Consider Employee Arbitration Agreements to Avoid the Pitfalls of the Courtroom

Karl W. Butterer
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Despite recent efforts to limit the reach of private arbitration agreements to resolve employment disputes (**see Arbitration Sidebar**), the use of mandatory arbitration agreements remains an attractive option for employers to avoid the pitfalls of courtroom litigation.

Broadly speaking, when an employee wants to file a legal claim against their employer, the employee has two basic avenues for relief. For some types of claims, the employee may file a civil lawsuit in a trial court. For some other types of claims, the employee has a right to file a complaint or charge with an appropriate governmental administrative agency (more on that later).

If an employee files a civil lawsuit in a trial court, the impact on the employer can be significant. The process is often long and time consuming. After months of "discovery", e.g. depositions and document productions, it may take a year or longer to go to trial. With some exceptions, much of the information revealed in discovery will be available to anyone. The trial itself will be open to the public. Often juries are primarily comprised of employees, not employers, so employers may be concerned about jury bias. Employers worry that a "runaway" jury may award unreasonable damages to a sympathetic employee. After a trial, the losing party may file multiple appeals, which can last for years.

Mandatory arbitration agreements offer an alternative to courtroom litigation. In short, the employer and employee may agree that if a dispute arises in the future, they will mutually select a private arbitrator (usually an experienced attorney) to decide the dispute by a set of established rules. Mandatory arbitration offers several potential advantages for employers to courtroom litigation:

- The dispute can be resolved quicker with more limited "discovery".
- The decision can be final so as to avoid lengthy appeals.

AUTHORS/ CONTRIBUTORS
Karl W. Butterer

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- The parties can select an arbitrator with whom they are both comfortable.
- Employers can avoid the danger of a "runaway" or anti-employer biased jury.
- The parties can agree to keep the arbitration process confidential.
- Employers can avoid class action lawsuits, such as collective actions by multiple employees for alleged wage and hour violations of the Fair Labor Standards Act.

Mandatory arbitration agreements are not a silver bullet for employers. As an initial matter, arbitration agreements cannot force employees to arbitrate all potential claims, such as some kinds of administrative claims referenced near the top of this article. The following claims are generally not subject to arbitration: charges of unfair labor practices under the National Labor Relations Act (see related article on **Federal Labor Law**), charges filed with the Equal Employment Opportunity Commission, workers' compensation claims, and unemployment claims, among others. Significantly, new federal legislation significantly limits an employer's ability to arbitrate sexual harassment and sexual assault claims. (**See Arbitration Sidebar**). Additionally, from the employer perspective there are potential down-sides to arbitration, including but not limited to:

- For reasons beyond the scope of this article, employers often shoulder the entire cost of engaging an arbitrator, which can be expensive.
- Because of the "low entry" cost for employees to request arbitration, some employers worry that it will encourage frivolous claims. (This author is unaware of any statistical date to confirm these worries).
- In complicated cases, the cost of the discovery process can still be significant.
- Sometimes the scope and enforceability of the arbitration agreement itself is the subject of courtroom litigation before the arbitration may proceed.

Whether an employee arbitration agreement make sense for you will depend on a number of factors unique to your business. Please contact Karl Butterer at kbutterer@fosterswift.com or 616-726-2212 to help you sort through the pros and cons of arbitration agreements.