Mandatory Arbitration of Employment Claims Continues to be a Hot and Evolving Topic

By Mary L. Topliff, Esq., and Allison Pitigoi, Esq.

Arbitration of a legal dispute mimics, in many ways, a court proceeding. Evidence is gathered through discovery and presented at a hearing before an arbitrator (or a panel of arbitrators) who then issues a ruling. What is absent is the possibility of an emotionally charged runaway jury. This is the primary driver for most mandatory arbitration policies and agreements in which employees waive their right to a trial by jury. However, arbitration is not a silver bullet; here are some pros and cons to consider when determining if it is right for your organization.

Pros:

- No unpredictable jury verdicts.
- Faster than litigation through the court system.
- Private proceedings (not a public record).
- Parties can select an experienced neutral arbitrator who is an expert in employment law disputes.
- Less formal civil procedure and discovery rules can mean less legal fees.

Cons:

- Expensive since there are no court-imposed deadlines (and filing fees can be hefty along with paying the arbitrator by the hour).
- No possibility for employers to obtain summary judgment.
- Employers may spend money litigating the enforceability of the arbitration agreement in court before even getting to arbitration.
- If arbitration is not binding, the parties may end up re-litigating claims.

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Speaking Events

Ms. Topliff will be presenting a four-part webcast series in July 2013 on All About Time Off and Leaves of Absence through NCHRA. Ms. Topliff will be conducting a BLR webinar on 8/6/13 entitled, "Addressing FMLA/CFRA Abuse." For more information, please email topliff@joblaw.com.

Implementation Considerations

1. Have employees sign a written binding arbitration agreement. Employers should not rely simply on a binding arbitration policy in their Employee Handbook, or a blurb on an employment application (a case is currently pending on this issue before the California Supreme Court). A stand-alone arbitration agreement should be signed by employees and must clearly describe that employees (and the employer) are waiving their right to a jury trial, the types of

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disputes that will be arbitrated, what procedures are to be followed in arbitration, and other items described below.

2. Make mandatory binding arbitration a negotiable part of the new hire process. Applicants should be informed that the employer has a mandatory binding arbitration policy and an agreement that must be signed as a condition of employment. If potential new hires do not wish to agree to this term of employment, they are free to decline employment, or they may be such hot prospects that an employer may opt to hire them even though they have not agreed to arbitration. This "negotiation" can be memorialized in the offer letter and/or in the arbitration agreement itself by including language that the employee acknowledges having been given the opportunity to negotiate.

3. Be realistic about imposing mandatory arbitration on employees after their date of hire. Employers often consider imposing mandatory arbitration in reaction to an employment claim. However, employees who have been working for some time may react quite negatively to their employer's requirement that they give up their right to a jury trial. Employers are wise to consider how they will communicate this new requirement and what they will do if an employee flatly refuses to sign an arbitration agreement. Is the employer prepared to fire such an employee?

Bolster the Enforceability of Your Arbitration Agreements

1. Watch out for new and changing laws. California courts continue to have inconsistent, often hostile, views of arbitration, primarily involving the extent to which the contractual provisions are viewed as unconscionable to the employee. For example, in Trivedi v. Curexo Technology Corporation (Cal. App. 2010), an arbitration clause was found to be unconscionable because (among other reasons) the employer included a provision that was inconsistent with statutory requirements for awarding attorneys' fees to the prevailing party. Rather than ignore the unenforceable aspects of the agreement, the court found the entire agreement unenforceable. Over the years, the California courts have continually expanded the requirements for arbitration agreements to be enforceable. Employers (and their legal counsel) are wise to regularly review their arbitration agreements in light of changing law to ensure the best chance of enforceability.

2. If particular rules govern the arbitration agreement, provide them to the employee. Many, if not most, arbitration agreements provide that any claims will be arbitrated according to rules published by large alternative dispute resolution organizations. For example, the American Arbitration Association has published National Rules for the Resolution of Employment Disputes. Employers who wish to utilize these procedures in an arbitration could notify the employee by attaching a copy of them as an exhibit to the agreement. However, these rules tend to be lengthy and employers will save paper by providing a website link to the rules in the agreement. That said, beware that some California courts have expressed concern about forcing employees to go to another source to find out the full import of the agreement prior to signing, so attaching a hard copy of the governing rules may be best, if feasible. See e.g. Samaniego v. Empire Today, LLC (Cal. App. 2012).

3. Ensure that rights to pursue provisional court remedies, such as injunctions, are clearly mutual and do not unduly favor the employer. Arbitrators do not have all of the same powers as a court, namely, they typically cannot issue an order for an employee or employer to stop doing something. An employer may need this type of relief when an employee is unfairly competing against it -- and an employee may request a provisional remedy such as

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an order for the employer to reinstate the employee. If an arbitration agreement explicitly provides that only the employer can seek injunctive relief in court while all other claims must be arbitrated, it may not be enforceable. However, if the agreement allows for either party to seek appropriate injunctive relief, the courts are more likely to uphold it. A recent California Appellate case (Baltazar v. Forever 21) is favorable on this point (albeit the decision itself has been depublished pending the outcome of another case on review before the California Supreme Court).

4. If employees do not speak English as a first language, consider providing a translation of the arbitration agreement in their first language. The Samaniego court found an arbitration agreement unconscionable, in part, because it was provided in English to employees who were not able to read English (at all, or sufficiently well). The employees had asked for a Spanish translation but were told none were available.

5. Enforceability of class action waivers in arbitration agreements is currently uncertain, so keep watch. Even smaller employers are not completely immune to class or representative actions. For example, it isn't uncommon these days for class and representative actions to be brought over wage and hour technicalities, such as employee paystubs. Considerable litigation has been generated regarding whether a party may waive its right to class arbitration (typically resulting in individual arbitrations of claims, which may be overly costly to pursue). In 2012, the United States Supreme Court, in AT&T Mobility v. Concepcion, held that the Federal Arbitration Act preempted California law which refused enforcement of arbitration clauses that required individual arbitration and precluded class-wide arbitration. Currently, California courts are split on the enforceability of class and representative action waivers in arbitration agreements. However, the California Supreme Court will resolve this issue, having recently granted review of Iskanian v. CLS Transportation, in which the California court followed the AT&T case.

The Law Offices of Mary L. Topliff can assist in determining whether mandatory arbitration is right for your workforce and draft arbitration agreements to bolster their enforceability in light of new and changing laws. Please contact Ms. Topliff at topliff@joblaw.com for more information.

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