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ATTORNEYS AT LAW

Arbitration Agreements, Employee Handbooks: Bad Mix

By James Hammerschmidt

So, you've heard that arbitration agreements are the way to go. You've read or been told that arbitration is less expensive than litigating discrimination and other employee claims in court, and that it avoids the risk of a runaway jury verdict in favor of your employee. Just slip the agreement into your company's employee handbook and you're good to go.

Not so fast … and not so good. In fact, you're probably wasting the paper the agreement is written on – and ruining an otherwise perfectly good handbook.

First, let's debunk the myth about cost savings. Do you pay a judge for his or her time? No. Do you pay a jury for its time? No. Do you pay the court for its time to write an opinion or decide your case? No. Do you pay an arbitrator for all of these things? Yes. You may also pay a hefty fee to the American Arbitration Association or a similar organization for processing the case. And truth be told, you are unlikely to save attorneys' fees because they will handle an arbitration case just like litigation, including conducting discovery, taking depositions and filing motions. You will want no less a defense in arbitration than in court.

Second, while juries can be scary, arbitrators are known to "split the baby." You may have a strong defense that persuades a judge or jury – who are remarkably good at following the law – but an arbitrator may throw the employee a bone by awarding him or her some damages. It also bears mention that many employment suits are thrown out by the court before they even get to the jury. This is far less likely to happen in arbitration.

Finally, if you don't like an arbitrator's decision and want to appeal, your chances are slim and none! A court will normally overturn an arbitrator's decision only if it's fraudulent, exceeds the arbitrator's authority, or disregards the law. This is a far more rigorous standard of review than an appellate court will apply to a decision by a trial court in most cases. Thus, you may be stuck with an arbitrator's decision that is just plain wrong.

Notwithstanding the drawbacks, arbitration may provide a faster resolution for employment claims and also allow the company to keep the employee's allegations from the public limelight. So, if you are intent on using arbitration to resolve your employee lawsuits, here's a lesson others have learned the hard way: DO NOT PUT THE ARBITRATION AGREEMENT IN YOUR EMPLOYEE HANDBOOK.

Employee handbooks, as well they should be, are full of disclaimers such as, "this is not a contract" and "the company reserves the right to modify this handbook at any time." If the handbook is not a contract (it is not in most states and, believe me, you don't want it to be), then how can an arbitration provision in a handbook be binding on the employee? It can't! Along those same lines, if a company can change its handbook at any time and the arbitration provision is in the handbook, then the company will be seen as reserving the right to change the arbitration provision at any time as well. As a result, courts have held that such a combination creates an illusory contract, i.e., no contract at all.

You also want to make sure you give the employee something in return for agreeing to waive his or her rights to go to court or that the company suffers some detriment (this is called "consideration"). Recently, a federal court in Illinois refused to enforce a company's attempt to compel an employee to arbitrate his discrimination claims because the arbitration provision (which was part of the "Acknowledgment of Receipt and Understanding" for the company handbook) stated that "this arbitration agreement is not required as a condition of employment." In many states, employment itself can be consideration for an employee's agreement to arbitrate. That is, the company is agreeing to hire the employee if he or she signs the agreement and, likewise, the employee is getting a job in return for signing the agreement. In this case, however, the company screwed that up since, by the very language in the agreement, it didn't suffer any detriment (i.e., the binding obligation to hire the employee) and gave the employee nothing in

return for signing the agreement (i.e., cash or a job). The employee was allowed to sue the company in court instead of having his claims arbitrated.

It's equally important not to make the arbitration agreement one-sided in favor of the company. To the contrary, you may want to provide that the company will pay for most or all fees and cost for arbitration, except the filing fee. I could devote pages to discussing fair arbitration agreements, but suffice it to say, drafting a fair, enforceable arbitration agreement can be very tricky and enforceability depends on the law of the state in which the company does business. If you've decided arbitration is the preferred method for dealing with your company's employee disputes, take the time and obtain the appropriate legal advice. Don't grab something "off the shelf" or off the Internet.

Now, you may be asking, if I shouldn't use arbitration to avoid juries, what other options do I have? I suggest you consider a jury trial waiver instead, which would not be contained in the company handbook, of course. That, however, is a discussion for another day.

