ARBITRATION
AN ALTERNATIVE APPROACH TO RESOLVING DISPUTES ARISING IN THE WORKPLACE

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When disputes arise between employees and employers in a non-unionized setting, the parties traditionally have looked to the courts to resolve their differences. Litigation in the courts, however, is costly, time-consuming, and usually a matter of public record. Litigation also is disruptive to an employer's business, and it can have an adverse effect on the morale of the workforce, regardless of the outcome.

As an example of the expenses that arise in litigation, one recent survey of almost 650 employment cases filed in court found that the average legal fees and costs was over $47,000 per case. This figure includes only legal expenses to the employer, *not* settlements that were paid to "stop the bleeding" of continued litigation, damages that were paid in cases where employers were found liable, or attorneys fees that the employer was required to pay to the employee's attorney under the fee-shifting statutes that are a common feature of many employment laws. It is plain that litigation – even when the employer "wins" – is an expensive venture.

Arbitration is an alternative to taking a civil dispute to court. It is the process by which parties to a dispute refer that dispute to an impartial third person (the arbitrator) chosen by the parties or by a method to which the parties agree. The parties agree in advance that they will abide by the arbitrator's decision, which is issued after a hearing at which both parties have an opportunity to be heard. Arbitration is intended to avoid some of the formalities, the delay, and much of the expense of ordinary litigation.

In 1925, Congress passed the Federal Arbitration Act ("FAA"). The Supreme Court has recognized that the FAA's purpose is "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

Arbitration, in contrast to litigation, typically is less expensive to the parties, and can reach resolution more quickly than court actions. The award of an arbitrator typically is shared only between the parties, although some decisions are published by agreement of the parties. These differences benefit both parties, yet still provide for a fair, neutral resolution of disputes. Some even argue that the process may yield more fair results than juries, which are perceived by many to decide cases not based just on the facts of a particular case but also on the preconceived notions they carry into the jury room.

I. How Arbitration is Different

The fundamental difference between arbitration and litigation is that the matter is decided by a neutral that is chosen by the parties, not a judge (or jury) selected through governmental processes and paid by tax dollars. This difference highlights many advantages to arbitration for parties seeking to reduce the expenses and delays of litigation.

First, the parties can select an arbitrator who is at least somewhat familiar with employment laws and possibly even their specific application in a particular industry. Judges, by contrast, are typically generalists.

They must consider not just employment matters, but a wide range of civil disputes, not to mention criminal cases that often take precedence over civil matters.

An arbitrator voluntarily serves in each case in which she is selected. She can accept a case load that she can handle, and remover herself from consideration when she believes herself to be sufficiently busy. By contrast, courts have little control over the volume of cases they must decide. As important as a particular civil case may be to the litigants, it may seem less important to the court either because a law mandates a higher priority to other cases (like criminal cases), because another case has been pending for a longer period of time, or simply because the judge is not interested in employment matters. These factors often conspire to impose long delays on the resolution of any particular dispute.

Arbitration is typically conducted in a private hearing room in an office building or a similar facility. Court proceedings, on the other hand, are generally held in open court, with a court reporter recording all the proceedings. The witness stand in a courtroom can be much more intimidating to witnesses than sitting at a conference table in an office building. As a result of these factors, even well-meaning, honest witnesses may be less open and forthcoming in open court than they would be in the less formal setting that is typical of arbitration.

Ultimately, though, deciding a case in arbitration instead of court is only a change in forum – or the place where the case is decided. The Supreme Court acknowledged this in *Gilmer*, a case in which the high Court first acknowledged that employment discrimination claims arising under federal law may be decided in arbitration. The parties still have the opportunity to present their respective versions of the facts. When conflicting versions are presented, the arbitrator still needs to make credibility determinations and make findings of fact. The arbitrator must also look to the law that applies to the situation to resolve the matter. In short, just like disputes that are tried in court, it is impossible to ever be absolutely certain of the outcome of a case in arbitration before the matter is actually resolved by the arbitrator.

II. Making an Arbitration Program Enforceable

The benefits of arbitration, of course, can only be realized by employers and employees who enter into valid and enforceable arbitration agreements. As mentioned earlier, the purpose of the FAA is "to reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24. As a result, a defense that is available as to any other contract likewise is available to a party seeking to avoid an agreement to arbitrate disputes.

A. Did the Parties Agree to Arbitrate?

A court will first ask whether the parties actually made a contract to arbitrate disputes between them. Like any contract, this involves questions whether the terms were offered and accepted, and whether there is consideration to support a contract. These typically simple issues sometimes are complicated because of the nature of the employment relationship.

For example, some employers describe the arbitration program in the employee handbook. It is convenient to present the method for resolving disputes in the same document that sets forth work standards, benefits, disciplinary procedures, and other matters that are likely to be the subject of those disputes. By contrast, a stand-alone arbitration agreement is a separate document that must be distributed and explained in the orientation process.

A frequent problem with this approach is that it is common, for completely different and valid reasons, for a handbook to contain an express disclaimer stating that the handbook <u>is not a contract</u>. Along

the same lines, some employers do not require employees to sign the handbook. When employers do require a signature, they typically merely acknowledge receipt and understanding of the contents, not agreement with the terms. There are good reasons to avoid turning a handbook into an employment contract; but courts may be receptive to the argument that there is no agreement to arbitrate because the arbitration provision is found in a document that states it is not a contract.

Another area that makes arbitration agreements vulnerable is the legal concept of "consideration." Like any contract, each party must give something to the other for an arbitration agreement to be enforceable. Often – but not always – it is enough for an employer to provide continued employment to the employee in return for the employee's agreement to arbitrate disputes. Most states observe the doctrine of "at-will" employment, meaning that the employer technically can terminate an employee for no reason at all, or even for a bad reason (as long as the reason is not unlawful in itself, like race discrimination).

Many courts have determined that an employer may lawfully terminate an employee who elects not to agree to arbitration; and as a result, continued employment is sufficient consideration to support an arbitration agreement. But other states have held that continued employment is not sufficient consideration to change the terms and conditions of employment, which includes the method of resolving employment disputes. This also is true in those few jurisdictions that do not follow the at-will employment doctrine. In such cases, the employer must offer something else (usually, money) to the employee in exchange for the employee's agreement to arbitrate disputes.

B. Contract Defenses

Even when a contract is the result of an offer, acceptance and exchange of consideration, a party may be able to raise defenses to avoid the consequences of a contract. For example, if an employer induces an employee to sign an agreement by fraud or by duress, the resulting contract may be invalidated. Most states have requirements that consumer contracts be written in plain language and in a typeface that is conspicuous, and these requirements may be applied to arbitration agreements, just like any other contract. Likewise, contracts signed by minors typically are "voidable," meaning the minor can choose to withdraw from the agreement at any time; the age of majority for this purpose varies by state.

Another common defense that is invoked in attempting to avoid arbitration agreements is the doctrine of unconscionability. In most jurisdictions, a party seeking to avoid an agreement on this basis must prove both that the party had no real choice in making the contract, *and* that the contract itself is unfair. To satisfy this second element, plaintiffs often argue that the terms of the arbitration agreement are unfair because the rules are stacked in the employer's favor. Common examples of conduct making a contract unconscionable are attempting to limit the relief available to employees, trying to impose very short periods within which employees must initiate claims, or reserving the right to unilaterally change the terms of the arbitration agreement.

C. Is Arbitration a Fair Forum?

In addition to standard contract defenses, the Supreme Court has implicitly acknowledged another reason that a party may not be bound by an agreement to arbitrate disputes. A party may hold another party to his agreement to arbitrate only "[s]o long as the prospective litigant effectively may vindicate [his or her] cause of action in the arbitral forum." *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79, 90 (2000). Conversely, if a prospective litigant can demonstrate that he *cannot* effectively vindicate his claim in arbitration, he may be able to escape his agreement to arbitrate.

Employees have argued that arbitration does not provide a fair forum for resolving employment disputes, which often involve claims of discrimination that are allowed under federal statutes. They argue that the statutes serve not just to protect the rights of individuals, but also to serve the public purpose of eliminating discrimination. As a result, they argue that the private nature of arbitration is contrary to the public purpose of the statutes.

These claims, however, have been rejected by most courts. The Supreme Court has recognized that discrimination laws serve a public purpose; but so do laws addressing securities and racketeering, which the Court also has found arbitrable. *Gilmer*, 500 U.S. at 27-28. The Ninth Circuit (which covers California and other Western states) has held that in the employment context, employers are "repeat players," and as a result they get an unfair advantage in arbitration, because they presumably have greater information than do employees, who are unlikely to be repeat participants in the arbitration process. This reasoning, however, does not seem to have been adopted in any other jurisdiction.

Recently, courts also have considered financial barriers to entry into the arbitral forum. Because courts are public, the fee to file a case usually is low, and can be reduced or eliminated if a particular plaintiff can demonstrate financial hardship. Some arbitration programs, however, require a claimant to initiate arbitration with a filing fee that may be more than he can afford. Some arbitration programs also require the parties to split the costs of arbitration, which can run into the thousands of dollars; but courthouses and judges are paid through taxes, and are available at no additional cost to litigants.

As a result, when drafting an arbitration agreement, an employer should carefully evaluate what kind of financial burden will be placed on the employee, and make sure that cost will present no more of a barrier to entry than it would in court. If the employee is a well-paid executive, it may be reasonable for the parties to share costs. But for employees who constitute the majority of the workforce, it often is better to require that the employee only pay a fee in the amount they would be required to file in court; and even then, provide that the employer will pay the fee if the employee can show financial hardship. The language of the arbitration agreement should be clear that all other expenses and costs of arbitration are paid by the employer.

III. Implementing a Fair Arbitration Program

Once an employer decides to establish an arbitration program, it should carefully consider how to implement that program. There are several issues to bear in mind, and the best solution will differ according to such factors as the jurisdiction(s) in which the employer operates and the support structure the employer has at its disposal. One size does not fit all.

When initially implementing a program, the employer will have to obtain separate written agreements from current employees. The employer will need to consider how to reach an agreement with its employees to arbitrate disputes and then document that agreement. Ideally, the terms of the arbitration agreement are clearly stated in a concise document that is presented and explained to the employee, who then signs it. In some jurisdictions, even this much formality is not necessary; merely publishing the arbitration program and informing employees that continuing work constitutes acceptance of the terms is enough. In other locations, however, an employer must go further, and must provide some additional benefit to the employee beyond continued employment, such as a cash signing bonus.

Once an employer has initiated the program, it generally is a simpler task to obtain agreements from new employees. An employer may include arbitration agreements as part of the application process, so that disputes that arise from hiring decisions are covered. Including an agreement to arbitrate disputes on

application forms is common practice for some employers. The practical alternative to this approach is requiring employees to sign an arbitration agreement as part of the orientation process for new hires.

Looking ahead to the time when disputes will actually be arbitrated, the employer should think about the entity best suited to administer the program. The administering entity will perform functions such as establishing the rules of arbitration, assisting the parties with selection of an arbitrator, and in some cases providing a venue to hold the arbitration. Some companies have sophisticated employee relations or human resources departments, and can effectively establish and administer their own dispute resolution programs. Other companies may wish to leave these matters to an independent dispute resolution organization such as the American Arbitration Association (www.adr.org), either because of a lack of internal resources or just to enhance the notion that arbitration is conducted by a neutral and independent organization.

The employer must also consider who will pay for the arbitration of each individual dispute. Remember, if cost is a barrier to an employee's access to arbitration, the employee may successfully argue that this barrier makes the agreement to arbitrate unenforceable. If an outside organization administers the program, the parties can expect to pay administrative fees as well as the costs and expenses of the arbitrator. Typically, such organizations will provide rules that explain how costs and expenses are assessed to the parties; but an employer usually may change these rules in its arbitration agreement.

The written program should clearly set forth the nature of the claims that must be arbitrated. Because arbitration merely represents a change in forum, there theoretically is nothing to prevent the parties from submitting all claims that may arise between them to arbitration. But an agreement cannot limit the rights of an agency that is not a party to the agreement; and an attempt to foreclose administrative agency action may not be successful. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Supreme Court held that an enforceable arbitration agreement between a restaurant company and its employee did not prevent the EEOC from pursuing a discrimination claim against the employer. It is similarly unclear whether an arbitration agreement that prohibits class actions would be enforceable. As a result, while the employer may want to pick and choose the claims that are subject to an arbitration agreement, it must be careful not to draft the agreement in a manner that could render it unenforceable.

The employer must also take into consideration the geographic scope of the agreement. Although the FAA is a federal law, the enforceability of any given arbitration agreement will be determined by the contract law of the appropriate state. Employers operating in only one state can more readily adapt an agreement and its implementation to the requirements of its state. If an employer with multiple locations wishes to use a uniform arbitration program in several states, however, it must take care to review the relevant law of each jurisdiction to make sure it meets enforceability standards in all of the places it operates.

Conclusion

Arbitration can be an effective, efficient and fair method to resolve disputes, and provides many advantages over traditional litigation. But for an arbitration program to be enforceable, it must be developed and implemented with care.