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A background image of the Houston skyline, featuring several prominent skyscrapers. In the foreground, a bridge spans across a river, with lush green trees and a walkway visible. The entire scene is overlaid with a semi-transparent dark filter.

*Should We or Shouldn't We? What Employers Need  
to Know about Arbitration*

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# Overview

- Review of how arbitration works
- Effect of *Epic Systems* on enforceability of arbitration agreements
- State law considerations
- Other arbitration agreement provisions
- Pros and cons of arbitration agreements

# How Arbitration Works

- Private process to resolve disputes
- Private arbitrator acts as the judge
- No jury
- Final and binding decision
- Enforceable in court
- Limited appeals

# *Epic Systems*

- Background
  - Plaintiffs' attorneys challenged class action waivers arguing that they violated the National Labor Relations Act (NLRA)
  - Obama Board agreed and found class action waivers unlawful
  - Most federal courts disagreed, finding that the Federal Arbitration Act (FAA) preempted the NLRA
  - In recent years a few courts began to agree with the Board
  - Circuit split led the Supreme Court to decide issue in *Epic Systems*

# *Epic Systems*

- Supreme Court Decision
  - 5-4 Decision – Upholding class action waivers under FAA
  - Consistent with several Supreme Court decisions over last several years enforcing parties' arbitration agreements
  - Decision does not affect state law considerations related to arbitration agreements, such as consideration, unconscionability, etc.

# State Law Consideration Issues

- **New Employees**
  - Offer of employment is typically sufficient
  - Can be a condition of employment
  - Recommend having employees sign agreement
- **Current Employees**
  - Many states require more than continued employment
  - Mutual agreement to arbitrate claims
  - Additional consideration?
- Depending on turnover, may consider rolling out only to new employees to avoid issues

# State Law Unconscionability

- Opt-out procedures
  - Makes argument for enforcement easier
  - May be required in some jurisdictions
  - Cannot fire employees who opt out
- Statute of limitations
  - Shortening the statute of limitations for claims may make agreement unenforceable
- Illusory agreement
  - Retaining the right to modify or revise the agreement may limit enforceability in some states



# Arbitrability

- Generally, courts have held that the arbitrator will decide whether the arbitration agreement (including the class action waiver) is enforceable
  - Incorporation of AAA rules has been found to trigger this result
- Consider including a provision in the agreement specifying that the court, not the arbitrator, will make this decision
  - Court more likely to enforce in light of *Epic Systems*
  - More options to appeal adverse decision
- Exclusions from arbitration

# Pros and Cons of Arbitration Agreements

- Pros
  - Class action waiver can avoid costly litigation
  - Arbitration can be less expensive than litigation (limited discovery)
  - Arbitration decisions are not as public as court decisions
- Cons
  - Arbitration can be expensive (AAA fees, arbitrator fees)
  - Arbitrators tend to split the baby
  - Less likely to prevail on motion to dismiss or summary judgment
  - May end up with multiple arbitrations

# Questions?

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