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Expert Analysis

Arbitrating Employment Disputes: Factors to Consider

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It is becoming increasingly common for employers to adopt policies requiring that all employment-related disputes be submitted to mandatory binding arbitration. These policies are generally enforceable, even with respect to statutory claims of employment discrimination or wage and hour violations.[1] While arbitration offers many advantages over litigation to employers, there are also disadvantages to arbitration that are not always fully considered by employers in adopting these policies. When counseling employer clients with respect to arbitration policies, it is incumbent upon attorneys to consider both the benefits and the detriments of these policies, and to properly tailor such policies to match the specific client's needs, taking into account its work force and the client's particular industry.

Advantages of Arbitration

Several of the generally cited advantages of arbitration are particularly relevant when it comes to employment disputes. For example, in arbitration the parties get to choose their "judge," and their selected arbitrator or arbitrators will decide their case, not a jury. Employers tend to view juries as employee-friendly and unpredictable. The threat of a jury awarding excessive damages often drives employers to settle cases that they otherwise would not. Arbitrators are generally considered to be more predictable and restrained with respect to damages awards, and the fact that the parties select their arbitrator(s), usually from a long list of eligible candidates with varied backgrounds and expertise, may give employers comfort that they would not have with a jury as trier of fact.

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Arbitration is also generally less expensive and faster moving than litigation. While both of these factors are frequently overstated when arbitration is discussed, as arbitration can be quite a costly and lengthy process, in general the limited discovery and pre-trial motion practice available in arbitration renders arbitration more efficient than litigation. The finality of arbitration also minimizes the threat of costly appeals. There are very limited grounds for appealing an arbitration determination.

Also of particular relevance in employment disputes, arbitration offers the benefit of privacy. Unlike in litigation, arbitrations are not played out in public records and open hearings. Media and other outsiders generally have no access to arbitration proceedings, and arbitration determinations are not usually published. Many employers place a premium on privacy and confidentiality when it comes to disputes with their employees.

Another benefit of mandatory arbitration policies for employers is that such policies can be drafted to prohibit employees from prosecuting their claims in class or collective actions. This is a particular benefit when it comes to claims for wage violations under the Fair Labor Standards Act (FLSA). With respect to FLSA claims, it is often not economically viable for an individual employee to pursue his or her claim alone, and thus, it is common for these claims to be litigated as class or collective actions. Such class actions can be burdensome and expensive for employers to defend.

The U.S. Court of Appeals for the Second Circuit has very recently held that arbitration policies that prohibit class or collective actions or arbitrations are enforceable.[2] By adopting an arbitration policy that contains a waiver of class and collective actions, employers can make it less economically viable for employees with relatively small individual claims to prosecute their claims, and thus, can curb such litigation.

The ability to have employees waive their right to bring claims in a class or collective action is an example of how the relevant benefits of adopting an arbitration policy may vary depending upon the specific employer client's particular

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situation. The threat of FLSA class or collective actions is much greater in some industries than in others. For example, to an employer that has a large work force of mostly manual laborers who are covered by the FLSA's protections, the ability to prohibit class or collective actions would likely be a much weightier consideration than it would be to an employer of mostly professional employees who are exempt from the FLSA's protections.

Disadvantages of Arbitration

In considering whether to adopt an arbitration policy, and the scope of such policy, an employer should weigh the benefits of arbitration against the detriments of binding itself to arbitration.

Employers may consider the limited availability of dispositive motion practice to be a downside of arbitrating an employment dispute. It is common for employers in litigation to seek to dispose of employment cases on pretrial motions, and thus, to avoid trial altogether. In many instances, these motions are not available to parties to an arbitration. Similarly, critics of arbitration argue that arbitrators, untethered to the rule of law and with knowledge that their decision is subject to very limited appellate review, are more likely to reach a compromise decision, rather than dismiss or deny an employee's claim altogether. Thus, by mandating arbitration, employers may inhibit their ability to defend against claims on procedural and technical grounds, which are often successful in litigation.

Additionally, while the limited discovery that is usually available in arbitration can be seen as a benefit, in that it curtails costs, employers should also consider the downside of foregoing extensive pretrial discovery. Pretrial discovery allows employers to explore potential defenses to claims and to prepare such defenses for trial. In the absence of discovery, employers may have a difficult time preparing and presenting certain defenses to an employee's claim. For example, a common defense to employment discrimination claims is that the employee has failed to mitigate his or her damages by seeking a similar employment position elsewhere. Without the opportunity to ask the employee about his or her mitigation efforts, through depositions, interrogatories or other discovery devices, it may not be possible for an employer to develop this defense prior to the arbitration hearing.

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There is also no requirement that a statutory claim for employment discrimination be presented to the Equal Employment Opportunity Commission (EEOC) or other administrative agency prior to an employee commencing an arbitration, as there is for federal litigation.[3] Administrative agencies such as the EEOC serve many useful purposes, including facilitating early settlement of employee complaints and investigating the facts and merits of complaints. By committing to arbitration, an employer eliminates the administrative hurdle that its employees must pass before commencing litigation. On the flip-side, however, the existence of an arbitration agreement between an employer and employee does not prevent the EEOC from prosecuting an enforcement action against the employer in court, even one for victim-specific relief.[4]

Employers should also consider the relative informality of arbitration. Absent an express agreement to the contrary, arbitrators are generally not bound by formal rules of evidence and need not issue a reasoned decision. Thus, arbitrators can consider "evidence" that would not be considered in litigation, and need not justify their decision. This, coupled with the fact that appellate review of an arbitrator's decision is generally limited to claims of serious misconduct, bias, corruption and acting outside of the scope of authority, may be cause for concern to employers, who are usually viewed as the less sympathetic party in an employment dispute.

Also, while dwarfed by the legal fees associated with litigation in the usual case, the parties to an arbitration are responsible for payment of an arbitrator's fees, which can be substantial. In comparison, court filing fees are usually relatively nominal.

Conclusion

While there are advantages and disadvantages to arbitration that should be considered whenever parties enter into a binding arbitration agreement, there are special concerns that should be closely examined when employers consider adopting arbitration policies. Whether it is beneficial to a particular employer to adopt a policy requiring arbitration, and the scope of claims that should be subject to the policy, are determinations that should be made on a case-by-case basis. Considerations such as the make-up of the employer's work force and the employer's specific industry should be taken into account. Attorneys representing employers should be cognizant of, and consider carefully, the various advantages and disadvantages of employment arbitration policies in order to provide their clients with good counsel. Merely providing employers with a "one-size-fits-all" form arbitration policy will often prove to be a disservice to the client.

1. *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991).
2. *Sutherland v. Ernst & Young*, 2013 U.S.App.LEXIS 16513 (2d Cir. Aug. 9, 2013); *Raniere v. Citigroup*, 2013 U.S.App.LEXIS 16765 (2d Cir. Aug. 12, 2013).
3. *Morris v. Temco Service Indus.*, 2010 U.S.Dist.LEXID 84885, **14-15 (S.D.N.Y. Aug. 12, 2010).
4. *EEOC v. Waffle House*, 534 U.S. 279 (2002).