

The NFL and the Limits of Arbitration Agreements: What Employers Need to Know

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Brian Flores, an NFL coach, recently made headlines after the U.S. Supreme Court declined to intervene in a dispute over whether his claims must be arbitrated. Flores asserted race discrimination claims against the NFL and several teams arising from his employment. With the Court denying certiorari on the enforceability of the NFL's arbitration agreement, those claims will proceed in federal court in the Southern District of New York.

This development is notable given the increasing prevalence of arbitration agreements in employment relationships. Many employers require employees to sign arbitration agreements at the outset of employment, often limiting their ability to litigate claims, such as discrimination or wage-and-hour disputes, in court. Because courts frequently grant motions to compel arbitration under these agreements, more disputes are diverted away from judicial forums. However, the NFL's experience in this case illustrates that not all arbitration agreements will withstand judicial scrutiny.

The Federal Arbitration Act ("FAA") embodies a **strong federal policy favoring arbitration**, meaning that the vast majority of arbitration agreements will stay a federal suit while the parties proceed in an arbitral forum. Still, that policy is not without limits. Arbitration agreements must preserve a party's ability to pursue statutory remedies and must, in substance, provide for arbitration, not merely label a process as such.

In *Flores v. New York Football Giants, Inc.*, the Second Circuit concluded that the NFL's arbitration provision did fall under the purview of the FAA. The court emphasized two critical deficiencies. First, the agreement failed to provide for an independent forum for resolving disputes. Instead, it vested authority in the NFL Commissioner to oversee the process. This arrangement fell short of the neutrality expected in arbitration. As the court explained, an arbitration agreement must contemplate an **"independent forum that is separate from the parties to the dispute."** A process that requires one party to submit disputes to the "substantive and procedural authority of the principal executive officer" of the opposing party is "an agreement for arbitration in name only."

Second, the agreement lacked sufficient procedural framework. Under the FAA, an arbitration agreement must **establish how disputes will be resolved**. Although the NFL's provision granted the Commissioner authority to define procedures, the court found this open-ended delegation inadequate. Thus, the agreement "bore virtually no resemblance to arbitration agreements as envisioned and protected by the FAA."

For employers, the decision provides important guidance. While arbitration remains a valuable tool, its enforceability depends on careful drafting.

Key Takeaways for Employers

Ensure True Independence of the Arbitral Forum

The forum must be neutral and separate from the parties. Employers should avoid retaining unilateral control over the decision-maker or process.

Define Clear Procedures

Arbitration agreements should outline, at least in general terms, how disputes will proceed — such as rules governing selection of the arbitrator, discovery, and hearings. This can often be done by selecting JAMS, AAA, or another arbitration service.

Avoid Unconscionability

Procedural fairness matters. Discovery limitations, for example, must not prevent employees from effectively vindicating their statutory rights. As the Fourth Circuit noted in *Stinger v. Fort Lincoln Cemetery, LLC*, while limited discovery is inherent in arbitration, it cannot be so restrictive as to undermine those rights.

Account for State Law Requirements

In addition to federal law, state-level unconscionability standards can affect enforceability. Employers should ensure their agreements comply with applicable state law.

Ultimately, while the FAA does much of the heavy lifting in enforcing arbitration agreements, the *Flores* case serves as a reminder that an agreement must actually provide for arbitration in both form and substance. Employers who take the time to draft fair, balanced, and clearly defined arbitration provisions will be best positioned to ensure their agreements are enforceable.