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FAQs About Implementing Arbitration Agreements and Class Action Waivers

Insight — 07/19/2018

In late May, the U.S. Supreme Court ruled that arbitration agreements between an employer and an employee to resolve employment disputes through one-on-one arbitration do not violate the National Labor Relations Act (NLRA). In a huge win for businesses, the *Epic Systems Corp. v. Lewis* decision means that employers may use arbitration agreements to prohibit employees from filing and joining class or collective action lawsuits in employment-related matters.

In the weeks since SCOTUS's decision, organizations have asked important and thoughtful questions on how to implement and use arbitration agreements and class action waivers with their employees. Although no guidance is "one-size-fits-all," these FAQs may help answer common issues that come up.

Why Should We Use an Arbitration Agreement?

By requiring that employees resolve employment disputes through arbitration instead of filing a lawsuit in court, employers may benefit from numerous differences in both procedure and exposure. First, proceedings before a neutral arbitrator (or panel of arbitrators) are handled in private whereas lawsuits filed in a state or federal court are available to the public. In other words, unless documents are filed under seal, most court documents, hearings, and trials will be open to anyone, including reporters, competitors, other employees, etc. Consequently, requiring arbitration keeps publicity related to employment disputes at a minimum.

Second, procedures and evidentiary rules differ between arbitration and court proceedings. An employer may set forth in the arbitration agreement which arbitration rules will govern employment-related disputes. In addition, the employer and employee (and their attorneys) mutually select an arbitrator whereas the parties to a court action do not have input into the judge assigned to their lawsuit. In addition, an arbitrator has broad discretion over discovery and need not follow formal discovery and civil procedure rules that govern the courts (which may or may not be desirable in a given context). Finally, although there are some grounds for judicial review, arbitration awards generally cannot be appealed, meaning that disputes can get to a final resolution quicker.

What are the Benefits of a Class Action Waiver?

A class action waiver is typically one provision within an arbitration agreement stating that the employee agrees to resolve employment

disputes on an individual basis and agrees to refrain from pursuing or joining any class or collective actions in conjunction with his or her fellow employees. By having employees waive class actions, businesses may avoid lengthy and expensive class action lawsuits that often involve hundreds, even thousands, of current and/or former employees nationwide. In addition, attorneys who represent employees are unlikely to receive the millions in attorneys' fees that can be awarded as class counsel when forced to represent employees on an individual basis.

Are There Any Downsides to Using an Arbitration Agreement and/or Class Action Waiver?

Sure, it is possible that mandatory arbitration agreements and class action waivers may not be a good fit for every employer or for use with every employee. Although generally viewed as a benefit to employers, private arbitration can mean that resolution of an issue with one employee does not bind or even influence the resolution of that same issue with other employees. Accordingly, some employers may want to have a court rule on the lawfulness of a particular policy or practice so that it has more certainty for future enforcement. Also, smaller companies may not see the benefit in separately litigating each employee's dispute in a separate proceeding if the company only has a handful of employees—meaning that in some situations, addressing multi-plaintiff cases could be less expensive if the pool of employees is relatively small.

In addition, arbitration is not always less expensive than court litigation since the employer is generally required to pay its own attorneys' fees as well as most of the arbitration and arbitrator fees. There is also criticism and skepticism leveled at arbitration, on the theory that arbitrators will not grant motions to dismiss or summary judgment motions, or may attempt to “split the baby” rather than making tough decisions in favor of employers. Finally, a remote but possible scenario in a tight labor market is that key employees may refuse to agree to these mandatory agreements resulting in the loss of good talent or skilled, experienced workers.

May We Make New Employees Sign a Class Action Waiver as a Condition of Employment?

Generally, yes. You may make it a condition of employment that new hires sign a mandatory arbitration agreement with a class action waiver.

What About Using a Waiver with Current Employees?

If you want existing employees to sign an arbitration agreement and class action waiver, you typically have to offer sufficient consideration to support the new agreement. In some states, continued employment is sufficient to create an enforceable contract. However, in some jurisdictions, employers must offer something more, such as a bonus or other payment, to support the new obligations. Check with your employment attorney about state requirements for the jurisdictions in which your business operates.

May we Include the Arbitration Requirement and Class Action Waiver

in our Employee Handbook?

No, we don't recommend that you include a mandatory arbitration agreement and class action waiver in your employee handbook. First, you want the agreement to be enforceable, so it should be signed by both the employee and employer to demonstrate mutual consent and agreement. Second, an employee handbook and its acknowledgment form typically state that the handbook does not create a contract of employment. Therefore, you should not insert mandatory "agreement" language into the handbook which may contradict the at-will employment statements in the handbook while opening the door to challenging the enforceability of the agreement. Similarly, employers generally do not want their handbooks to create contractual rights on the part of employees and should therefore avoid attempting to bind an employee through a policy handbook.

Can We Include a Confidentiality Provision?

Generally, yes, you may insert a provision in the arbitration agreement that requires that employees keep the fact that you require mandatory individual arbitration as well as the terms of the agreement confidential. Just be aware that some states have requirements governing the enforceability of confidentiality agreements so depending on the wording you use, you may be subject to those requirements. You should definitely include language stating that any arbitral proceedings must be kept confidential.

May All Employment Matters Be Arbitrated?

No, certain types of claims should not be subject to arbitration. Non-waivable claims under workers' compensation and unemployment compensation laws should not be arbitrated. In addition, an arbitration agreement may not prohibit an employee from filing an administrative charge with most government agencies, such as the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB). The agreement may require the employee to resolve his or her own case through arbitration rather than the courts, but it may not prevent the employee from filing a charge and the subsequent investigation and potential enforcement by the applicable agency.

Will We Have to Litigate Over the Enforceability of the Arbitration Agreement?

In some cases, yes. Even though SCOTUS ruled that mandatory arbitration agreements do not violate the NLRA, employees may still attack such agreements on other grounds, such as fraud, duress, or unconscionability. For example, if the terms of the agreement are so onerous or unfair to the employee, a court may find it unconscionable. That could occur if you try to write contractual terms to shorten the statute of limitations on employment claims, limit the statutory remedies that an arbitrator may award, or shift too many costs to the employee.

Further, for employers who use electronic signatures on employment-related documents, we have seen employees challenge arbitration

agreements by claiming that they never signed it. The first months of the dispute then involve getting computer experts and the electronic signature company to testify that the employee did indeed sign the agreement electronically. If you engage experienced counsel to help draft and implement your agreements, you should lessen the likelihood of litigating enforceability issues. We especially recommend incorporating and using language that was acceptable to SCOTUS in its recent decision.

To Sum It Up . . .

Mandatory arbitration agreements with class action waivers generally are effective mechanisms for employers to control and limit their exposure and liability for most employment-related claims. Although they may not be right for all employers and all situations, they are beneficial to many organizations. But before you find some sample agreement on the Internet, discuss the pros and cons with your executive team and legal counsel and have experienced attorneys draft your agreements to comply with the requirements of the jurisdictions in which you operate.

If you have any questions on these FAQs or any related employment topic, please contact Bryan Benard at BBenard@hollandhart.com, or reach out to the Holland & Hart attorney with whom you typically work.

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