

Employment Law Notes

October 2004

ARBITRATION AGREEMENTS

ARE YOUR ARBITRATION AGREEMENTS ENFORCEABLE?

Plaintiffs' attorneys continue to look for ways to invalidate employee pre-dispute arbitration agreements under theories of lack of consideration and unconscionability.

Consideration

For the agreement to be valid, the employee needs to have received consideration - something of value in trade for giving up the right to go to court. In an employment-at-will situation, employers sometimes argue that it is sufficient consideration just to continue employment. Don't rely on that argument. Instead, link the demand to sign the agreement with some clear benefit to the employee: the initial job offer, a raise or promotion, or a cash bonus.

Unconscionability

If an agreement contains overreaching and one-sided clauses that offend a judge's sense of fairness, the court is likely to invalidate the contract on grounds of unconscionability. Here are the red-flag issues courts focus on:

1. The employer must pay the arbitrator's fees (it may be acceptable to give the arbitrator discretion to require the employee to pay if he has acted in bad faith).
2. The specified location for arbitration must not be unduly expensive for the employee.
3. Both the employer and employee must be bound to arbitrate. Limited carve-outs are permissible, such

as workers' compensation matters, unemployment benefits and injunctions to halt violations of non-compete agreements and the like.

4. Don't try to rewrite the law - don't limit the remedies that would normally be available, and don't impose shorter time limits than the statutes of limitation.
5. The agreement must provide for a neutral arbitrator. Dispute-resolution services such as the American Arbitration Association or JAMS can supply excellent arbitrators, although they are not cheap.
6. The agreement should require the arbitrator to issue written findings explaining her decision at the end of the case.
7. The agreement cannot unreasonably limit discovery, such as depositions and document production.
8. The agreement cannot forbid the employee to file complaints with agencies like the EEOC, DOL, NLRB or their state counterparts.

Other clauses to avoid: forbidding the employee to be represented by a lawyer, present evidence, cross examine witnesses or appeal the arbitrator's decision, forbidding arbitration of class-action claims, or imposing a "gag rule" on employees who invoke arbitration.

Conclusion

Employers should review their arbitration agreements and rewrite them if they contain any of the red-flag items listed here. ✍

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