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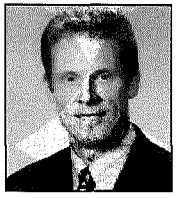

Enforceability of and Alternatives to Mandatory Arbitration Agreements in the Workplace

By James R. Hammerschmidt

Responding to rising litigation costs and reports of astronomical jury verdicts, many employers have turned to arbitration, hoping to avoid litigating employment disputes in court. Their reasoning is simple: arbitration proceedings are perceived as less costly and less uncertain than jury trials. However, arbitration agreements must be carefully and thoughtfully drafted. Additionally, mandatory arbitration may not always be the right answer.

After years of uncertainty, the Supreme Court unambiguously endorsed the validity of arbitration provisions in *Circuit City Stores v. Adams*. The United States Court of Appeals for the Fourth Circuit followed suit in *Adkins v. Labor Ready, Inc.* Even the federal appellate court in California – one of the last holdouts – has finally decided that the Civil Rights Act of 1991 does not preclude enforcement of mandatory arbitration of Title VII claims. Still, many courts seem troubled by the adhesive nature of such agreements and seize any opportunity to free employees from the perceived constraints of arbitration.

Courts routinely invalidate agreements that give employers unilateral control over the pool of arbitrators, require employees to give up substantive rights (such as having the EEOC bring a claim on an employee's behalf), shorten limitation periods, limit the type of relief or amount of damages provided in employment laws, require the loser to pay the arbitration costs and expenses, require employees to bear more than a nominal cost to arbitrate or reserve employers' rights to unilaterally modify the agreement.

For example, in *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, the Court of Appeals of Maryland held that an employer's arbitration agreement was not enforceable against the employee and let the employee proceed to court. A summary of the employer's arbitration policy – found within its employee handbook – gave the employer the right to alter, amend, modify or revoke the arbitration policy at any time. This language meant that the employer was not really bound by the policy and that the employer's employment of the employee did not serve as sufficient consideration for the agreement. Without consideration, the court refused to force the employee to arbitrate. In a separate case, the Fourth Circuit recently adopted the same position.

Because employees' waiver of their statutory rights to a judicial forum is so important, courts also look critically at whether employees have been given adequate notice of mandatory arbitration. Recently, a court refused an employer's request to stay litigation based on an e-mail notification to all its employees referencing implementation of its dispute resolution policy. The text of the e-mail summarized and referenced the policy and contained links to the full policy and the company handbook. However, the e-mail did not mention key policy provisions, such as those taking away the right to trial. And the company could not verify that the employee opened the links or read the policy. The court held that sending a mass e-mail without more fails to constitute the minimum level of notice.

These judicial trends impact the way employers must draft and implement arbitration agreements. Any arbitration agreement must be a clear and unambiguous waiver of employees' rights – and it must be in writing. It must also be a separate, stand-alone document signed by employees. Do not include or reference arbitration policies as part of an employee handbook or policy manuals. Handbooks are typically littered (and for good reason) with disclaimers that they are not binding contracts. Also, do not rely on e-mail notification.

An arbitration agreement must also be carefully crafted, not overreaching. An employer does not want to find after the fact that its arbitration agreement is unenforceable, permitting its employees to pursue their claims in court. Importantly, an arbitration agreement should not require cost-splitting, include loser-pays provisions, limit remedies, force employees to travel to a distant local or cut procedural corners.

An alternative to mandatory arbitration that has been gaining some ground is the jury trial waiver. While largely untested in the courts, a jury trial waiver is no different than proceeding before an arbitrator, in which there is no jury. Yet, it offers all the trappings of the judicial process (which is better than arbitration for employees) and offers employers the opportunity for summary judgment proceedings, to avoid runaway juries and to appeal.

Employers should also consider whether or not to require arbitration at all. Because it is perceived as less costly, mandatory arbitration may lead to an increase in claims and make it more difficult to get rid of frivolous claims. Employers who have faced few or no claims, have good human resource policies and practices, are located in an employer-friendly jurisdiction and who can afford the cost of litigation may do better in court. Employers should not blindly assume arbitration is the answer or implement arbitration policies without careful consideration.

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