enrollment for 2019 coverage has ended, but residents with qualifying events can still get coverage; enrollment in Medicaid exchange grew by two percent in 2019 but was higher in 2016–17).

304. Matthew Celentano, *Maryland Continues to Lead on Health Policy*, HEALTHCARE FOR ALL (Jan. 3, 2016), http://healthcareforall.com/2017/01/md-continues-to-lead-on-health-policy/; *see also State Law Prohibits Discrimination in Housing*, *supra* note 8.

305. H.B. 1731, 437th Leg., Reg. Sess. (Md. 2017).

306. Richard Cauchi, *State Action to Halt Price Gouging for Generic Drugs*, NCSL (July 20, 2018), http://www.ncsl.org/Portals/1/Documents/Health/Generic_drug_antiprice_gouging_Maryland_31894.pdf.

307. MD. DEP'T OF LEGISLATIVE SERV., http://mgaleg.maryland.gov/2019RS/fnotes/bil_0004/hb0754.pdf (last visited Sept. 6, 2019).

308. *Id.*

309. *Id.*

310. Elizabeth Seeley & Aaron S. Kesselheim, *Pharmacy Benefit Managers: Practices, Controversies, & What Lies Ahead*, THE COMMONWEALTH FUND (Mar. 26, 2019), https://www.commonwealthfund.org/publications/issue-briefs/2019/mar/pharmacy-benefit-managers-practices-controversies-what-lies-ahead.

employer–sponsored plans, exchange plans, and Medicare Part D enrollees.[311] Conflict with PBMs arises through rebates and their role in drug pricing.[312] Simply stated, PBMs are reimbursed partially based on the rebates they receive, which is dependent upon the percentages of the drug list price.[313] The higher the drug price, the higher the opportunity to collect a big rebate.[314]

In an effort to protect patients and keep costs low, HB 754 prohibits contracts or amendments from becoming effective unless filed with the Insurance Commissioner for approval within thirty days.[315] It also requires that each contract between a pharmacy benefits manager and a contracted pharmacy include appeals, investigation, and dispute resolution processes.[316] The details of the dispute resolution process are not clearly defined, but the process must be in compliance with standard ADR practices. Instead of having an effect in fiscal year ("FY") 2019, special fund revenues for the Maryland Insurance Administration will have a minimal increase in FY 2020, rising only from the $125 rate and form filing fee.[317] General fund revenue increases will likely begin in FY 2020. This bill does not materially affect local government finances or operations.[318] HB 754 was approved by the governor on May 13, 2019.[319]

C. Indiana

Cultural changes in the family dynamic have made child custody a prevalent issue.[320] When a parent seeks custody and visitation rights, courts tend to apply the "child's best interest" standard.[321] This standard allows for judicial discretion and flexible determination of factors to represent, as it suggests, the child's best interests.[322] In Indiana, the Supreme Court shifted to "parenting time" guidelines.[323] The parenting time guidelines are based on the premise that it is usually in a child's best interest to have frequent, meaningful, and continuing contact with each parent.[324] Based on child developmental stages, the eight factors[325] of a child's

311. *Id.*
312. *Id.*
313. Aaron S. Kesselheim, Jerry Avorn, & Ameet Sarpatwari, *The High Cost of Prescription Drugs in the U.S.: Origins and Prospects for Reform*, 316 JAMA 858 (2016).
314. *Id.*
315. H.B. 754, 439th Leg., Reg. Sess. (Md. 2019).
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. Margaret Ryznar, *The Empirics of Child Custody*, 65 CLEV. S. L. REV. 211 (2017).
321. *Id.*
322. *Id.*
323. IND. PARENTING GUIDELINES, https://www.in.gov/judiciary/rules/parenting/ (last visited Sept. 6, 2019).
324. *Id.*
325. "A child's basic needs 8 factor–test: (1) To know that the parents' decision to live apart is not the child's fault. (2) To develop and maintain an independent relationship with each parent and to have the continuing care and guidance from each parent. (3) To be free from having to side with either parent and to be free from conflict between the parents. (4) To have a relaxed, secure relationship with each parent without being placed in a position to manipulate one parent against the other. (5) To enjoy regular and consistent time with each parent. (6) To be financially supported by each parent, regardless of how much time each parent spends with the child. (7) To be physically safe and adequately supervised when in the care of each parent and to have a stable, consistent and responsible child care arrangement when not supervised by a parent. (8) To develop and maintain meaningful relationships with other significant

basic needs are at the forefront.[326] Typically, child custody cases can be resolved through court intervention; however, dockets are jam–packed. To alleviate the burden on the courts, Senator Randy Head authored Senate Bill 292: Notice and Hearings on Child Relocation ("SB 292") on January 7, 2019.[327]

This bill changes the procedures governing the relocation of a child in custody cases for determination of paternity and cases heard under statutes governing custody and visitation.[328] SB 292 requires parties to exchange certain contact information unless a court finds that the disclosure of such information creates a significant risk of substantial harm to the individual or the child.[329] This bill further requires a nonrelocating individual served with a notice of intent to move to file a response unless parties have filed a prior written agreement with the court addressing all custody–related issues.[330] The requirements of SB 292 have the potential to reduce the number of civil cases that would be petitioned to the courts, though it will likely have only a minimal impact.[331] A court may order the parties to participate in mediation or another ADR process before a hearing.[332] One of the most popular forms of ADR in Indiana is mediation.[333] Depending on the county, some courts have programs for low–cost or no–cost mediation services to families involved in a domestic relations cases.[334] This provision could reduce the amount of revenue in the ADR fund; the potential amount of revenue reduction is indeterminable and would depend on the number of indigent litigants who will participate in the program.[335] SB 292 was signed by the Governor on May 2, 2019, as Public Law 186,[336] which went into effect July 1, 2019.[337]

V. HIGHLIGHTS

A. Alaska Senate Bill 119

Alaska Senate Bill 119 ("SB 119") authorizes employers and employees to mediate workers compensation disputes and allows collective bargaining agreements ("CBAs") to supersede provisions of Alaska's Workers Compensation Act.[338] The bill also stipulates that the mediator is a third party neutral, and he or she has no authority to compel a resolution between the employer and the employee.[339] Should mediation fail, the bill instructs the parties to proceed to the

adults (grandparents, stepparents and other relatives) as long as these relationships do not interfere with or replace the child's primary relationship with the parents." *Id.*

326. *Id.*
327. S.B. 754, 121st Leg., Reg. Sess. (Ind. 2019).
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Mediation/Alternative Dispute Resolution*, IND. JUDICIAL BRANCH, https://www.in.gov/judiciary/selfservice/2360.htm (last visited Sept. 6, 2019).
334. *Id.*
335. *Id.*
336. S.B. 754, 121st Leg., Reg. Sess. (Ind. 2019).
337. *Id.*
338. S.B. 119, 31st Leg., 1st Sess. (Alaska 2019).
339. *Id.*

next step, which is arbitration.[340] Additionally, SB 119 allows for the CBAs to lay a foundation for identifying independent medical examiners for workers compensation claims and the resulting awards from the resolution process, among other administrative and logistical items.[341] Currently, the bill remains introduced by Senator Jesse Kiehl on May 1, 2019.[342]

B. California Assembly Bill 692

Assembly Bill 692 ("AB 692") alters the process through which attorney fee disputes are handled in California.[343] Currently, existing legislation in the state calls for fees at the time for filing a civil action seeking judicial resolution of a dispute subject to arbitration.[344] The time frame for such fees spans from the time arbitration is initiated until 30 days after receipt of notice of the award of the arbitrators or receipt of notice that the arbitration is otherwise terminated, whichever comes first.[345] Additionally, existing law prohibits the commencement of arbitration if a civil action requesting "the same relief would be barred by existing law governing the time of commencing civil actions."[346] Further, existing law "establishes an exception to that prohibition for a request for arbitration by a client pursuant to specified provisions for arbitration of attorney's fees, following the filing of a civil action by the attorney." AB 692 would instead authorize arbitration upon a request by a client following the commencement of an action in any court or any other proceeding by the attorney.[347] The bill was introduced by Assembly Member Brian Maienschein on February 19, 2019.[348] On June 26, 2019, the bill was adopted by the California Assembly.[349]

C. Maryland House Bill 754

On February 8, 2019, Delegate Nicholaus R. Kipke sponsored House Bill 754 ("HB 754").[350] This emergency bill applies to pharmacy benefits managers that contract with carriers *and* those that contract with managed care organizations.[351] This bill also prohibits contracts or amendments from becoming effective unless filed with the Insurance Commissioner for approval at least thirty days before the contract or amendment is to become effective.[352] All contracts must include a certain dispute resolution process.[353] Instead of having an effect in FY 2019, special fund revenues for the Maryland Insurance Administration will have a minimal

340. *Id.*
341. *Id.*
342. *Id.*
343. Assemb. B. No. 692 (Cal. 2019).
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. Assemb. B. No. 692 (Cal. 2019).
350. Assemb. B. No. 754 (Md. 2019).
351. *Id.*
352. *Id.*
353. *Id.*

increase in FY 2020 only from the $125 rate and form filing fee.[354] A general fund revenue increase will likely begin in FY 2020. This bill does not materially affect local government finances or operations. HB 754 was approved by the Governor on May 13, 2019.[355]

D. Indiana House Bill 1548

On January 17, 2019, Representative Cindy Kirchhofer authored Indiana House Bill 1548 ("HB 1584").[356] This bill adds appointments by the Indiana Association of Health Plans and the Indiana Primary Care Association to the Medicaid Advisory Committee ("Committee").[357] The bill will increase Committee membership to six members through appointment by the Speaker of the House and President Pro Tempore.[358] Each of the three members appointed by each Speaker and President Pro Tempore must be members of the minority party.[359] This bill adds twelve members to the Committee: two lay members and ten legislators. HB 1584 was signed by the Governor on April 29, 2019 as Public Law 140,[360] which went into effect on July 1, 2019. [361]

E. Indiana Senate Bill 292

On January 7, 2019, Senator Randy Head authored Indiana Senate Bill 292 ("SB 292").[362] This bill changes the procedures governing the relocation of a child in custody cases for determination of paternity and cases heard under statutes governing custody and visitation.[363] It requires parties to exchange certain contact information unless a court finds that the disclosure of information creates a significant risk of substantial harm to the individual or the child.[364] SB 292 further requires a nonrelocating individual served with a notice of intent to move to file a response unless parties have filed a prior written agreement with the court addressing all custody related issues.[365]

The requirements of the bill have the potential to reduce the number of civil cases that would be petitioned to the Courts, but will likely have only a minimal impact.[366] A court may order the parties to participate in mediation or another ADR process before a hearing.[367] This provision could reduce the amount of revenue in the ADR fund; the potential amount of revenue reduction is indeterminable and would depend on the number of indigent litigants who will participate in the

354. *Id.*
355. *Id.*
356. H.B. 1548, 21st Gen. Assemb., 1st Reg. Sess. (Ind. 2019).
357. *Id*
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.*
362. S.B. 754, 121st Leg., Reg. Sess. (Ind. 2019).
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*

program.[368] SB 292 was signed by the Governor on May 2, 2019 as Public Law 186,[369] which went into effect July 1, 2019. [370]

F. Missouri Senate Bill 154

Senator Tony Luetkemeyer introduced Missouri Senate Bill 154 ("SB 154") on January 9, 2019.[371] This bill attempts to codify recent Missouri Supreme Court decisions holding that in cases involving arbitration agreements between an employer and an employee, the arbitrator shall make all initial decisions as to arbitrability, including deciding whether the parties have agreed to arbitrate, whether the arbitration agreement is enforceable, and whether specific claims are arbitrable.[372] SB 154 would not apply to arbitration agreements contained in a collective bargaining agreement.[373] The arbitrator must either be selected mutually by the parties or through a ranking process if the parties cannot agree.[374] The bill establishes certain criteria for when the arbitrator shall determine that the arbitration agreement is valid.[375] Courts will stay arbitration when a party submits a motion alleging that the arbitration agreement does not expressly delegate the issue of arbitrability.[376]

Further, SB 154 would make any clause in an arbitration agreement between an employer and an at–will employee confidential and unenforceable as to claims of sexual harassment, sexual assault, or claims of discrimination based on certain protected statuses.[377] As of May 17, 2019, SB 154 was voted out of the Small Business and Industry Committee and has an informal calendar date.[378]

G. Nebraska Legislative Bill 354

Senator Patty Pansing Brooks introduced Nebraska Legislative Bill 354 ("LB 354") on January 16, 2019.[379] LB 354 amends Nebraska's statute controlling juvenile pretrial diversion.[380] LB 354 provides for a juvenile's record to be sealed *immediately* upon successful completion of a court–diversion program, rather than six months later.[381] The bill also allows the State Court Administrator to view sealed records for bona fide purposes.[382] LB 354 outlines how mediation is to be used as a court–diversion tool and to whom it is accessible.[383] Mediation is mostly

368. S.B. 754, 121st Leg., Reg. Sess. (Ind. 2019).
369. *Id.*
370. *Id.*
371. S.B.154, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).
372. S.B. SUMM. 154, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id*.
378. S.B. 154, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).
379. Leg. B. 354, 106th Leg., 1st Sess. (Neb. 2019).
380. Leg. B. 354, INTRODUCER STATEMENT OF INTENT (Neb. 2019).
381. *Id.*
382. *Id.*
383. Leg. B. 354, 106th Leg., 1st Sess. (Neb. 2019).

used under this statute as a way to promote restitution and restorative justice.[384] Nebraska Governor Pete Ricketts approved LB 354 on March 27, 2019.[385]

H. Rhode Island Senate Bill 512

On February 27, 2019, Rhode Island Representative Camille Vella–Wilkinson introduced Senate Bill 512 ("H.5437").[386] This bill creates what are known as "Evergreen Contracts" for certified school teachers and municipal employees.[387] In essence, the bill states that "[w]hile the parties are engaged in negotiations and/or utilizing the dispute resolution process[,] . . . all terms and conditions in the collective bargaining agreement shall remain in effect."[388] Advocates insist legislation will likely "level the playing field" for public unions by removing the ability for city and town leaders to impose wage cuts on employees during ongoing collective bargaining agreements.[389] Opponents of H.5437 believe that this would hamstring municipalities by eliminating any incentive or timeframe for unions to come to the bargaining table,[390] while also leading to property tax increases.[391] Representative Vella–Wilkinson insists that this is not a union bill but, rather, a bill to ensure that teachers are being treated fairly.[392] After receiving minor revisions from the House and Senate Labor Committees, H.5437 was signed by Governor Gina Raimondo on May 14, 2019 and became effective upon passage.[393] This bill was passed concurrently with identical Senate Bill 512.[394]

I. Virginia House Bill 1820

On January 1, 2019, Representative Karrie Delaney introduced Virginia House Bill 1820 ("HB 1820") in an effort to prohibit employers from requiring an employee to execute a nondisclosure or confidentiality agreement with the effect of concealing details of sexual assault.[395] This bill was introduced in response to the *#MeToo* movement and follows a trend that began in 2018 aimed at curbing sexual assault concealments in the workplace.[396] As originally introduced, HB 1820 was to provide that arbitration agreement provisions of concealment are unconscionable, except in the case when the victim of sexual harassment or sexual assault proposes

384. *Id.*
385. Leg. B. 354, CHANGE PROVISIONS RELATING TO SEALING OF JUVENILE RECORDS (Neb. 2019).
386. H.B. 5437A, Gen. Assemb., Jan. Sess. (R.I. 2019).
387. Katherine Gregg, *R.I. House OKs Evergreen Contract Bill*, PROVIDENCE JOURNAL (Apr. 23, 2019), https://www.providencejournal.com/news/20190423/ri-house-oks-evergreen-contract-bill.
388. H.B. 5437A, Gen. Assemb., Jan. Sess. (R.I. 2019).
389. Gregg, *supra* note 387.
390. Jacob Marrocco, *Municipal Leaders Oppose 'Evergreen' Contract Bill*, CRANSTON HERALD (Apr. 24, 2019, 12:32 PM), http://cranstononline.com/stories/municipal-leaders-oppose-evergreen-contract-bill,141825.
391. Gregg, *supra* note 387.
392. *Id.*
393. H.B. 5437A, Gen. Assemb., Jan. Sess. (R.I. 2019).
394. S.B. 512, Leg., Reg. Sess. (R.I. 2019).
395. H.B. 1820, Gen. Assemb., Reg. Sess. (Va. 2019).
396. Michael Lolito & James Paretti, Jr., *WPI State of the States: From Sexual Harassment & Equal Pay to Vaccines & Big Data—February was a Mixed Bag of Legislative Activity*, JDSUPRA (Mar. 4, 2019), https://www.jdsupra.com/legalnews/wpi-state-of-the-states-from-sexual-50412/; *see also* Ryan Blansett et al., *State Legislative Update*, 2019 J. DISP. RESOL. 257, 273–79 (2019).

it.[397] Perhaps as a concern over violating federal law,[398] the House Subcommittee recommended passing the measure with the substitution of nondisclosure agreements for arbitration provisions.[399] The bill garnered overwhelming bipartisan support, passing the House and Senate without a single "nay" vote.[400] Subsequently, HB 1820 was signed by Governor Ralph Northam on February 22, 2019 and became effective July 1.[401]

VI. CATALOG OF STATE LEGISLATION

The following states have no new ADR–related bills enacted or pending at this time: Alabama, Alaska, North Dakota, and Oklahoma. The remaining states, listed below, each have enacted new bills and/or have ADR–related legislation pending.

ARIZONA

Bills Enacted: SB No. 1126 (requires specific ADR remedies to be available); SB No. 1434 (authorizes and explains the process of mediation as an ADR mechanism between applicable parties if an agreement between them is not reached).

ARKANSAS

Bills Pending: SB No. 119 (authorizes employers/employees to mediate workers compensation disputes and allows CBAs to supersede provisions of the Arkansas Workers Compensation Act); SB No. 88 (authorizes an agency or entity to request Office of Administrative Hearings to conduct arbitration and ADR).

CALIFORNIA

Bills Enacted: AB No. 813 (requires support centers for those with developmental disabilities to create ADR programs to hear and decide disputes between centers and consumers regarding provision for eligibility for services); AB No. 707 (requires a private arbitration company to collect and report demographic data in the aggregate relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators, as

397. H.B. 1820, Gen. Assemb., Reg. Sess. (Va. 2019).
398. David S. Baffa, Noah A. Finkel, & Joseph S. Turner, *U. S.: Halloween Bill Provides a Scare by Seeking to Prohibit Workplace Arbitration Altogether*, MONDAQ (Nov. 8, 2018), http://www.mondaq.com/unitedstates/x/752646/Arbitration+Dispute+Resolution/Halloween+Bill+Provides+a+Scare+By+Seeking+to+Prohibit+Workplace+Arbitration+Altogether.
399. H.B. 1820, Gen. Assemb., Reg. Sess. (Va. 2019).
400. *Id.*
401. *Id.*

specified); AB No. 1820 (grants Department of Fair Employment and Housing the power to appoint mediators to conciliate, mediate, and prosecute complaints); SB No. 578 (authorizes the issues to be submitted to arbitration in accordance with the rules of another third–party arbitration organization selected by the parties and existing provisions governing arbitration); AB No. 1611 (states the decision obtained through the department's independent dispute resolution process shall be binding on both parties, and the plan shall implement the decision obtained through the independent dispute resolution process); SB No. 384 (allows a commenter on the draft environmental review document to submit to the lead agency a written request for nonbinding mediation within five days following the close of the public comment period).

Bills Pending: AB No. 692 (allows commencement of arbitration upon a request for arbitration by a client pursuant to those provisions following the commencement of an action in any court or any other proceeding by the attorney).

COLORADO

Bills Enacted: HB 1174 (permits a provider or healthcare facility to initiate arbitration if the provider or facility believes that a payment made pursuant to subsection (3) or (5.5) of this section or section 24–34–114 or a facility believes that a payment made pursuant to subsection (5.5) of this section or section 25–3–122 (3) was not sufficient given the complexity and circumstances of the services provided); SB No. 2 (states the administrator shall designate, support, and maintain a student loan ombudsperson to provide timely assistance to student loan borrowers).

Bills Pending: SB No. 180 (provides mediation services for disputes between a landlord and tenant that could prevent or resolve the filing of an eviction).

CONNECTICUT

Bills Enacted: HB No. 6923 (ensures per diem compensation equity for State Board of Mediation and Arbitration arbitrators); HB No. 7104 (enables individuals to resolve a dispute concerning the interpretation of the trust or its administration through mediation, arbitration, or other ADR procedure).

Bills Pending: SB No. 768 (creates an Office of the Property Rights Ombudsman, which shall have responsibilities including, but not limited to, arbitrating and mediating disputes between agencies and property owners).

DELAWARE

Bills Pending: SB No. 38 (declares victim–offender mediation programs' alternative case resolutions can meet the needs of Delaware's citizens by providing forums in which persons may voluntarily participate in the resolution of certain criminal offenses in an informal and less adversarial atmosphere); HB No. 153 (requires that notice of the time, place, and purpose of mediation be served upon each party in a matter at the party's last known address by registered or certified mail).

FLORIDA

Bills Enacted: HB No. 1075 (declares the ombudsman shall maintain his or her principal office in any place convenient to the offices of the division to enable the ombudsman to expeditiously carry out the duties and functions of his or her office).

GEORGIA

Bills Enacted: HB No. 84 (sets forth that ADR may be initiated by the patient, person responsible for payment, or his or her legal representative within 90 days of receipt of a bill for emergency services from a healthcare provider by filing an application with the Commissioner).

HAWAII

Bills Pending: SB No. 306 (states that the real estate commission shall receive and investigate any complaints regarding disputes between an association and a unit owner or any complaints referred to mandatory mediation, mandatory arbitration, or voluntary binding arbitration, pursuant to this subpart).

IDAHO

Bills Enacted: HB No. 42 (states the requirements of negotiations in open sessions shall also apply to meetings with any labor negotiation arbitrators, fact–finders, mediators, or

similar labor dispute meeting facilitators when meeting with both parties to the negotiation at the same time).

ILLINOIS

Bills Pending: SB 1760 (requires a buyer to initiate a qualified third–party dispute resolution process, if available, before asserting the presumption that a reasonable number of attempts have been made to repair the nonconformity); SB 1732 and HB 2275 (amend the Illinois Educational Labor Relations Act).

INDIANA

Bills Enacted: HB 1331 (provides that if a party to a dispute involving a homeowners association requests mediation, then mediation is mandatory); HB 1170 (requires a county, city, town, or township (unit) that does not have a procedure for resolution of an impasse in contract negotiations through ADR with an employee organization for the unit's police or fire department employees to include mediation of disputes in a written agreement entered into with the employee organization); HB 1629 (provides that the state board shall establish the education dispute resolution working group).

Bills Pending: SB 292 (requires a relocating individual and the nonrelocating individual to participate in mediation or another ADR process unless participation in an ADR process is waived by the court upon the motion of the relocating individual or a nonrelocating individual); HB 1548 (requires the secretary of the Office of Family and Social Services to adopt rules establishing a dispute resolution procedure for disputes between Medicaid providers and Medicaid contractors).

IOWA

Bills Pending: HF 147 (relates to employment matters involving public employees including collective bargaining, educator employment matters, personnel records and settlement agreements, city civil service requirements, and health insurance matters, and also includes effective date, applicability, and transition provisions).

KANSAS

Bills Pending: HB 2072 (amends the Uniform Arbitration Act of 2000 to address validity of an agreement to arbitrate in a contract of insurance); SB 52 (concerns due process for terminating teachers' contracts).

KENTUCKY

Bills Enacted: SB 7 (amends KRS 336.700 to allow arbitration, mediation, or ADR agreements to be required by employers as a condition or precondition to employment); HB 275 (amends KRS 417.050 to exempt arbitration agreements entered by industrial insured captive insurers from the provisions of KRS Chapter 417).

Bills Pending: SB 24 (creates a new section of Subtitle 17A of KRS Chapter 304 to establish a binding independent dispute resolution program for disputed charges for covered healthcare services provided by a nonparticipating provider).

LOUISIANA

Bills Pending: HB 371 (enacts Chapter 21 of Title 22 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 22:2481 through R.S. 22:2496, relative to independent dispute resolution for out–of–network health benefit claims).

MAINE

Bills Enacted: SP 415 (changes the foreclosure mediation program to allow the courts to directly sanction a mortgage servicer when the servicer's conduct evidences a failure to mediate in good faith); HP 1217 (specifies that funds received by the commission for the purpose of implementing a third–party neutral mediation program are not subject to any statewide cost allocation plan).

Bills Pending: HP 1299 (establishes the right of an adult with serious and persistent mental illness, who is denied access to certain services by a provider contrary to the terms of the provider's contract with the Department of Health and Human Services, to seek informal department review of the provider's action and informal dispute

resolution by the department to facilitate access to the service).

MARYLAND

Bills Enacted: HB 754 (requires that each contract between a pharmacy benefits manager and a contracted pharmacy include a certain dispute resolution process); SB 698 (repeals the prohibition against a community care retirement community provider, subscriber, or group of subscribers being represented by counsel during a certain mediation procedure); SB 863 (authorizes the Commissioner on a certain determination to resolve certain issues informally or by mediation).

Bills Pending: SB 322 (prohibits a claim against a healthcare provider for damage due to a medical injury from being filed with the Director of the Health Care Alternative Dispute Resolution Office); SB 323 (establishes that a defendant in a claim filed with the Health Care Alternative Dispute Resolution Office may seek discovery as to the basis of a certificate of a qualified expert filed by the claimant or plaintiff without prejudice to later discovery if the attesting expert is designated as a trial expert); SB 1049 (establishes the Office of Asbestos Case Mediation and Resolution in the Executive Department); HB 1275 (requires an administrative law judge to complete a training course on special education law before conducting a mediation session or due process hearing related to special education); HB 1346 (establishes the Student Peer Mediation Program Fund to provide grant assistance to schools and community–based organizations in Baltimore City to establish student peer mediation programs to reduce juvenile violence); HB 1251 (alters the matters for which certain employee organizations representing certain Baltimore City police officers or the City of Baltimore may request arbitration and repeals certain provisions limiting the matters that may be arbitrated and prohibiting the board of arbitration from providing for certain issues).

MASSACHUSETTS

Bills Pending: SB 339 (promotes ADR for students).

MICHIGAN

Bills Pending: HB 4431/SB 271 (institutes a dispute resolution process for contesting water bills); HB 4034 (amends 1939 PA 176, entitled "An act to create a commission relative to labor disputes," to provide for the mediation and arbitration of labor disputes and the holding of elections thereon); HB 4033 (amends 1947 PA 336, entitled "An act to prohibit strikes by certain public employees to provide for the mediation of grievances and the holding of elections").

MINNESOTA

Bills Pending: SF 749 (concerns education ADR and due process hearings and repeals conciliation conferences); SF 992 (concerns special education placement ADR and due process hearings and removes additional prior notice requirements); SF 1048/HF 1135 (implements the Red River mediation agreement); SF 2775 (appropriates money for housing mediation eviction prevention programs); SF 1829/HF 2318 (establishes a family law mediation task force); HF 2526 (provides and appropriates funding for housing mediation eviction prevention programs).

MISSISSIPPI

Bills Enacted: HB 2403 (mandates mediation before proceeding on a complaint filed by a political subdivision against another political subdivision).

Bills Pending: HB 554 (provides that arbitration clauses in certain contracts shall be considered nonbinding); HB 278 (amends Section 83–9–5 of the Mississippi Code of 1972 to provide that binding arbitration shall be the method to resolve certain disputes between healthcare providers and the insured); HB 483 (requires certain consumer information concerning facility–based physician and notice and availability of mediation for balance billing in amounts greater than $250); HB 442 (amends Section 37–11–54 of the Mississippi Code of 1972 to require the State Board of Education to develop and implement curriculum of conflict resolution and peer mediation).

MISSOURI

Bills Pending: MO SB 54 (adds interest to insurance settlements); MO HB 547 (requires each judicial circuit to establish a veterans' treatment court); MO SB 154 (modifies laws regarding arbitration agreements between employers and employees and revises provisions relating to workers' compensation law); HB 573 (creates new provisions relating to rights of accused college students in Title IX proceedings); HB 7 (appropriates money for the Departments of Economic Development; Insurance, Financial Institutions, and Professional Registration; and Labor and Industrial Relations); SB 248 (modifies provisions relating to workers' compensation judges).

MONTANA

Bills Pending: HB 76 (allows the Department of Agriculture to provide ADR procedures); SB 78 (modifies notice requirement in workers' compensation).

NEBRASKA

Bills Enacted: LB 354 (changes requirements for juvenile pretrial diversion).

Bills Pending: LB 595 (establishes the ADR Act and restorative justice programming).

NEVADA

Bills Pending: SB No. 459 (authorizes collective bargaining for some state employees); SB No. 58 (allows a board to appoint a Deputy Commissioner to bargain between local governments and employees).

NEW HAMPSHIRE

Bills Pending: HB 684 (allows mediation of rent increases in manufactured housing parks).

NEW JERSEY

Bills Enacted: A664 (codifies the Judiciary's Foreclosure Mediation Program and dedicates money from foreclosure filing fees and fines).

Bills Pending: A584 (provides State agencies will not enter into contracts with business entities that require persons or public entities to submit disputes to binding arbitration).

NEW MEXICO

Bills Pending HB 264 (sets out a program for paid family leave).

NEW YORK

Bills Pending: A00638 (requires employers to annually report to the Division of Human Rights on the number of settlements with employees and other individuals regarding claims of discrimination on the basis of sex).

NORTH CAROLINA

Bills Pending: HB 470 (amends laws pertaining to parents' advocates in family court).

OHIO

Bills Pending: SB 11 (adds protections and mediation to civil rights law and keeps exemption).

OREGON

Bills Enacted: HB 2444 (revises statutes relating to mediation of agricultural disputes).

Bills Pending: SB 659A (establishes requirements for asserting a claim of professional negligence against a real estate licensee in binding arbitration proceeding).

PENNSYLVANNIA

Bills Pending: SB 400 (provides for the appointment of an ombudsman to oversee the process related to student loans).

RHODE ISLAND

Bills Enacted: S0512 (establishes the process of arbitration in schoolteacher collective bargaining agreements).

SOUTH CAROLINA

Bills Pending: H. 4403 (establishes procedures for dispute resolution in cases of school bullying.)

SOUTH DAKOTA

Bills Enacted: SB 49 (establishes sexual identity at birth as the sole determinant for sexual identity for purposes of participation in high school athletics).

TENNESSEE

Bills Pending: HB 986 (provides for a requirement that employers make reasonable accommodations for medical needs arising from pregnancy).

TEXAS

Bills Pending: SB 797 (provides for arbitration in collective bargaining agreements).

UTAH

Bills Enacted: SB 29 (reauthorizes provisions regarding medical malpractice arbitration agreements).

VERMONT

Bills Pending: S.139 (permits employees, whistleblowers, and representative organizations to bring civil actions in an attempt to curb mandatory arbitration).

VIRGINA

Bills Enacted: HB 1820 (prohibits an employer from requiring a non–disclosure agreement in sexual assault and harassment cases).

WASHINGTON

Bills Pending: HB 1965 (increases access to the judiciary system, thereby decreasing the burden on the Department of Labor).

WEST VIRGINIA

Bills Pending: HB 2107 (provides for meetings and conference rights for members of municipal fire departments and creates duties for the firefighters' Civil Service Commission).

WISCONSIN

Bills Pending: AB 116 (permits employees to bring unlawful employment actions outside of mere worker's compensation claims).

WYOMING

Bills Pending: HB 271 (provides for nonbinding arbitration in firefighter collective bargaining agreements).