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HR and Employment Law News

February 06, 2013

Why all employers should have arbitration agreements with their employees

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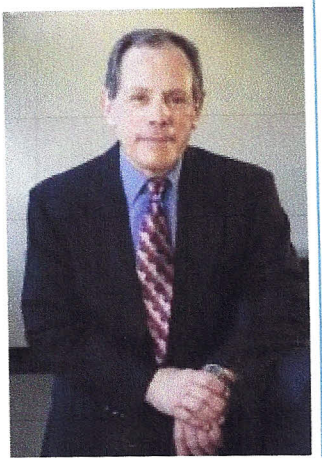

For decades, large employers with sophisticated human resource management departments have required that all their non-union employees sign agreements which mandate them to arbitrate any disputes relating to their employment (e.g. sexual or other harassment, wrongful termination, equal pay claims, and the like).

Employers want to contractually bind their employees to arbitrate such disputes, as opposed to a lawsuit in court, because there are numerous advantages for employers in arbitration.

Arbitration refers to private, dispute resolution as an alternative to traditional courts. A case is heard by an arbitrator, who conducts a hearing, similar to a trial in court, but less formal and, obviously, without a jury. Arbitrators are typically attorneys who specializes in employment law, retired judges, specialists in human resource management, or law school or graduate school professors.

4 advantages of arbitration for employers

No jury. The first and most important advantage for the employer in arbitration is that there is no jury. Almost uniformly, juries are composed of individuals who are themselves employees and who will naturally identify with, and be more sympathetic toward, the employee plaintiff.

By comparison, most arbitrators are or have been employers either in their own law firms or in management consulting businesses, or they have had managerial responsibilities, such as a dean of a department in a law school. Hence, from their own work experience and responsibilities arbitrators tend to have an understanding and appreciation of the employer's perspective of the dispute.

Smaller punitive damages. A second advantage for employers in arbitration is that even when they are found to have violated employee rights, it is highly unlikely that an arbitrator will award an employee the same large amount of money damages which a jury would award in a similar situation.

In most employment law cases, the largest amount of money is awarded as "punitive damages." As the name suggests, this is to punish the employer economically, as an incentive not to violate the law again.

Consequently, in a lawsuit in court, with a jury, such punitive damages generally bear little or no relationship to the actual financial loss the employee experienced (for example; lost income from being wrongfully terminated). Similarly, there is no relationship between such damages and the personal injury the employee actually suffered (e.g. pain, suffering and emotional distress from sexual harassment).

For example, particularly in sex harassment cases, employees often experience a small loss of income because they find comparable jobs after only a short period of unemployment, and they suffer relatively little personal injury because in most cases, they have no permanent psychological damage. As a result, their compensatory damages for lost income and personal injury are relatively small.

Yet in many such cases, juries have awarded punitive damages in the millions of dollars. This resulted from a very calculated, impassioned and successful appeal by the

employee's attorney to the jury's emotions and their collective outrage at the employer's conduct.

This result rarely occurs in arbitration where individuals are approved to be arbitrators precisely because their education and experience enable them to dispassionately decide a case on its merits.

Even where a particular situation of sexual harassment was outrageous, an arbitrator probably will not grant a large punitive damages award when, based on a dispassionate evaluation, the arbitrator concludes that a future incident of harassment against another number of the employer's workforce is unlikely. Therefore, the deterrent affect of such a large punitive award is unnecessary.

Confidentiality. Confidentiality is a third advantage of arbitration for employers, particularly for those that have public images they want to protect. Agreements for arbitration should include provisions which prohibit the employee, and his/her attorney, from disclosing to anyone any information about the arbitration process and any award the employee may be granted.

Also, because arbitration, by its very nature, is a private procedure for resolving a dispute, the general public and the media are not entitled to attend the hearings, nor to obtain any information about the arbitration or its results.

Economics. A fourth advantage of arbitration for employers is the economics of the process. Access to the courts is free, except for a few minimal filing fees.

By comparison, the organization which provides the arbitration services charges substantial fees for administering the process, and the arbitrators bill for their time at hourly rates which can exceed $500 an hour. With the arbitration agreement requiring that the employee pay half the costs of the arbitration, this can often become a real financial burden for the employee which can force an early, favorable settlement for the employer.

Another economic advantage for the employer, and a real disadvantage for the employee and his/her attorney, is an arbitration agreement that provides that each party is responsible for paying its own attorney's fees and other litigation costs, such as fees for expert witnesses.

Many statutes which prohibit various forms of discrimination and other conduct by employers, such as retaliation for "whistle blowing," also provide that if the employee proves his/her claim in a lawsuit in court, then the employer also has to pay the employee's attorney's fees and litigation costs.

With arbitration being a private means for resolving the employee's claim, this possible shifting of the employee's attorney's fees and costs to the employer can be avoided by a provision in the arbitration agreement that each party has to pay its own fees and costs. In this situation, probably no attorney will represent the employee under a contingency fee arrangement (i.e. an arrangement where the attorney is paid only if he/she obtains a monetary award for the employee).

The employee having to pay the attorney each month as the case proceeds will obviously create another financial burden which can lead to an early and favorable settlement for the employer.

Given these advantages, companies can protect themselves from employee litigation through arbitration agreements with all their non-union employees.

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