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Trends in Employment Law

BY A. MICHAEL WEBER

Today, a large percentage of the U.S. work force is covered by some sort of alternative dispute resolution (ADR) program. One study of Fortune 1000 corporations indicated that more than 23 percent of the respondents used ADR for nonunion employment dispute resolution.¹ Statistics from the American Arbitration Association (AAA) indicate that it has handled more than six million employment disputes through private ADR programs.² Similarly, JAMS handles more than 10,000 “complex filings” per year.³ Thus, ADR has been an important avenue for resolution of workplace disputes in the United States. While there are many forms of ADR used in the workplace (e.g., mediation, neutral evaluation, internal review procedures, etc.), this article focuses on mandatory arbitration.

Employers are able to take advantage of the increased acceptance by U.S. courts of alternative dispute resolution with employees. In 2001, the U.S. Supreme Court issued its decision in *Circuit City Stores Inc. v. Adams*.⁴ The Court’s decision in *Circuit City* opened the door to uniform, nationwide application of mandatory arbitration agreements through the Federal Arbitration Act (FAA).⁵ Before the *Circuit City* decision, the debate over whether the FAA would apply to contracts with employees and the uncertainty created by the debate caused some employers to shy away from mandatory arbitration as an ADR option.

State courts have followed the example of the federal courts. In *Luboweicki v. Ernst & Young*,⁶ a New Jersey court in 2004 enforced a mandatory arbitration agreement between an employer and employee, even where the employee claimed the agreement was unconscionable. In that case, the employer, Ernst & Young, offered a 24-year employee an arbitration agreement without an opportunity to negotiate any of its terms. The employer terminated him a year later. The employee sued, claiming that the arbitration agreement was invalid on public policy

Rise of ADR for Workplace Disputes

*Deciding
whether
to adopt
mandatory
arbitration*

grounds because it: was offered to him under duress; required that he split arbitration fees and costs with his employer; put his employer at an evidentiary advantage by limiting discovery; and mandated arbitration in a pro-employer forum. The court rejected the employee’s arguments and upheld the enforceability of the arbitration agreement, finding that “there is a long standing public policy underlying the Federal Arbitration Act.”

Now, with the uncertainty regarding the enforceability of arbitration agreements resolved by the Supreme Court’s *Circuit City* decision and state courts that have followed, the next generation of arbitration agreement programs is set to emerge. Before implementing an arbitration program,

however, employers are encouraged to consider both the advantages and disadvantages of mandatory arbitration carefully.

Advantages

Reduced Litigation Costs. Arbitration is usually a less costly method of resolving problems in the workplace than traditional litigation. In a study on court-supervised arbitration, the Institute for Civil Justice of the Rand Corporation concluded that arbitration resulted in a 20 percent cost savings to the parties on average. While historically employers typically paid all of the arbitrator’s fees, that trend is changing, and may present a further cost savings to employers.

Faster Resolutions. Traditional employment litigation is a time-consuming process. Litigation, including an appeal, can range from two to eight years before a final decision is rendered, depending on which court resolves the dispute. The Institute for Civil Justice of the Rand Corporation concluded that the average processing time from the initial complaint until an arbitrator’s decision is about 8.6 months.

Greater Privacy. Although there is an obligation for a certain degree of public distribution of an arbitration award, there is no question that arbitration offers a greater potential for privacy than the public courtroom. Traditional litigation can be highly publicized, depending upon the nature of the dispute and the parties involved, as we have seen in recent sexual harassment cases in New York. Court filings, unless filed under seal, are public records. In contrast, having a matter resolved by a neutral arbitrator

A. Michael Weber is a senior partner and founder of the New York office of Littler Mendelson. **Elena Paraskevas-Thadani**, an associate in the firm’s New York office, assisted in the preparation of this article.

is significantly more private and focused.

Arbitrator Replaces Jury. The jury is a prominent, but unpredictable, feature of wrongful discharge and civil rights litigation in the United States. Juries often identify very closely with the employee-plaintiff precisely because most jurors are employees. Moreover, counsel may be concerned that juries in employment cases often base their decisions on how they would want to be treated by an employer, rather than the actual legal standard, which is usually more stringent. Likewise, a concern is whether jurors feel that a large employer can afford to help a struggling former employee whether or not the employer is liable.

Increased Predictability. An arbitrator's previous decisions in prior similar disputes, when available, can provide insight into how he or she decides a case. There are many sources for arbitration decisions, including Labor Arbitration Reports, Labor Arbitration Awards, and the Labor Arbitration Index. Also, the AAA rules require an arbitrator to disclose the names of prior or pending cases in which the arbitrator served or is serving and the results of each case. These rules can be requested as part of the selection process according to the procedures provided for in the agreement.

The ability to review and study previous arbitration decisions provides increased predictability in the decision-making process. On the other hand, it is impossible to predict with certainty how a jury, composed of a random group of six to 12 people, may view and resolve a dispute.

Enhanced Settlement Potential. Arbitration may encourage resolution without litigation. The system is more predictable with regard to time, cost, and likely result. Consequently, it is easier for both sides to put a value on the case and resolve the matter quickly.

Possible Insurance Discount. The insurance industry has been reviewing coverage of workplace disputes such as wrongful termination and employment discrimination. In writing policies to cover such disputes, the industry has begun considering significant discounts to companies that adopt ADR techniques. Insurance companies are enthusiastic about ADR because the processing time and litigation costs will be significantly reduced, and the predictability of resolutions will increase. Thus, an insurance company may be more likely to provide coverage if an employer has adopted ADR techniques.

Disadvantages

Increased Usage. If an arbitration policy is adopted, the employer may very well be forced to defend against a greater number of claims. Employees may utilize arbitration more frequently because of reduced costs. The employer has to consider whether the time and cost of possibly handling more claims offsets the savings the employer would achieve by avoiding judicial litigation of fewer claims.

Summary Judgment/Other Dispositive Motions. It is generally more difficult for an employer to have a case dismissed on a dispositive motion in arbitration than it is in court. Because of this, it may be more difficult to settle cases that are brought before an arbitrator, because plaintiff's attorneys believe that they will have their case heard before a trier of fact.

Reduced Appellate Rights and Options. Judicial review of an arbitration award is limited. If a jury makes a mistake of law, this mistake can often be corrected in the appellate process. In contrast, courts generally will not overturn an arbitration award except in very limited circumstances. Obviously, this can be either an advantage or a disadvantage to arbitration depending on the arbitrator's decision.

Employee Resistance and Skepticism. Employees may resist the implementation of a new system and feel that their individual rights are being eroded by the introduction of ADR. Indeed, if employees perceive that the system erodes individual rights, it could have a negative effect on employee morale. To avoid this disadvantage, employers should explain that only the forum has changed and that the same statutory rights and remedies available in court are available in arbitration.

Potential for and Response to Unionization. If the employer is nonunion and decides to implement an arbitration system, there is the potential that a union could seek to organize the employees, asserting that arbitration is a very complex process requiring employee representation. On the other hand, if the employer is nonunion and one of the reasons the employees might consider joining a union is to gain access to arbitration, the employer can demonstrate unionization is unnecessary by voluntarily implementing an arbitration policy.

Legal Uncertainty. There are some legal uncertainties in the application of ADR. The enforceability of the system will depend on

the current state of the law, the state in which the employer is located, and the particular procedures adopted. An arbitration agreement may be subject to attack by employees, the Equal Employment Opportunity Commission (EEOC), or other groups or agencies. For example, in some jurisdictions, an employee in a collective bargaining setting can still bring his or her Title VII claims in court, despite binding arbitration provisions in the collective bargaining agreement.⁷

While this is not so in a nonunion setting, the EEOC has emphasized, "It is critical that employees know that even when their employer maintains a mandatory arbitration policy, they retain the right to file discrimination charges and to participate in any investigation or lawsuit arising out of them."⁸ This means that an employer cannot prevent or attempt to deter an employee from filing charges in federal and state administrative agencies with an arbitration agreement.⁹ In addition, some courts have frowned upon arbitration agreements that contain class action waivers,¹⁰ which would essentially eliminate an employee's right to sue in court on behalf of, or as a member of, a class.

Presented below is a checklist incorporating the major advantages and disadvantages of compulsory arbitration. Each employer can add to this list based upon its particular circumstances.

Factors in Making a Decision

A simple review of advantages and disadvantages of arbitration is only the first step in deciding whether to adopt an arbitration program. Before adopting a policy requiring arbitration of employment disputes, an employer should also carefully analyze whether adoption of such a policy for its nonunion employees makes sense economically and in terms of current employee relations. Some of the factors that should be considered are the following:

- What is the employer's past history with respect to employment disputes? Because arbitration is generally less costly than litigation, an employer that has had one or more large judgments against it in employment actions has more of an incentive to adopt an arbitration policy than an employer that has never had an employment-related lawsuit filed against it.

- Has the employer been involved in litigation? If an employer has had a limited

number of cases filed against it, it may not want to introduce a new procedure and advise employees that they now have a right to file for arbitration which alerts them to the idea that they have a simple mechanism to initiate claims. Employers who do contemplate adopting arbitration policies need to know that although the same discovery techniques are available in arbitrations as in litigation, discovery is often less extensive and contentious in arbitration. Litigation is also typically more costly than arbitration.

- Are there special factors, such as foreign management, that make the employer leery of having a local plaintiff go to the jury? If management witnesses are not fluent in English or are not part of the community, their credibility may be undermined before the jury. Moreover, if the employer has a bad reputation, the jury may be biased. Arbitration could allow such an employer to avoid community bias and unwelcome publicity.

- What is the employer's exposure to punitive damages? A large employer, with substantial assets and income, is a target for punitive damages. An arbitrator is more likely to balance all of the relevant factors in deciding the amount of the award and whether to award punitive damages.

- Is image important? Many employers are very concerned about the impact adverse publicity has on their image. For example, a sexual harassment lawsuit that may be frivolous and ultimately dismissed may receive two or three days of undeserved negative publicity. Arbitration promises to be faster, and quieter, and to entail less media exposure than traditional litigation.

- Where is the employer located? If the employer is located in an area where large jury awards are typical or the judges are known to favor the plaintiff, arbitration will typically be a more predictable and less costly forum.

- Is the employer expecting staffing changes? If the employer has had a very stable operation for more than 20 years—rarely a termination, seldom a layoff, relatively few complaints of a serious nature—the attractiveness of this system lessens. If, on the other hand, there is a lot of turmoil in the workplace or the employer expects to lay off or terminate many employees in the future, then the employer may find it in its interest to adopt an arbitration system.

- What else is going on in the employer's relations with its employees? If the employer is

in the midst of a union organizing campaign, it would be foolish to try to implement an arbitration policy. Employees might perceive such a move as an effort to take away existing rights, which could backfire for the employer in a representation election or even lead to unfair labor practice charges. On the other hand, if the employer is in the process of publishing a new employee handbook, if it is about to implement an improved benefits package, or if employee relations are generally good, the time may be opportune to implement an arbitration policy.

- Will the time and cost of handling more claims offset the savings the employer would achieve by avoiding litigation of fewer claims? If an arbitration policy is adopted, the employer may very well have more claims filed, because it should be cheaper and faster to arbitrate a dispute than for an employee to find a lawyer and go to court.

- Will the employer be disadvantaged by the relatively simpler arbitration proceedings? While an arbitration procedure may provide for motions for summary judgment to get rid of meritless claims prior to the arbitration hearing, it is likely to be much harder to win such a motion before an arbitrator. Most arbitrators will be inclined to simply hear the evidence and rule after the hearing.

- Is the employer willing to litigate the propriety of the arbitration agreement? At least initially, an employer may have to defend its arbitration agreement in court by filing motions to compel arbitration to prevent employees from pursuing claims in court.

- Can the employer accept that not all types of proceedings are waived by an arbitration agreement? If an employer expects an arbitration agreement to eliminate all other avenues of relief for an employee, the employer will be disappointed. For example, even with the institution of a mandatory arbitration program, an employee still maintains the right to file discrimination claims with the EEOC and to participate in investigations. This means, not only will the employer still have to deal with an employee's administrative EEOC charge, it can still be exposed to the possibility of EEOC-initiated litigation.¹¹

- Is the employer willing to "split the baby"? Courts are more likely than arbitrators to dismiss a lawsuit and grant a complete victory to an employer with a meritorious case. Arbitrators, on the other hand, are more likely

to render a decision in which both sides give something up.

- Is the employer willing to give up its right to appeal? The finality of arbitration is both a benefit and a drawback. Because the appeal process is costly, and can result in the reversal of a favorable decision, it is often beneficial to submit a claim to binding arbitration. However, the employer may be unable to challenge a highly adverse decision by an arbitrator.

Conclusion

The growing trend has been for more employers to embrace ADR, which indicates that many employers feel the benefits of arbitration outweigh the drawbacks. The decision to institute a mandatory arbitration program requires that employers work with their counsel and consider whether such a program is suitable for their business model, culture, reputation and vision. However, for many employers, the increased privacy, the contained costs, the increased predictability, the increased expediency, and the finality of the process present a very attractive alternative to litigation. For these reasons, we will see a rise in the trend to institute mandatory arbitration programs.



1. Lipsky, David & Arcebor, "The Use of ADR in U.S. Corporations: Executive Summary" (1997) (survey conducted by Price Waterhouse and Cornell University's PERC Institute on Conflict Resolution).

2. Elizabeth Hill, "Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association," 18 OHIO ST. J. ON DISP. RESOL. 777, 779-80 (2003).

3. JAMS—The International Resolution Experts, METROPOLITAN CORP. COUNSEL, August 2007, available at <http://www.metrocorp.counsel.com/current.php?artType=view&artMonth=August&artYear=2007&EntryNo=6990>.

4. 532 U.S. 105 (2001).

5. 9 USC §81 et seq. (2007).

6. *Lubowiecki v. Ernst & Young*, No. MID-L-2690-04, Transcript of Proceedings and Decision (N.J. Super. Ct. Aug. 4, 2004), aff'd by the New Jersey Appellate Division, ___A.2d___, 2005 WL 3309785 (N.J. Super. A.D. Dec. 8, 2005), cert. denied, 186 N.J. 257, 893 A.2d 724 (2006).

7. *Nance v. The Goodyear Tire & Rubber Co.*, ___F3d___, 2008 WL 2151626 (6th Cir. May 23, 2008).

8. Employment Law 360, "Forced Arbitration Deals Can't Be Too Broad: EEOC," by Elaine Chow (quoting EEOC attorney John Hendrickson) (May 22, 2008).

9. Id.

10. *Gentry v. Superior Court*, 64 Cal. Rptr. 3d 773 (August 2007), cert. denied, 128 S.Ct. 1743 (March 2008).

11. *EEOC v. Ralph's Grocery Co.*, 07-5110 (N.D. Ill. May 8, 2008).

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