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Mandatory Employee Arbitration and Class Action Waivers

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Gilmer vs. Interstate/Johnson Lane Corp. Circuit City Stores vs. Adams

There are “real benefits” to arbitration, and those benefits do not “somehow disappear” in the “employment context.” “Arbitration agreements allow parties to avoid the cost of litigation, a benefit that may be of particular importance in employment litigation.”

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- In 2016, approximately 31,000 federal lawsuits were filed in five categories of employment cases: “civil rights cases: employment,” “ADA” (Americans with Disabilities Act), “FLSA” (Fair Labor Standards Act), “ERISA” (Employee Retirement Income Security Act), and “FMLA” (Family and Medical Leave Act).

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- 8,686 FLSA lawsuits filed in 2016 were filed as class or collective actions.

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- In addition to the 31,000 federal lawsuits filed in 2016, 195,000 employment lawsuits per year were filed in state courts of general jurisdiction.

1992

2% of employees subject to mandatory arbitration agreements

2000

25% of employees subject to mandatory arbitration agreements

2016

55% of all employees subject to mandatory arbitration agreements

65% of employers with over 1000 employees subject to mandatory arbitration agreements

Advantages and Disadvantages of Mandatory Employee Arbitration

FAVOR

- A potential reduction in the number of claims filed as many plaintiff lawyers shy away from claims which can only be arbitrated.
- A likely reduction in employment practice insurance (“EPLI”) premiums.
- On average, arbitration costs as compared to civil litigation costs are less.

Advantages and Disadvantages of Mandatory Employee Arbitration

FAVOR

- Very important is the lessened risk of a “runaway” jury verdict.
- Arbitration is usually quicker and more streamlined than typical civil litigation in either state or federal court.
- The findings are, for the most part, final and binding.

Advantages and Disadvantages of Mandatory Employee Arbitration

AGAINST

- The findings are, for the most part, final and binding.
- More employees may choose to pursue arbitration on a *pro se* basis.
- Many states require mutuality of the right to arbitrate. This means that employers may not be able to fully carve out claims for injunctive relief for violations of trade secrets, restrictive covenants, non-compete clauses, or other instances when they may wish to resort to a court instead of arbitration.

Advantages and Disadvantages of Mandatory Employee Arbitration

AGAINST

- Arbitrators are paid by the hour or by the day and administrative costs can end up being considerable for hearings lasting more than a day.
- Very important - Arbitration proceedings are less likely to be decided by a dispositive motion than are court proceedings.
- Arbitrators are less likely to accept procedural defenses.

Advantages and Disadvantages of Mandatory Employee Arbitration

AGAINST

- Arbitrators are more likely to allow hearsay and irrelevant witnesses or evidence.
- An arbitration policy generally will be ineffective and unenforceable with regard to the filing of claims and charges before administrative agencies, and cannot prevent the United States Department of Labor, the Equal Employment Opportunity Commission, or similar agencies from bringing suit, including class and collective actions.

Fairness vs. Unconscionability

- Provide for the selection of a neutral arbitrator;
- Provide for reasonable and meaningful discovery;
- Allow for the recovery of all types of relief that would otherwise be available in court (specifying the various statutory claims which are subject to the arbitration agreement is important).

Fairness vs. Unconscionability

- Require the employer to pay most, if not all, of the costs, including the fees of the arbitrator;
- Require written award to allow for potential judicial review (though in reality it doesn't exist);
- Be signed by both employer and employee;
- Not unreasonably minimize available discovery tools;

Fairness vs. Unconscionability

- Include a copy of all applicable arbitration rules or provide reference to where such rules can be found;
- Avoid reserving the right to retroactive modification or amendment;
- Acknowledge availability and standards of a summary judgment procedure;
- Require proceedings to be confidential;
- Contain class/collective action waivers (if ultimately permitted).
- Should not attempt to alter or shorten statutes of limitation.

Fairness vs. Unconscionability

- Savings Clause – The inclusion of a severability provision should be considered to save enforceability of a mandatory arbitration provision should a review in court find that any portion thereof is unenforceable.
- Delegation Clause – Provide for the arbitrator and not a court to decide whether or not the arbitration agreement covers a particular dispute or is otherwise enforceable.
- Clearly identify employees to be covered by the arbitration agreement.

Exclude

- The right to file a charge before a governmental agency such as the EEOC, NLRB, or DOL;
- The right to file a worker's compensation claim;
- The right to file an unemployment compensation claim.

Cautions

- The importance of a stand-alone agreement cannot be overemphasized. Rather than simply including it as just one more policy in a handbook, the arbitration agreement should be presented to the employee separately, requiring a directive to review and approve prior to signature. It doesn't hurt to advise the employee that he/she may seek legal counsel before signing.
- Obviously, employers should keep a copy of each signed arbitration agreement in the employee's personnel jacket.

Cautions

- Some states do not consider the offer of continuing employment to be sufficient consideration of consent. To ensure their enforceability when possible and protect the notion of mutual consent, agreements should be presented upon an initial offer of employment and upon re-employment. Courts have consistently approved this form and timing of consent. Requiring existing employees to sign as a condition of continued employment is typically a matter of state law where and when the agreement is signed.

Class Action Waivers Enforced

FAA vs. NLRA?

- ***FAA** vs. COGSA
 - ***FAA** vs. Securities and Exchange Act of 1934
 - ***FAA** vs. RICO
 - ***FAA** vs. ADEA
- * “No contrary Congressional Demand”

Questions?



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