TOP TIP: Avoiding Jury Trials Through Written Agreements

By Elizabeth Torphy-Donzella Posted January 31, 2019

As our lead story in this E-Update explained, by federal law, arbitration is given a favorable status. It is a means to avoid having to defend legal challenges to employment decisions in jury trials (which favor individuals over companies, by-and-large). Our Top Tip this month explains some essential elements of enforceable arbitration agreements (and offers, at the end of the piece, a lower-cost alternative to achieve the same goal).

The Federal Arbitration Act (and the law of virtually all States that have enacted a version of the Uniform Arbitration Act) favors arbitration. Contractual agreements that clearly and unmistakably set forth an intent to arbitrate disputes normally will be enforced (barring a judicial "lapse of judgment"). A key benefit: in arbitration, there is no jury! Employers know that juries are fickle, and may decide an issue based on empathy and anger rather than the rules of law contained in the jury instructions.

While an employer would be foolhardy to implement an arbitration agreement without assistance of counsel, below are some requirements that must be satisfied to ensure that employment disputes will be decided by an arbitrator.

- Make sure to identify the disputes that will be subject to arbitration. In all likelihood, you will want to have most everything decided in that forum (including the threshold question of whether a dispute is subject to arbitration). However, if you have restrictive covenants, you probably will want to exclude them from arbitration so that you are not foreclosed from seeking a preliminary injunction in court to stop your cheating former employee from using your trade secrets and stealing your customers. Arbitration does not normally provide that relief.
- Know what "consideration" is required in your jurisdiction to create a binding agreement. Consideration is something of value that is given in exchange for a promise. Without consideration, all of the words in your contract are for naught. In many jurisdictions, continued employment is consideration for an agreement but in some, it is not. In those jurisdictions, you will need to provide something more – an increase in compensation, a promotion – to create an enforceable agreement.
- Make the duty to arbitrate mutual, and do **not** include a clause in the agreement that permits the employer to modify or eliminate the agreement to arbitrate at any time for any reason. While this reservation of rights is something that you want to include in handbooks, if you include this clause in your arbitration agreement, you have an illusory promise that will be unenforceable in most States.
- Speaking of handbooks, understand that if your handbook is properly drafted, it will have contract disclaimers in more than one place. If your arbitration obligation is contained in the handbook, it will, by definition, be unenforceable (because you disclaimed that anything contained in the handbook was contractually binding). That goes for other

things like confidentiality requirements – which, in a handbook, may establish policy violations but may not be relied on in court to prove violations of binding duties.

- Make sure that the employer is required to pay the "lion's share" of the fees to arbitrate and that the full panoply of remedies may be obtained by the employee in arbitration. Otherwise, there may be defenses to requiring arbitration of employment disputes.
- Finally, think before you implement. Will you apply this obligation to new hires only, or do you want to try to get signatures from all employees? If the latter, are you willing to terminate employees who refuse to sign. It is a tight labor market right now.

Before we conclude our discussion, we will share a few observations.

The #MeToo trend has caused some legislatures to bar arbitration of sexual harassment claims. While there may be legal arguments about the authority of the legislatures to impose these restrictions given the breadth of the laws favoring arbitration, make sure you understand the law of your State. (Challenging the authority of a legislature to enact a law costs a lot of money.)

Also, be aware that arbitration can be quite expensive. In addition to the initial filing fee, which often is determined by the fanciful damages claim a plaintiff puts in his/her complaint, arbitrators frequently charge at least $450 an hour (often more). They rarely grant a wholesale dismissal without a hearing (a cynical person would say the financial incentive points in the opposite direction) and if you want a written decision at the end, it will cost you (as will conferences to resolve any disputes). On top of all of this, discovery often is permitted nearly to the same degree as in court. Thus, avoiding a jury normally comes with a hefty price tag.

Another option, if your State permits it, is to have employees sign written agreements that any disputes will be decided by a court **sitting without a jury**. Yes, in many states you can have the benefit of the judicial system your tax dollars fund, but with your dispute decided by the judge in a bench trial (or on summary judgment). Just as with arbitration agreements, there must be consideration to make the promise enforceable (so getting the agreement at the start of employment, as a condition of employment, when new hires are most willing to sign documents, is optimal).