New Contours in Arbitration of Employment Disputes

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Since 1991 when the U.S. Supreme Court compelled arbitration of an employee's age discrimination claim in *Gilmer v. Lane Johnson Corporation*, employers' use of agreements requiring mandatory arbitration of employment-related claims has steadily grown. Either through individual employment agreements and/or employee handbooks (less advisable), many employers have gravitated towards requiring that private arbitrators resolve workplace disputes, keeping those claims out of court. Due to recent developments, employers should take a closer look at the current state of the law of mandatory arbitration and best steps going forward for employers.

Arbitration has historically been viewed by employers as a more efficient and predictable approach to resolving work-related claims. Conventional wisdom is that arbitrators privately and more reliably decide cases based on their merits and, if they rule against employers, will award more reasonable damages. In contrast, jury trials are public and less predictable. Additionally, arbitration allows both sides input into arbitrator selection (courts assign judges), and historically has allowed for more informal, efficient and less costly proceedings (reduced discovery, motions and hearings), and appeal of arbitration decisions is limited.

However, the analysis is not so simple. Rather, some of the perceived or historical "pros" to arbitration may be, in reality, "cons" depending on the setting and circumstances. For instance, although limited discovery and motion practice expedites resolution and reduces costs, these factors also reduce an employer's ability to learn the strengths and weaknesses of an employee's case. Moreover, unlike in court, summary judgment or other dismissal motions are seldom filed in arbitration, forcing the parties to either settle or go to hearing.

Further, the informality of arbitration can lead to the arbitrator's consideration of evidence that would not be admissible in court. Moreover, the limited appeal rights inherent in an arbitration decision may leave an employer with no viable avenue to challenge even significant errors at the hearing. Finally, another common objection to arbitration is that arbitrators are more likely to "split the baby"--finding a way to award the employee something out of compassion or a sense of fairness, even where evidence supporting the claim(s) is lacking.

Recent developments have created additional considerations that employers should account when evaluating whether to seek mandatory arbitration of employment disputes. Arbitration agreements are contracts, and attorneys for employees have raised numerous state contract law challenges to the enforceability of arbitration agreements over the years. These challenges have largely focused on whether it would be fair to force a claim into arbitration or whether the specific agreement before the court was either procedurally or substantively "unconscionable."

One frequently challenged provision contained in many arbitration agreements has been a class action waiver, whereby an employee agrees that he or she will only bring individual claims against the employer. Such an agreement waives the employee's right to be a member of a class action suit with other employees. In May 2018, the Supreme Court upheld the use of class action waivers in employment arbitration agreements in the case *Epic Systems Corp. v. Lewis*. This case resolved a decision from the U.S. Supreme Court (which generally upheld class action waivers in arbitration agreements in the 2011 case *AT&T Mobility v. Concepcion*) that conflicted with decisions from the National Labor Relations Board (which took the opposite position and found in 2012 that such waivers unlawfully restricted employees' ability to engage in "protected concerted activity" under Section 7 of the National Labor Relations Act).

Although *Epic* appeared to be a big win for employers, some employers are now confronting unexpected and concerning ramifications from the ruling. While class action cases can be costly for employers to defend, the overall costs of individual claims may be higher. For example, at the time of the decision, both Uber and Chipotle were facing wage and hour class action lawsuits. 240,000 Uber drivers claimed employee rather than independent contractor status and 10,000 current and former Chipotle workers claimed minimum wage and overtime violations. After *Epic*, the class action lawsuits were eliminated, but almost 13,ooo Uber drivers and 3,000 Chipotle employees have since filed requests for individual arbitration. Employer costs in such cases can easily include administrative fees in excess of $1,000 and defense costs of at least $30,000-50,000 per case.

Based on these pitfalls of arbitration, employers should not automatically assume that arbitration is the right approach for every case. Employers must consider the "hard" upfront costs of arbitration as well as the "soft" morale costs if employees feel forced into arbitration. It is prudent to thoroughly examine the composition of the workforce and likely claims and risks prior to implementing mandatory arbitration of employment disputes. ■

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