RECENT DEVELOPMENTS IN EMPLOYMENT AND LABOR LAW

Kate Bally, Adam D. Fuller, Daniel Furshpan, and Roscoe Mutz

Kate Bally is Director of Thomson Reuters Practical Law's Labor & Employment Service. She serves as a Vice-Chair to the ABA TIPS Corporate Counsel and In-House Professionals General Committee, Vice-Chair to the Employment and Labor Law General Committee, and CLE Board Standing Committee Member. Adam D. Fuller is a Partner with Brennan, Manna & Diamond, LLC in Akron, Ohio. He is the Chair of the ABA TIPS Employment and Labor Law Committee. Daniel Furshpan is a Partner with Rivkin Radler in Uniondale, New York. He is a Vice-Chair to the ABA TIPS Employment and Labor Law Committee. Roscoe Mutz is a Partner at Farhang & Medcoff PLLC in Tucson, Arizona, where he practices employment law and civil litigation. He serves as a Vice-Chair to the ABA TIPS Employment and Labor Law Committee.

I. INTRODUCTION

The goal of this article is to highlight a few important, but overlooked, trends and decisions in employment and labor law over the 2021–2022 survey year.

Pay disclosure laws are on the rise to combat gender and racial pay gaps. These laws require employers to disclose the compensation available to advertised job positions, with the intention of promoting pay equality. State and local legislatures are leading the charge for such laws, with the expectation that this burgeoning wave of legislation will eventually make it to the federal level.

The Crown Act seeks to prohibit discrimination based on a person's hair texture or hairstyle that is commonly associated with a particular race or national origin. Some workplace policies that appear facially neutral can disproportionately impact certain protected classes. Specifically, workplace policies that seek to regulate the appearance of hair often bar natural and protective hairstyles commonly associated with people of African descent. The Crown Act seeks to shed light on this issue and prohibits workplace policies that disproportionately impact Black men and women.

In *Morgan v. Sundance, Inc.*, the U.S. Supreme Court reversed nine U.S. Circuit Courts of Appeals in holding that arbitration agreements should not receive preferential treatment over other types of contractual provisions when it comes to the potential waiver of an arbitration provision. While the Federal Arbitration Act expresses a preference for arbitration over litigation where the parties previously agreed to arbitrate, the Court determined that the issue of waiver or forfeiture of the right to arbitrate—at least under federal law—should not require a showing of prejudice to the other party.

II. SHOW ME THE MONEY: THE RISE OF PAY DISCLOSURE LAWS

The #MeToo movement, Black Lives Matter, and interest in environmental, social, and governance (ESG) issues in recent years have put a spotlight on persistent parallel challenges: the gender and racial pay gaps. Increasingly, states and local legislatures are imposing new requirements on employers to disclose the compensation available for posted and promotional positions in an effort to promote equity.[1] Although the new requirements have broad implications, at their core, they represent another attempt to tackle

1. For a full and up-to-date accounting of state and local pay disclosure law, see Practical Law Labor & Employment, State and Local Pay Disclosure Requirements in Job Postings Chart: Overview Practical Law Practice Note W-034-9561 (West 2022) https://us.practicallaw.thomsonreuters.com/w-034-9561.

this pernicious problem. In this article, we will explore the issue, solutions to date, and recent efforts to promote fairness.

A. *Gender and Racial Pay Gaps*

In 2019, the Equal Pay International Coalition[2] created International Equal Pay Day, recognized each September 18. This initiative was inspired by findings that, globally, women continue to earn $0.77 for each dollar earned by a male equivalent for the same work.[3] Estimates suggest that without enhanced efforts, it will take 257 years to end the gender pay gap across the world.[4] Numbers in the United States are dismal as well. The U.S. Census found that in the United States in 2020, women were paid $0.83 cents for each dollar paid to a male equivalent for the same work.[5]

Racial inequities are similarly skewed. In a study spanning 2017 to 2019, the U.S. Department of Labor found dramatic distinctions in pay along racial lines. For each dollar paid to a white worker:

- Black workers were paid $0.76.
- Native American/American Indian workers were paid $0.77.
- Hispanic/Latino workers were paid $0.73.
- Multiracial workers were paid $0.81.[6]

The pandemic brought significant disruption and drastic unemployment in its early days. However, the lasting impact of the pandemic on wage gaps was minimal. The pay gap for Black workers, Hispanic workers, and women changed little before and after the worst of the pandemic.[7]

There is reason for optimism, however. The U.S. Census notes that Equal Pay Day, which is "timed to represent how far into the year women must work to equal what men earned the previous year" falls on March 15 for 2022, which is earlier in the year than it ever has been since this data

2. The Equal Pay International Coalition is a group made up of representatives from the International Labour Organization, United Nations Women, and the Organisation for Economic Co-operation and Development. See https://www.equalpayinternationalcoalition.org/the-coalition/.

3. Closing gender pay gaps is more important than ever, UN News, September 18, 2022, https://news.un.org/en/story/2022/09/1126901.

4. *Id.*

5. Megan Wisniewski, In Puerto Rico, No Gap in Median Earnings Between Men and Women, March 1, 2022, https://www.census.gov/library/stories/2022/03/what-is-the-gender-wage-gap-in-your-state.html.

6. Department of Labor, Earnings Disparities by Race and Ethnicity, https://www.dol.gov/agencies/ofccp/about/data/earnings/race-and-ethnicity. Interestingly, the study found that Asian-Pacific Islander workers were paid $1.12 for every dollar paid to a White worker.

7. Rakesh Kochhar and Jesse Bennett, Pew Research Center, Despite the pandemic, wage growth held firm for most U.S. workers, with little effect on inequality, September 7, 2021, https://www.pewresearch.org/fact-tank/2021/09/07/despite-the-pandemic-wage-growth-held-firm-for-most-u-s-workers-with-little-effect-on-inequality/.

was tracked starting in 1996.[8] In 2021, that date fell on March 24.[9] This progress is heartening and warrants a brief overview of key U.S. efforts to date.

B. *Initiatives to Date*

In some ways, it is remarkable that the American pay gap is still so wide given the breadth of the sources of law that prohibit pay discrimination. Most notably:[10]

- 1963: Equal Pay Act of 1963 (EPA) prohibits sex-based wage discrimination as part of the Fair Labor Standards Act (FLSA).[11]
- 1964: Title VII of the Civil Rights Act of 1964 (Title VII) prohibits, among other things, compensation discrimination on the basis of race and sex.[12]
- 2009: The Lilly Ledbetter Fair Pay Act established, among other things, that a new statute of limitations period starts when a plaintiff receives compensation based on a pay practice or policy thought to be discriminatory.[13]

Additional federal efforts, such as the Paycheck Fairness Act and the Equal Employment Opportunity Restoration Act failed to be passed into law. At the state level, every U.S. state now prohibits racial and gender pay discrimination, and many have laws banning salary history disclosures. Salary history bans prohibit employers from requiring candidates for employment to reveal information about their prior pay rates with an eye toward eliminating prior discriminatory pay practices.[14]

C. *Pay Disclosure Laws*

The most recent strategy for combatting pay gaps is the requirement to disclose pay up front to applicants. Some jurisdictions impose this requirement only upon request, whereas others require pay disclosure up front. Like many other prior legislative attempts, the idea is to reveal pay rates to curb discriminatory practices.

---

8. Megan Wisniewski, *In Puerto Rico, No Gap in Median Earnings Between Men and Women*, U.S. Census Bureau (Mar. 1, 2022), https://www.census.gov/library/stories/2022/03/what-is-the-gender-wage-gap-in-your-state.html.

9. *Id.*

10. *See* Ryne Posey & Brianna Flores, Skadden, Arps, Slate, Meagher & Flom LLP, with Practical Law Labor & Employment, Conducting a Pay Equity Audit, Practical Law Practice Note W-020-0740 (West 2022), https://www.practicallaw.com/w-020-0740.

11. 29 U.S.C. § 206(d).

12. 42 U.S.C. § 2000e.

13. *Id.* §§ 2000e-5(e)(3), 2000e-16(f), 12117(a); 29 U.S.C. §§ 626(d), 794a(a)(1).

14. For a full list of salary history ban laws across the United States, see Practical Law Labor & Employment, State and Local Salary History Bans, Practical Law Practice Note W-005-9410 (West 2022), https://us.practicallaw.thomsonreuters.com/w-005-9410.

1. State Law

Colorado was at the forefront of this trend with a January 2021 requirement to disclose in both job postings and promotional advertisements the compensation or a range for hourly or salary positions.[15] To be covered, employers need only have one employee in Colorado. Posting requirements apply to work tied to locations within the state and to remote work, but do not apply to work performed entirely outside of the state, including jobs either entirely outside the state or with only modest travel to the state. However, employers cannot exclude Colorado applicants from remote job openings to avoid the requirements.

Washington State was also an early adopter of pay disclosure, at least upon request, and as of January 1, 2023, amended the law to require disclosure even absent request.[16] Washington entities with fifteen or more employees are required to disclose each position's salary range or wage scale plus a description of other compensation and benefits.[17] Requests for salary/wage information are required for internal promotions or transfers.[18]

A number of states impose pay disclosure requirements at the request of the applicants, including California,[19] Connecticut,[20] Maryland,[21] and Rhode Island.[22] Nevada requires disclosure for those who have completed interviews and employees who have applied for, interviewed for, or been offered an internal position and have requested pay information.[23] Although this limited set of states have taken action, some municipal and city legislatures are dissatisfied with the pace of progress and have pursued solutions on the local level.

2. Local Law

The jurisdiction enacting pay disclosure requirements that garnered the most attention recently was New York City.[24] The pay gaps along gender and racial lines in New York is no exception to the general rule. Reuters cited a 2019 study noting a New York state gender pay gap of approximately $9,000 annually in median earnings and a 2021 study of New York

15. Colo. Rev. Stat. Ann. §§ 8-5-101(4), (5), 8-5-201(2); 7 Colo. Code Regs. § 1103-13:4.
16. Wash. Rev. Code § 49.58.110; effective January 1, 2023, SB 5761 (Wash.) amends the pay disclosure requirements.
17. *Id.*
18. *Id.*
19. Cal. Lab. Code § 432.3; SB 1162 (Cal.).
20. Conn. Gen. Stat. Ann. § 31-40z(a)(4), (b)(8) and (9).
21. Md. Code Ann., Lab. & Empl. §§ 3-301(d), 3-304.2(A).
22. R.I. Gen. Laws §§ 28-6-17(10), 28-6-22(c); see also S. 0270 (R.I.).
23. SB 293, § 1.3 (Nev.); Nev. Rev. Stat. § 608.012.
24. N.Y.C. Admin. Code §§ 8-102, 8-107(32).

City municipal workers revealing a pay gap of $27,800 annually for Black workers and $22,200 annually for Latino workers.[25]

Originally, New York City's pay disclosure was slated to go into effect on May 15, 2022, but was postponed until November 1, 2022.[26] The law requires minimum and maximum wages or salary for purposes of advertising a job, promotion, or transfer. The disclosure must be a good-faith estimate when posted. Employers are covered if they have four or more employees and at least one employee working in New York City. The requirement applies to work that will be performed entirely or partially in New York City. It creates a private right of action for employees, but not for applicants, and allows employers a chance to cure after a first violation. Uncured first violations and additional violations may subject employers to up to $250,000 in civil fines.

New York City's requirement grabbed headlines, but it is not the only local requirement. Others include the following:

- Jersey City, New Jersey (effective April 13, 2022)[27]
- City of Ithaca, New York (effective September 1, 2022)[28]
- Westchester County, New York (effective November 6, 2022)[29]
- Cincinnati, Ohio (upon request and conditional offer) (effective April 12, 2020)[30]
- Toledo, Ohio (upon request and conditional offer) (effective August 4, 2020)[31]

D. *Conclusion*

Pay disclosure requirements are daunting to employers accustomed to the status quo but making compensation clear at the outset of employment may help eliminate pay distinctions based on race or gender. The long

25. Daniel Wiessner, *NYC Pay Disclosure Law, Aimed at Closing Wage Gaps, Takes Effect*, Reuters (Nov. 1, 2022), https://www.reuters.com/legal/government/nyc-pay-disclosure-law-aimed-closing-wage-gaps-takes-effect-2022-11-01.

26. N.Y.C. Admin. Code §§ 8-102, 8-107(32) (with N.Y.C. Introduction No. 134-A moving the effective date of the requirement to November 1, 2022).

27. Jersey City, N.J. Mun. Code § 148-4.1 (see also Jersey City, N.J. Ordinance 22-026 (Mar. 24, 2022), https://cityofjerseycity.civicweb.net/document/64623/Pay%20Transparency%20Ordinance.pdf?handle=2AC02EF375634143A9F735C75E1366E4; Jersey City, N.J. Ordinance 22-045 (June 16, 2022), https://cityofjerseycity.civicweb.net/document/68348/#:~:text=In%20stating%20the%20minimum%20and,job%2C%20promotion%20or%20transfer%20opportunity).

28. Ithaca, N.Y., Code §§ 215-2, 215-3.

29. Westchester Cnty., N.Y. Mun. Code § 700.03(a)(9)(i); *see also* N.Y.C. Local Law Introduction No. 2022/119, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5680542&GUID=67451241-7B6E-4888-AFFE-A87AB397AD90&Options=ID|Text|&Search=.

30. Cincinnati, Oh., Mun. Code § 804-03(c); *see also* Cincinnati Ordinance 83-2019.

31. Toledo, Oh., Mun. Code § 768.02(c); see also Toledo Ordinance No. 173-19.

legislative history of similar efforts gives us reason for skepticism, but at least on the gender pay differential, the U.S. numbers are improving slowly. No progress is possible without these kinds of efforts, and we are seeing an attempt to promote equity even at the local level. Perhaps these most recent requirements will help move the needle toward more equitable pay.

III. THE CROWN ACT: A POTENTIAL SOLUTION TO A HAIRY DISCRIMINATION ISSUE

The Civil Rights Act of 1964 is considered the cornerstone of civil rights law in the United States. Over the years since enacted, amendments and judicial interpretation bolstered its protections such that it now prohibits discrimination in places of public accommodation and in the workplace on the basis of race, color, national origin or ancestry, religion or creed, sex (including gender, pregnancy, sexual orientation, and gender identity), genetic information, physical or mental disability, age, and Veteran status. Some workplace policies that appear facially neutral, however, can disproportionately impact certain protected classes. Specifically, workplace policies that seek to regulate the appearance of hair often bar natural and protective hairstyles commonly associated with people of African descent. Because the judiciary has, to date, been reluctant to broaden the interpretation of "race" as it pertains to these types of policies, advocates seek to resolve these deficiencies with new legislation.

A. *History of the CROWN Act*

The "Creating a Respectful and Open World for Natural Hair" Act ("CROWN Act") is a bill that prohibits discrimination based on a person's hair texture or hairstyle that is commonly associated with a particular race or national origin.[32] The CROWN Act was born out of years of work by a team of Black woman leaders. The movement was publicized with the help of organizational and corporate sponsors, collectively referred to as the CROWN coalition.[33]

To galvanize support for the movement and to demonstrate the need for laws banning race-based hair discrimination, Dove conducted research studies in 2019 and 2021. These studies demonstrated workplace biases and policies disproportionately impact Black girls and women. For example, Black women are 1.5 times more likely to be sent home from work because

32. CROWN Act of 2020, H.R. 5309, 116th Cong., (2020), https://www.congress.gov/bill/116th-congress/house-bill/5309?q=%7B%22search%22%3A%22crown+act%22%7D&s=1&r=2.

33. Official Campaign of the CROWN Act (2023), https://www.thecrownact.com/about; the founding members included Dove, National Urban League, Color of Change, and the Western Center on Law and Poverty.

of their hair, 3.4 times as likely to be perceived as unprofessional, and were consistently rated as less ready for job performance.[34] In recent years, there have been countless news stories of Black children being required to cut their dreadlocks to participate in school activities, and Black adults being denied employment because of their hairstyles. Dove's subsequent study in 2021 focused on school policies impacting girls aged five to eighteen years old.[35] The same discrimination perpetuated against Black women in the workplace was also experienced overwhelmingly by Black girls at school.[36] These biases were found most often at the elementary school level, with fifty-three percent reporting they experienced hair discrimination as early as five.[37] Some of these personal accounts have led to federal lawsuits, with the courts overwhelmingly finding no violation of Title VII.

This trend is perhaps best exemplified in *EEOC v. Catastrophe Management Solutions*, where the Eleventh Circuit ruled in favor of an employer who rescinded the job offer of a Black applicant when she refused to cut off her dreadlocks.[38] The EEOC argued a prohibition on deadlocks constitutes racial discrimination because dreadlocks are a racial characteristic that is "physiologically and culturally associated with people of African descent."[39] Relying on decades of case law, the court reasoned that Title VII only prohibits discrimination based on immutable traits, not cultural practices.[40] In reaching its holding, the court drew a narrow distinction between Black hair texture (an immutable characteristic), and Black hairstyles (a mutable choice).[41] The court acknowledged calls in recent decades to broaden the definition of race under Title VII to include cultural practices.[42] The opinion closed by suggesting the democratic process may be the appropriate avenue to "resolve what 'race' means (or should mean) in Title VII."[43] Perhaps this congressional call to action, along with the large gaps left by current legislation, was the catalyst CROWN Act proponents needed to get a bill on the House floor.

34. The CROWN Research Study (2019), https://static1.squarespace.com/static/5edc69fd622c36173f56651f/t/5edeaa2fe5ddef345e087361/1591650865168/Dove_research_brochure2020_FINAL3.pdf.

35. Dove CROWN Research Study for Girls (2021), https://static1.squarespace.com/static/5edc69fd622c36173f56651f/t/623369f7477914438ee18c9b/1647536634602/2021_DOVE_CROWN_girls_study.pdf.

36. *Id.*

37. *Id.*

38. Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016).

39. *Id.* at 1031.

40. *Id.* at 1021.

41. *Id.* at 1030.

42. *Id.* at 1034.

43. *Id.* at 1035.

B. *Current Status of the CROWN Act*

In 2019, just three years after the *Catastrophe Management Solutions* decision, the CROWN movement gained political steam when then Senator Holly J. Mitchell introduced the bill to the California legislature in January 2019.[44] The Act was signed into law just six months later in July 2019, and California became the first state to enact any such legislation.[45] The bill was introduced on the federal level in the House and Senate in late 2019 and early 2020, respectively.[46] While the House passed the bill in September 2020, it ultimately lacked the votes needed in the Senate.[47] Since then, the CROWN Act, or a variation of it, has been enacted in seventeen states, forty-three cities and/or counties, and legislation is pending in many others.[48] This past spring, the bill was reintroduced in the House by Representative Bonnie Watson Coleman (D-N.J.) and passed on March 18, 2022, by a vote of 235–189.[49] On December 14, 2022, Senate Republicans blocked the passage of the CROWN Act through the use of filibuster by Senator Rand Paul.

Advocates for the CROWN Act, including representative Ayanna Pressley (MA-07), vowed to continue fighting to pass the CROWN Act and had the following choice words for opponents of the bill:

> That Republicans would block passage of the CROWN Act in the Senate is unconscionable, but unsurprising given their blatant disregard for civil rights and contempt for Black, brown, and marginalized communities. . . . I won't stop pressing to ban race-based hair discrimination and I urge the Senate to use any legislative avenue to pass this critical bill and send it to President Biden's desk.[50]

While the fate of the federal CROWN Act legislation remains unclear, there are measures employers can take to ensure they are prepared if it is ever enacted.

---

44. *Id.*

45. *Id.*

46. CROWN Act of 2020, H.R. 5309, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/5309/summary/00; https://www.congress.gov/bill/116th-congress/senate-bill/3167/related-bills.

47. Summary, CROWN Act of 2020, H.R. 5309, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/5309/summary/53.

48. Official Summary, *supra* note 33.

49. Creating a Respectful and Open World for Natural Hair Act of 2021, H.R. 979, 168 Cong. Rec. 49 (Mar. 18, 2022), https://www.congress.gov/congressional-record/volume-168/issue-49/house-section/article/H3833-2.

50. Press Release, Ayanna Pressley (MA-7), Pressley Calls Out Senate Republicans for Blocking Passage of CROWN Act (Dec. 14, 2022), https://pressley.house.gov/2022/12/14/pressley-calls-out-senate-republicans-for-blocking-passage-of-crown-act.

C. *Compliance and Conclusions*

Depending on where a company is located, the CROWN Act may already be applicable law, and it may gain traction again at the federal level. Accordingly, there are measures employers can take to ensure they are prepared for the CROWN Act. First, management should familiarize themselves with the language of the bill. The pending legislation makes it unlawful to fail or refuse to hire or discharge any individual, or otherwise to discriminate against an individual, based on the individual's hair texture or hairstyle, if [it] is commonly associated with a particular race or national origin (including a hairstyle in which hair is tightly coiled or tightly curled, locs, cornrows, twists, braids, Bantu knots, and Afros).[51]

The bill also clarifies that while the CROWN Act is not an amendment to Title VII, it shall be enforced in the "same manner and the same means" as if it were incorporated into Title VII.[52] While critics argue the legislation could undermine workplace safety, proponents have pointed to the "longstanding provisions under civil rights laws" that enable employers to protect their workforce.[53] It is likely that, if these provisions currently apply to a workplace, they will continue to do so if the CROWN Act becomes federal law.

Employers should also review the language of their current dress and grooming policies to evaluate whether a facially neutral hairstyle policy disproportionately affects workers, particularly of African descent. Employers should consider not only updating old policies but also implementing new non-discriminatory hair policies that are inclusive and allow for hairstyles commonly associated with a particular race or national origin.[54] Where necessary, employers should include and explain workplace safety issues related to hair choice and allow for potential accommodations or personal protective equipment to address safety issues. Finally, by explicitly stating that the intention is to foster an inclusive, respectful environment, while also keeping employees safe, employees may feel empowered to escalate issues when they experience differential treatment.

IV. *MORGAN V. SUNDANCE, INC.*: SHIRT, SHOES, AND PREJUDICE NOT REQUIRED

In *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022) the United States Supreme Court took the minority view to hold that the Federal Arbitration

51. 168 Cong. Rec. 49.
52. *Id.*
53. *Id.*
54. Pamela DeLoatch, *'A Source of Tremendous Discrimination': Why Hair Policies Matter*, HRDive (Feb. 28, 2020), https://www.hrdive.com/news/a-source-of-tremendous-discrimination-why-hair-policies-matter/572959.

Act's (FAA's) policy of favoring arbitration does not allow courts to condition a waiver of the right to arbitrate on a showing of prejudice to the opposing party; abrogating decisions in nine circuits to the contrary.[55] In other words, legal defenses to arbitration agreements—such as the delay of a party to exercise its right to arbitrate—are to be treated no differently than any other provision in a contract.

A. *Factual Summary*

The plaintiff, Robyn Morgan, worked at a Taco Bell franchise owned by the defendant, Sundance, Inc. At her hiring, Ms. Morgan signed an agreement to arbitrate employment disputes. She later joined a collective action involving overtime compensation. Eight months after the action commenced, and after unsuccessfully moving to dismiss, Sundance filed a motion to stay and compel arbitration. Ms. Morgan opposed the motion and argued that Sundance had waived its right to arbitrate by litigating for such a lengthy time before filing its motion.

In deciding the motion, the district court and Eighth Circuit applied an arbitration-specific rule for deciding waiver; a party waives a known contractual right to arbitrate if it acted inconsistently with that right and prejudiced the other party by its inconsistent actions. The district court found that Ms. Morgan had been prejudiced; the Eighth Circuit held there was no prejudice because the case was in the early stages of litigation, and, among other reasons, the parties had not yet begun written discovery.

The United States Supreme Court took the case to resolve a circuit split and held the Eighth Circuit had erred in conditioning a waiver of the right to arbitrate on a showing of prejudice.

B. *The Decision*

Justice Kagan, writing the unanimous opinion of the Court, held that federal courts may not adopt an arbitration-specific procedural rule conditioning a waiver of the right to arbitrate on a showing of prejudice.[56] Summarily put, federal courts may not create "arbitration-specific variants" of federal procedural rules, like those relating to waiver, simply because the FAA has a general policy favoring arbitration.[57] The Court observed that the policy "is merely an acknowledgment of the FAA's commitment to overrule the

55. Joca-Roca Real Estate, LLC v. Brennan, 772 F.3d 945, 948 (1st Cir. 2014); O. J. Distributing, Inc. v. Hornell Brewing Co., 340 F.3d 345, 355–356 (6th Cir. 2003); PaineWebber Inc. v. Faragalli, 61 F.3d 1063, 1068–69 (3d Cir. 1995); S & H Contractors, Inc. v. A. J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990); Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 497 (5th Cir. 1986); ATSA of Cal., Inc. v. Cont'l Ins. Co., 702 F.2d 172, 175 (9th Cir. 1983); Carolina Throwing Co. v. S & E Novelty Corp., 442 F.2d 329, 331 (4th Cir. 1971) (per curiam); Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968).

56. Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1711 (2022).

57. *Id.* at 1712.

judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts."[58]

The Court explained that the FAA policy requires courts to treat arbitration contracts "like all others."[59] Indeed, Section 6 of the FAA provides that any application under the statute, including a motion to stay or compel arbitration, "shall be made and heard in the manner provided by law for the making and hearing of motions."[60] As such, conditioning waiver on prejudice, like the test applied by the Eighth Circuit, violates Section 6 of the FAA.[61]

Turning to the facts of the *Morgan* case, the Supreme Court decided that, after removing the prejudice requirement, the waiver inquiry should be focused on Sundance's conduct; for instance, whether Sundance knowingly abandoned the right to arbitrate by acting inconsistently with that right either through forfeiture or otherwise.[62] The case was remanded to resolve that question.

C. *Why the Decision Matters*

The message parties to arbitration agreements in employment contracts should take away from *Morgan* is that a party should express its intent to compel arbitration at the start of litigation and take the necessary steps to do so, or otherwise take steps to avoid an intentional relinquishment of that right. Regardless of the FAA's favoritism of arbitration over litigation, the more a party participates in a litigation, the greater the chance they will be found to have waived the right to arbitrate. For instance, if a party files responsive pleadings, participates in discovery, or files motions, the question of waiver will almost certainly be raised, placing the party in a difficult position to explain its actions and avoid forfeiture regardless of the existence of prejudice to the other party (at least under federal law).

58. *Id.* at 1713 (quoting Granite Rock Co. v. Teamsters, 561 U.S. 287, 302 (2010) (internal quotation marks omitted)).

59. *Id.*

60. *Id.* at 1714.

61. Notably, the prejudice requirement is not a feature of federal waiver law generally. Thus, state courts where a prejudice requirement features a state waiver law are beginning to distinguish themselves from *Morgan*. *See* F.T. James Constr., Inc. v. Hotel Sancho Panza, LLC, 657 S.W.3d 623, 635 (Tex. App. 2022); Desert Reg'l Med. Ctr., Inc. v. Miller, 303 Cal. Rptr. 3d 412, 433 (Ct. App. 2022).

62. *Morgan*, 142 S. Ct. at 1714.