

**To Arbitrate or Not to Arbitrate:  
Pros and Cons of Choosing to Arbitrate Employment Disputes**

One of the most important risk management decisions that a company should make is whether to require binding arbitration of employment claims. Based on a recent court decision called *Lagatree v. Luce, Forward, Hamilton & Scripps*, employers may now condition offers of employment upon the signing of an arbitration agreement. (The agreement must still comply with certain fairness guidelines, which will be discussed below.) Without an arbitration agreement in place, the company will be forced to litigate employment disputes in the courtroom.

Each company should, therefore, determine whether or not arbitration makes business, practical, and “cultural” sense. The following checklist should help guide the decision of whether to have employees sign arbitration agreements.

**Features of Arbitration Compared to Traditional Litigation:**

- ? No Jury. Without an effective arbitration agreement, employees will file in court and have the right to a jury trial in most cases. A jury trial usually entails more fees, costs and larger awards. While arbitrators may consider awarding punitive damages, it is more likely that a sympathetic or “runaway jury” will award punitive and “soft” damages for claimed emotional distress.
- ? Ability to Select Experienced Decision-maker. In addition to not having a jury, in arbitration the parties have more power to select the decision-maker. In court, the parties are assigned a judge. In arbitration, depending on what the arbitration agreement calls for, the parties have some input in selecting the arbitrator, or at least the ability to veto unacceptable arbitrators. For example,

the parties may be presented with a panel of experienced employment law arbitrators from which to accept or reject.

- ? Specific Rules. The rules of the arbitral organization may also be tailored to employment disputes, as opposed to the more generalized litigation rules that apply to all civil cases filed in court.
- ? Private Forum. As opposed to the public courtrooms, arbitration has the benefit of a private proceeding that is not open to the general public.
- ? Speed and Efficiency. Arbitration is typically quicker and more efficient. This is not always the case, however, because arbitrators can be lenient about postponements and delay; whereas, judges typically set a firm trial date. Note that efficiency and speed might not be desired, as the employer may have the better ability, or some incentive, to weather delays in the process.
- ? Costs. As discussed below, employers must pay the additional costs of arbitration, such as increased filing and administrative fees. In one well-known arbitral organization, the filing fee can be quite high, based on a sliding scale depending on the amount of damages claimed. The organization will also charge for the hearing room and an administrative fee. Plus, the fees paid to the arbitrator can run very high. Some arbitration agreements require a panel of three arbitrators, and the employer could end up paying for all three. In a court case, the entry fee will be several hundred dollars only – paid by the employee filing the case.
- ? Client Involvement Time. Since there is less time, discovery and fewer procedures involved in arbitration, clients and company representatives will spend less time than they would in a court action.
- ? Third Parties. Since there are only limited grounds to add potentially liable third parties who have not signed the arbitration agreement, those parties might not be part of the arbitration – leading to incomplete relief or multiple actions.

- ? Motions and Discovery Process. Arbitrators may not permit all of the motions and discovery available in court cases, such as early motions to dismiss, motions for summary judgment and other procedures designed to narrow the issues. Discovery will also be limited in arbitration. While arbitrators will typically grant some discovery, and may hear an early motion to dismiss, all of the legal maneuvers in court are not available in arbitration.
- ? Applicable Law. Unlike judges, arbitrators do not have to follow legal precedent. The arbitrator's decision will not be reversed by an appellate court for mistakes of law. Arbitrators might also find a middle-ground, compromise award that satisfies no law or party, but is "rough justice."
- ? Finality. Except in very limited situations, there is no appeal of an arbitration award. The award is final. By comparison, a trial court judgment can be appealed to an intermediate appellate court and then to the Supreme Court.

### **What Will the Arbitration Look Like?**

The look and feel of the arbitration depends on the terms of the arbitration agreement. A well-crafted agreement can select the: (1) arbitrator or arbitral organization, (2) method to select the arbitrator, (3) number of arbitrators (usually one or three – and sometimes one for each party, where the third "neutral" arbitrator is selected by the "party" arbitrators), (4) venue or place of the hearing, (5) pre-hearing discovery and motions allowed, and (6) scope of issues subject to arbitration. Subject to the following limitations and guidelines, the agreement might specify other terms and features tailored to the company's needs.

### **Limitations of Arbitration Agreements:**

Due to unequal bargaining power between the company and its employees, and the important civil rights involved, the courts have imposed limitations on what an arbitration agreement may require. (The concern is that the arbitration forum remains a fair alternative.) If the agreement fails to meet these guidelines, or appears one-sided, a court may set aside the arbitration agreement and require courtroom litigation.

These guidelines, which come from the 2000 California Supreme Court decision of *Armendariz v. Foundation Health Services*, are as follows:

1. The agreement must provide for a neutral arbitrator;
2. The agreement must provide for adequate discovery (such as a limited number of depositions and document production by each side);
3. The agreement must require that the arbitrator make a written decision that includes the essential findings and conclusions;
4. The agreement cannot restrict the remedies that would otherwise be available in court. (For example, the agreement cannot bar punitive damages or recovery of attorneys' fees to a prevailing party);
5. The agreement cannot require that the employee pay any type of costs or arbitrator's fees unique to the arbitration forum. (The employer must pick up the tab for any costs beyond those typically incurred in litigation.)

One often-used tactic that could result in the unenforceability of an arbitration agreement is the lack of bilaterality. If the company is requiring employees to arbitrate their claims, then the company must also commit to arbitrating its claims against employees. For example, if the employer attempts to carve out, or exclude from arbitration, all disputes regarding intellectual property, trade secrets and confidentiality, a court might not enforce the agreement because it does not require arbitration of those claims typically brought by the employer. Therefore, assuming the employer is inclined toward arbitration of all disputes, the agreement should expressly reserve the option to seek urgency relief in court (preliminary injunctions and temporary restraining orders) regarding these important claims, while empowering the arbitrator to grant ultimate or final injunctive relief.

#### **Summation:**

Arbitration is well worth considering as an alternate forum to the courts. Employers typically prefer arbitration in order to avoid costly jury trials and runaway jury awards. Arbitrators tend to be more conservative, avoiding the large award, but will tend to award something rather than nothing – and often find a middle-ground. Thus, if

the company is risk-averse or has a workforce that opens the door to potentially large claims (such as having many workers, or an environment that might lead to discrimination or sexual harassment), then arbitration could make sense. If, however, the company would expect to see many smaller disputes brought in arbitration, which might otherwise not be brought in court, then having no arbitration agreement could make sense. There are many factors, and one size does not fit all, but arbitration agreements should be considered because the default choice - having no agreement - will end up being traditional litigation.

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