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Some Employment Arbitration Issues You May Not Have Considered

Most employment lawyers advise their employer clients to have employees sign mandatory arbitration agreements, particularly with regard to discrimination and wrongful discharge claims. While this generally is considered sound advice as it avoids bad publicity, time-consuming and expensive litigation and runaway jury verdicts, did you know the following? Your client might have to pay the full cost of the arbitration if the former employee refuses to pay his share due under the arbitration agreement, or your client might find itself in court on the claims it intended to arbitrate? The arbitrator may lack the authority to issue pre-hearing subpoenas to non-parties to enable you to obtain discovery? Your client might be stuck simultaneously having to arbitrate with signatories to the agreement and litigate very similar or even identical claims against related non-signatories to the arbitration agreement? Your client may face unfair labor practice charges under the National Labor Relations Act ("NLRA" or the "Act"), if the arbitration policy precludes an employee from filing a collective or class action in arbitration? Finally, did you know an arbitrator lacks the authority to enforce an order issued during the arbitration and even the ultimate award? As a result, when a former employee still has company records or property, the employer will have to bring an action in court to compel their return. As discussed below, be careful what you wish for and choose the language you use carefully when drafting an arbitration clause in an employment agreement.

Why Are Our Officers Subject To Arbitration When They Didn't Sign An Arbitration Agreement?

It is beyond the scope of this article to discuss the law with regard to whether an arbitrator or the court decides the question of what issues and what persons (other than direct signatories) are bound by an arbitration agreement. However, keep in mind that in certain jurisdictions, incorporating the rules of the American Arbitration Association ("AAA"), JAMS or a similar body by reference in an arbitration agreement may empower the arbitrator to make this determination. This not only includes any objections with respect to the existence, scope or validity of an arbitration agreement, but also the arbitrability of any claim or counterclaim. This may result in an arbitrator deciding that officers or directors of your corporate client are proper parties to the arbitration on an unrelated third-party claim filed by a former employee, even though the officers or directors were not parties to the contract containing the arbitration provision. Moreover, if the officers or directors challenge that determination in court, various reported cases, including one from the United States Supreme Court, have held that courts under those circumstances must defer to an arbitrator's arbitrability decision. That is, courts "must" give considerable leeway to arbitrators and should set

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aside these decisions only in certain narrow circumstances, utilizing the same standard courts apply when deciding whether to confirm an arbitration award.

Why Are We In Court When We Agreed to Arbitrate?

Let's assume your employer client, as the claimant, is happy to be in arbitration rather than court. What happens if a respondent disagrees and, therefore, refuses to pay his or her share of the arbitration fees and costs? The employer should be able to obtain a default against respondent, correct? Not so fast. The arbitration body might simply suspend the proceedings. Alternatively, it might order claimant (your client) to pay respondent's share of the arbitration expenses upfront, with those outlays being dealt with as part of any final award. (See AAA Employment Arbitration R-47.) Moreover, under those circumstances, your client's refusal to pay respondent's share may also result in a finding by the arbitration body that your client waived its right to proceed in arbitration and that the matter should proceed in court (which is what your client wanted to avoid in the first place).

Why Can't We Subpoena Documents In Advance of the Hearing?

Section 7 of the Federal Arbitration Act ("FAA") deals with discovery from non-parties in arbitration. Paraphrasing, it provides that the arbitrator may summon in writing non-parties to appear at the hearing as witnesses and to bring documents with them. The question that arises is whether arbitrators may issue subpoenas to require non-parties to produce documents in advance of the hearing.

Whether a court will enforce a pre-hearing subpoena depends upon the circuit. Some courts, including the Sixth and Eighth Circuits, have held that the power to order pre-hearing document production is implicit in the power to order the production of documents at a hearing. Others, such as the Second and Third Circuits, disagree, finding that Section 7 of the FAA unambiguously limits an arbitrator's subpoena power to instances in which the non-party actually appears at the hearing. Other courts, such as in the Fourth Circuit, generally will not allow pre-hearing discovery from non-parties without a showing of hardship or special need. The bottom line is consider your circuit's law when deciding whether to include an arbitration clause in an agreement and if you should incorporate a choice of law provision. If you believe a breach of an agreement will lead to a proceeding in which you will need access to voluminous documents from non-parties to review in advance of a hearing, make sure your circuit does not allow arbitration's goals of efficiency and reduced costs to trump your discovery needs.

Why Are Unfair Labor Practice Charges Being Filed Against the Company?

Under Section 7 of the NLRA, employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection. Therefore, employees have challenged arbitration agreements that preclude them from filing a collective or class action in arbitration by filing unfair labor practice charges pursuant to Section 8(a)(1) of the Act. While the law still remains somewhat unsettled, with most courts enforcing those provisions, NLRB judges have been finding that these class action waivers violate federal labor law under the NLRB's D.R. Horton decision and have ordered employers to cease and desist from maintaining these class or collective action waivers.

Why Can't We Get Our Documents Back Or Enjoin Our Former Employee?

When drafting an arbitration clause, be sure to have a carve-out allowing your client to go to court for injunctive relief. The 'finality rule' generally limits judicial review by a district court to final arbitration awards, but courts usually will enforce interim awards by an arbitrator to preserve the integrity of the arbitration process. (See FAA 9 U.S.C. §10(a) (1)-(3).) However, arbitrators have no power to enforce their decisions. Therefore, an interim award requiring a former employee to return the company's documents, or to abide by a non-compete agreement pending the arbitration of that claim, can only be enforced by a court willing to entertain an application prior to the conclusion of the arbitration.

Conclusion

Arbitration for employers is advantageous in a number of important and well known respects. However, there are other important issues for you and your clients to consider both when deciding whether to include an arbitration clause and when drafting the agreement. P