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Should Your Company Use Employment Arbitration Agreements?

Last week, the United States Supreme Court clarified employers may enforce mandatory arbitration agreements that contain waivers preventing employees from pursuing legal claims as a group. In light of this decision, employers should (re)evaluate whether it is in their best interest to use arbitration agreements with their employees. If so, employers must confirm the arbitration agreement is drafted to comply with specific obligations in order to be enforceable.

Employment litigation is inconvenient and expensive to a business, and employee lawsuits can be even more costly and time-consuming for managers and executives. Moreover, litigation impedes morale and might prompt other employees to initiate their own claims or attempt to create and or join a class action. Litigation can also expose information that corporations would prefer to keep confidential to avoid negative public relations.

Employers can reduce such litigation and the associated results through employment arbitration agreements. Arbitration is a confidential process, where a neutral third-party reviews the facts of the argument and produces a binding decision. The proceedings move more quickly and awards are significantly reduced when no class is involved.

Employees, however, have challenged the validity of arbitration agreements for many years. One of their arguments was that it was unlawful for such agreements to prevent employees from pursuing class actions. But, the Supreme Court has confirmed those waivers are lawful. Other arguments against arbitration agreements raised by employees tend to fall into the following three categories: (1) the agreement was not properly formed; (2) the dispute is outside the scope of the agreement; and (3) the agreement is unconscionable or against public policy (unfair).

It is important for employers to draft arbitration agreements that can withstand these attacks. For instance, an arbitration agreement contained in a stand-alone document and clearly disclosed to the employee is more likely to be enforced than one buried in the middle of an employee handbook. Questions about the scope of the issues covered by the agreement can be answered by precisely defining the types of issues covered by the agreement and delegating authority to the arbitrator to confirm an issue is covered. Also, agreements that contain the following provisions are more likely to be fair: (a) employer will pay the cost of arbitration; (b) mutuality, meaning claims the employer has against the employee will also be subject to arbitration; (c) employee may still pursue all remedies available under the law; (d) a statement that employees will not be subject to retaliation for engaging in the arbitration process; and (e) a clear method for selecting an arbitrator and procedures to be used (such as the Employment Dispute Resolution Rules of the AAA).

If you have any questions related to arbitration, would like assistance analyzing whether arbitration agreements would benefit your company, need assistance drafting an arbitration agreement, or if you would like assistance with any other employment law issues, please contact Jennifer S. Walther or Robert Finn Jensen of Mawicke & Goisman, S.C.

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