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

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Arbitration 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

- 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