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*This publication is a
summary of legal principles.
Nothing in this article
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consultation with an
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published here is believed
accurate at the time of
publication, but is subject to
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to be a complete statement
of all relevant issues.*

THE U.S. SUPREME COURT RULES THE FEDERAL ARBITRATION ACT (“FAA”) DOES NOT AUTHORIZE FEDERAL COURTS TO TAILOR AN “ARBITRATION-SPECIFIC PROCEDURAL RULE”

On May 23, 2022 the U.S. Supreme Court issued a unanimous decision ending a decades old practice among Circuit Courts of Appeal to create arbitration-specific federal procedural rules. In *Morgan v. Sundance, Inc.* (No. 21-328), the Court held that the Federal Arbitration Act (“FAA”) does not authorize federal courts to tailor bespoke procedural rules for arbitration. The key takeaway from the decision for employers is to continue to carefully evaluate the relative benefits of litigating a claim that is subject to an arbitration agreement, mindful that proceeding with litigation may act as a waiver of the right to arbitrate.

Robyn Morgan, an hourly employee at a Taco Bell franchise owned by Sundance, Inc., signed an agreement at hire requiring arbitration of any employment dispute. Despite the arbitration agreement, Morgan brought a nationwide wage and hour collective action claim against Sundance. Sundance responded by unsuccessfully

moving to dismiss the lawsuit and taking the case to a fruitless mediation. Eight months after Morgan’s claim was filed, Sundance moved to stay the litigation and compel arbitration. Morgan opposed Sundance’s motion, arguing it waived its rights under the arbitration agreement by engaging in the litigation. Applying Eighth Circuit precedent, the district court used a waiver test, asking whether Sundance knew of its right to arbitrate, acted inconsistently with that right, and whether Morgan was prejudiced by Sundance’s actions inconsistent with the arbitration agreement. Finding Sundance’s actions inconsistent with the agreement and prejudicial to Morgan, the district court denied Sundance’s motion. The Eighth Circuit reversed and allowed the case to go to arbitration, reasoning that Morgan was not prejudiced because discovery had not begun, and the case had not really gone to its merits.

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The U.S. Supreme Court noted that federal courts do not require a showing of prejudice to find waiver outside of the arbitration context. Although the FAA is a resounding pronouncement favoring arbitration, the statute forbids custom rules favoring or disfavoring arbitration; the law only makes arbitration agreements as enforceable as other contracts. Accordingly, said the Court, fashioning special rules for arbitration agreements would impermissibly serve to favor arbitration over litigation.

The Court did not reach the issue of whether Sundance waived its right to arbitrate the wage and hour claims here, remanding the case for the lower court to apply the traditional rule to focus on Sundance’s conduct, not its impact on Morgan. Stripping away the prejudice element, the court will determine whether Sundance’s eight-month effort to litigate the claim constitutes a waiver of its right to arbitrate.