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E-UPDATE

January 31, 2019

RECENT DEVELOPMENTS

Supreme Court Issues Arbitration Decisions

In January 2019, the United States Supreme Court issued two decisions construing arbitration agreements. One case provides guidance for employers that wish to mandate arbitration as the sole means of resolving employment disputes. The other concerns a statutory exclusion of certain workers' claims from forced arbitration.

Henry Schein, Inc. v. Archer & White Sales, Inc.**:**

Facts of the Case

Henry Schein, Inc. v. Archer & White Sales, Inc., involved a commercial contract that specified that disputes between the parties would be resolved exclusively by arbitration under the rules of the American Arbitration Association (AAA) unless the complaint sought injunctive relief. The AAA rules empower arbitrators to decide the "gateway issue" of whether a claim is subject to arbitration.

After the parties' relationship soured, Archer & White sued Schein in federal district court, seeking damages and injunctive relief. Schein moved to compel arbitration based on the contract. Archer & White opposed, claiming that they were permitted to file in court because their complaint sought injunctive relief, at least in part. The parties disagreed about whether the threshold question of arbitrability should be determined by the court or an arbitrator.

The district court held that the Federal Arbitration Act (FAA) included an exception to arbitration where a parties' argument in favor of arbitration was "wholly groundless." Finding Schein's argument that the dispute was arbitrable to be wholly groundless, the court ruled on the motion to compel arbitration and denied it. The U.S. Court of Appeals for the Fifth Circuit affirmed.

The Court's Decision.

A unanimous U.S. Supreme Court reversed, holding that the FAA does not include a "wholly groundless" exception and, indeed, that such a judicially created exception is inconsistent with the FAA. Arbitration is a matter of contract. The FAA favors enforcement of agreements to arbitrate. Justice Kavanaugh, writing for the Court, explained:

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> We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide arbitrability. That is true even if the court thinks that the argument that the arbitration agreement applies to particular dispute is wholly groundless.

The Court noted that binding Supreme Court precedent established that parties may delegate the threshold question of arbitrability to the arbitrator, so long as they do so in clear and unmistakable terms. Precedent also establishes that courts may not examine the merits of an underlying dispute in deciding a motion to compel arbitration. A court may only determine if a valid agreement exists. A determination that it is "wholly groundless" to compel arbitration of a suit violates these judicial limits.

The court remanded the case for the lower court to decide whether the underlying contract delegated the question of arbitrability to the arbitrator.

New Prime, Inc. v. Oliveira

Facts of the Case

Oliveira worked for New Prime as an interstate truck driver pursuant to an independent contractor agreement. The agreement provided that disputes arising out the parties' relationship would be resolved solely by arbitration.

Oliveira joined a class action lawsuit against New Prime, contending that he and other drivers were misclassified as independent contractors. New Prime moved the court to compel arbitration pursuant to the written agreement.

Oliveira argued that his dispute was not subject to arbitration because the FAA expressly excludes from its coverage "contracts of employment" in certain discrete areas, including workers engaged in foreign or interstate commerce. Regardless of whether or not he was an employee, his written agreement to work driving a truck across State lines fell within the exclusion. Thus, his suit was properly before the court.

New Prime countered that (1) the issue of whether the dispute was arbitrable was for the arbitrator to decide; and (2) as an independent contractor, Oliveira did not have a "contract of employment" so was not within the FAA exclusion.

The district court, affirmed by the U.S. Court of Appeals for the First Circuit, agreed with Oliveira and refused to compel arbitration.

The Court's Decision.

The Supreme Court affirmed. Although the FAA generally requires courts to defer to a written agreement as to question of arbitrability, before a court may exercise the authority granted under the FAA to compel arbitration, "a court must first know whether the contract itself falls within the

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boundaries of [an area excluded by the FAA]." The Court explained, "The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the dispute to an arbitral forum."

Having decided that the question of arbitrability was, as a statutory matter, the responsibility of the court rather than an arbitrator, the Court turned to the second question: whether the lower court held correctly that Oliveira's agreement with New Prime was a "contract of employment." New Prime and Oliveira agreed he was a worker engaged in interstate commerce. Oliveira agreed, for purposes of this question, to assume that his contract was an independent contractor agreement. Thus, the question turned on the meaning of "contract of employment" under the FAA.

To understand what was intended by the term, the Court reviewed its meaning in 1925, when the FAA was enacted. Based on dictionaries at the time "'employment' was more or less [treated] as a synonym for 'work.'" Also at the time, the phrase "contract of employment" was used in court cases to involve work agreements involving independent contractors. Additional evidence from the text of the law showed Congress' intent: the law used the term "workers" rather than "employees" in excluding from coverage "'contracts of employment of … any … class of *workers* engaged in foreign or interstate commerce.'" (*citing* 9 U.S.C. § 1, emphasis added). Based on all of this, the Court held that Oliveira's dispute was excluded from the FAA and affirmed the lower court's refusal to compel arbitration.

Lessons Learned.

The Court's decisions make clear that parties have broad authority to require that disputes be decided exclusively by arbitration – except when they don't! Seriously, however, with the exception of disputes that are expressly excluded under the FAA (here, disputes with workers engaged interstate trucking) a carefully crafted agreement that delegates all issues, including the gateway question of arbitrability, to the arbitrator should be enforced by courts. With such an agreement, courts are not authorized to look behind the agreement itself or examine the merits of the dispute (the court made clear that whether an argument is "wholly groundless" is beside-the-point in a motion to compel arbitration).

Of course, a party seeking to avoid arbitration still may raise arguments about whether a contract was formed. Whether a contract exists is a matter of State law. For example, an agreement must be supported by adequate consideration to be enforceable. Thus, before implementing an arbitration agreement, employers should consult with legal counsel to make sure that the agreement is not subject to challenge on this and other contract-formation grounds.

NLRB Reinstates Prior Independent Contractor Standard

Continuing its trend of reversing course on positions slanted toward unions and employees asserted during the Obama Administration, the National Labor Relations Board has now returned to its prior, long-standing independent contractor standard.

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For decades, the Board had relied on a common-law test to determine whether an individual is an employee, who is subject to the National Labor Relations Act, or an independent contractor, who is not. Under this test, a number of factors are evaluated:

- Extent of control by the employer, with greater control over the manner and means by which the individual does business indicating employee status
- Method of payment, as employers do not typically share the opportunity for profit or loss with independent contractors
- Instrumentalities, tools, and place of work, as those are typically provided by employers to employees but not to independent contractors
- Supervision, as independent contractors are not generally supervised
- The relationship the parties believed they created
- Engagement in a distinct business/work as part of the employer's regular business/the principal's business, since the more integrated the worker's services are into the employer's business, the more likely the worker is an employee
- Length of employment, with a longer relationship indicating employee status
- Skills required, with specialized skills or training indicating independent contractor status

"An important animating principle" under which the factors are evaluated is "whether the position presents the opportunities and risks inherent in entrepreneurism." In the 2014 case of *FedEx Home Delivery*, however, the Board revamped its independent contractor analysis and severely limited the significance of a worker's entrepreneurial opportunity.

Now, in *SuperShuttle DFW, Inc.*, the Board has reaffirmed the importance of the role of entrepreneurial opportunity in the determination of independent contractor status. As the Board notes, those factors that support a worker's entrepreneurial opportunity indicate independent contractor status, while those that support employer control indicate employee status. In the present case, the Board applied the factors to determine that franchisees operating airport shuttle vans are independent contractors: they own and control the vans; they control their daily work schedules and working conditions; they pay a monthly fee but do not share fares with the business; the parties' agreement clearly provides that franchisees are independent operators; there is little control over the means and manner of franchisees' performance; and there is no supervision of franchisees.

The *FedEx Home Delivery* case was viewed with great concern by employers, as it made it much more difficult to establish independent contractor status. This ruling will make it easier, once again, to establish that status.

Divided D.C. Circuit Upholds NLRB's Obama-Era Joint Employer Standard (While the NLRB's Notice of Proposed Rulemaking to Revise the Standard Remains Pending)

On December 28, 2018, the U.S. Court of Appeals for the D.C. Circuit, in a divided decision, upheld the NLRB's joint employer standard in *Browning-Ferris Indus. of California, Inc. v. National Labor Relations Board*. Although the court majority concluded that the Board had authority to adopt the new standard, it denied enforcement of the Board's order and remanded the case because the Board failed to apply the standard properly and failed to explain adequately the basis for its decision finding joint employment.

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Facts of the Case

A full recitation of the facts of the case is set forth in our prior e-publication, issued in 2015 when the NLRB reversed its then-current standard for determining joint employment status. In summary terms, Browning Ferris Industries (BFI) contracted with another entity (LBS) to supply workers under a labor services agreement. Approximately 240 LBS employees performed work at a BFI facility and were directly supervised by onsite managers employed by LBS. LBS was responsible for hiring the workers, subject to ensuring that they met certain conditions (i.e. drug screening) and qualifications specified by BFI. Under the labor services agreement, LBS had the sole responsibility for counseling employees, managing performance, establishing rates of pay, imposing discipline, and terminating.

BFI retained the right to take measures to ensure workers were free from the effects of alcohol and illegal drugs. BFI also was permitted to reject or discontinue the use of a worker for any or no reason. BFI determined how many shifts there would be and the duration of the shifts. BFI supervisors would also decide, on a daily basis, which production lines would run (and LBS supervisors staffed the lines). If BFI determined overtime would be needed for production reasons, LBS would ensure that the lines were staffed.

When a union petitioned to represent all of the employees, they designated BFI and LBS as joint employers of the workers. An ALJ determined that under existing precedent, BFI and LBS were not joint employers.

The NLRB's Decision

The NLRB found that BFI and LBS were joint employers. The Board held that two or more employers are joint employers of the same employees if they "share or codetermine those matters governing the essential terms and conditions of employment." The first question in applying the standard is "whether there is a common-law employment relationship with the employees in question." If so, then the next question is whether the "employer" in question "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." For purposes of control, the Board said it would no longer require that both employers exert actual control, but instead would consider an employer's reserved right to control and indirect control (a standard far more expansive than prior Board precedent, which the case overruled). Finding that BFI frequently exerted indirect control over LBS workers, the Board found joint employer status.

The Court's Ruling

The D.C. Circuit held that the standard articulated by the NLRB for joint employment was legally supported and should be upheld. Considering reserved authority and indirect control as relevant factors in determining joint employment status, the court reasoned, is consistent with the common law. The court noted that the Supreme Court has long held that the test for joint employment under the NLRA is determined by the common law of agency. The court stated, "the common-law inquiry is not woodenly confined to indicia of direct and immediate control; an employer's indirect control over employees can be relevant considerations."

However, the court reversed the Board because its decision failed to set "guide posts" for defining indirect control and "failed to differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspect of common law third-party contract relationships." The

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court reasoned that exerting "global oversight" over a party that supplies labor is a routine feature of independent contact relationships, while exerting direct and indirect control over their terms and conditions of employment is not. Because the court could not tell from the record the facts that proved dispositive to the Board, the court remanded the case so that the Board could reexamine the facts and identify the facts that support its conclusion.

The dissenting judge objected that the majority should not have decided the case because the Chairman of the NLRB had sought a remand without decision in light of the NLRB's issuance of a notice of proposed rulemaking to promulgate regulations to establish a joint employer rule. (Our September 2018 E-Lert, discussed the NLRB's proposed rule, and as noted in our News and Events section of this E-Update, Shawe Partner Parker E. Thoeni was involved in drafting comments that were submitted to the NLRB on the proposed rule). The dissenting judge noted that the NLRB is authorized to set standards by regulation rather than decisions in contested case, and opined "the majority opinion – without any reasonable explanation – threatens to short-circuit the Board's choice, to control and confine the scope of its rulemaking, and to influence the outcome of that proceeding."

Lessons Learned

The posture of this case is convoluted, to say the least. On remand, the Board will be required by "law of the case" to apply a standard to Browning-Ferris that is likely to be abandoned by a new rule. However, facts are subject to interpretation. Because the Board has been instructed by the D.C. Circuit to examine the facts and explain its conclusions under the now judicially approved standard, a differently constituted Board may well decide that the indirect control exercised in this case is not the sort that creates joint employer status after all. Instead, it may be found to be the sort of global control that is indicative of a bona fide independent contractor relationship. Stay tuned.

NLRB Holds that Use of the Word "We" In a Group Setting Does Not Make Individual Gripes Concerted Activity

In *Alstate Maintenance, LLC*, the National Labor Relations Board found that an employer did not violate Section 8(a)(1) of the National Labor Relations Act when it discharged an employee after he voiced individual gripes in a group setting, and included the word "we" in his complaint. In dismissing the complaint, the Board held that the employee's conduct was neither concerted nor protected.

Facts of the Case:

The employer terminated an airport skycap after he complained to his supervisor about being assigned to assist a French soccer team with its equipment. The employee, Greenidge, told his supervisor, in the presence of other skycaps, "We did a similar job a year prior and we didn't receive a tip for it." Greenidge and his fellow skycaps initially refused to assist the soccer team with its equipment, but eventually did so before the job was finished. The employer discharged Greenidge soon after the incident.

The Board's Decision:

The Board concluded that Greenidge was not engaged in concerted activity under Section 7 of the NLRA.

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First, the Board found Greenidge was not bringing a group complaint to management's attention, and there was no evidence of "group activities" upon which to conclude that he was doing so. The Board found that Greenidge's use of the "we" did not render his activity concerted; rather, the use of "we" merely showed that skycaps had previously worked together and received a poor tip as a group.

Second, Greenidge's statement alone did not establish that he was seeking to initiate group action. Because Greenidge was not looking to induce group action, or any action at all, the Board concluded that his statements constituted "mere griping," and were not concerted. Notably, the Board expressly overruled *WorldMark by Wyndham*, 356 NLRB 765 (2011), an Obama Board decision that effectively held that an individual employee's complaint in a group setting automatically constitutes concerted activity.

In addition to its holding that Greenidge's conduct was not concerted, the Board also concluded that his activity was not "protected." Greenidge was admittedly neither expressing dissatisfaction with existing tipping policies, nor was he seeking to change the employer's policies or practices. The Board noted that the amount of a tip given by a passenger to the skycap is a matter between the passenger and the skycap, from which the employer was essentially detached. Additionally, Greenidge's statement was not aimed at improving the skycaps' lot as employees. Accordingly, the Board found that Greenidge's conduct was not undertaken for the purpose of mutual aid or protection, and, thus, was not protected.

Lessons Learned :

While the Board will continue weighing the totality of the evidence when analyzing whether an employee's activity is concerted, the takeaway is that the Board will not find individual gripes to be concerted activity solely because they are voiced in a group setting and use the first-person plural.

A New Year, A New Batch of NLRB Advice Memos

The National Labor Relations Board's Office of the General Counsel (OGC) continues to issue Advice Memoranda, as it did throughout 2018 and as we previously discussed in many of our monthly E-Updates. Five more memos were issued in January, several of which were originally prepared years earlier, with the others prepared last month. Notably, many of the principles articulated in the memos apply to both non-union and union employers. Of particular interest are the following:

Service Employees Int'l Union (Nov. 6, 2017). In a case that involves a union as the employer, the GC found that the SEIU violated its own employees' rights under the National Labor Relations Act to engage in on-the-job protests over the terms and conditions of employment when it sent home five employees from an SEIU-organized convention for engaging in confrontational action and interrupting the President's speech. The GC affirmed the application of the ten-factor *Quietflex* test, which balances the rights of employers and employees during work stoppages:

1. the reason the employees have stopped working;
2. whether the work stoppage was peaceful;
3. whether the work stoppage interfered with production, or deprived the employer access to its property;
4. whether employees had adequate opportunity to present grievances to management;

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5. whether employees were given any warning that they must leave the premises or face discharge;
6. the duration of the work stoppage;
7. whether employees were represented or had an established grievance procedure;
8. whether employees remained on the premises beyond their shift;
9. whether employees attempted to seize the employer's property; and
10. the reason for which employees were ultimately disciplined.

Applying these factors, the GC found that the employees did not lose the protection of the Act when they briefly stopped work to attempt to deliver to the President a letter seeking union representation.

Moreover, the employer's removal of the five employees from the convention constituted an adverse employment action. An adverse employment action requires a showing that "the individual's prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse." It need not involve a loss of wages. In this case, the GC found that removal from the convention compromised the employees' standing and jeopardized their ability to fulfill their ongoing responsibilities. Thus, by taking an adverse employment action against the employees for engaging in protected activity, the employer violated the Act.

Duke Energy Indiana (Dec. 17, 2018). The GC found that the employer's implementation of non-solicitation/no-hire provisions with third-party subcontractors was not a mandatory subject of bargaining with the union. According to the GC, "the Union does not have authority to negotiate the terms of third-party agreements to which it is not a party, notwithstanding the effect that the non-solicitation provision has on the unit employees' terms and conditions of employment."

TLC Health Network dba Lake Shore Health (Mar. 19, 2014). According to the GC, the employer violated the Act when it discharged a supervisor for voting in a Board-supervised election. Her supervisory status was unclear before the election, and the only way for her to obtain Board resolution of her status was to vote. Thus, her discharge impeded access to Board processes and interfered with her rights under the Act.

TAKE NOTE

OSHA Rescinds Electronic Illness and Injury Reporting Requirements. The Occupational Safety and Health Administration has issued a final rule that rescinds the requirement for employers to submit certain reporting forms electronically.

In May 2016, OSHA issued a final rule requiring employers with 250 or more employees to submit electronically information from Forms 300 (Log of Work-Related Injuries and Illnesses) and 301 (Injury and Illness Incident Report). This electronic reporting requirement was originally to begin in July 2017, but was subject to several delays, and then in May 2018, OSHA announced that it would not accept the submission of Forms 300 and 301. In July 2018, OSHA issued a proposed rule to rescind those requirements. That rule has now been made final.

The new rule also now requires the submission of Employer Identification Numbers with Form 300A, which must be submitted electronically. Form 300A (Summary of Work-Related Injuries and

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Illnesses) must be submitted by employers with 20 to 249 employees in specifically-identified industries with historically high rates of workplace injuries and illnesses.

DOL's Annual Penalty Increase. The Department of Labor has announced its annual penalty increases. Due to the passage of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, federal agencies must issue regulations annually to adjust for inflation the maximum civil penalties that they can impose.

The DOL's announced increases for 2019 include the following:

- **Fair Labor Standards Act.** For repeated or willful violations of the FLSA's minimum wage or overtime requirements, the maximum monetary penalty will increase from $1,964 to $2,014. Penalties for violation of the FLSA's child labor restrictions will increase from a maximum of $12,529 per under-18 worker to $12,845, while violations resulting in the child's death will increase from a maximum of $56,947 to $58,383, which may be doubled for repeated or willful violations.
- **Employee Polygraph Protection Act.** The penalty for violations of EPPA increases from $20,521 to $21,039.
- **Family and Medical Leave Act.** The penalty for failing to comply with the posting requirement increases from $169 to $173.
- **Occupational Safety and Health Act.** The maximum penalty for posting, other-than-serious, serious, and failure-to-abate violations increases from $12,934 to $13,260. The maximum penalty for willful and repeat violations increases from $129,336 to $132,598.

Seventh Circuit Reverses Course in Finding ADEA's Disparate Impact Provision Does Not Cover Applicants. On rehearing, the full U.S. Court of Appeals for the Seventh Circuit reversed a prior ruling by a three-judge panel of that court in *Kelber v. CareFusion Corp*. (which we discussed in our April 2018 E-Update) and has now held that the disparate impact protections of the Age Discrimination in Employment Act do not extend to applicants.

The Seventh Circuit now agrees with the Ninth Circuit that the plain language of ADEA's disparate impact provision establishes that Congress intentionally excluded applicants from coverage. Under this provision, employers may not "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." The Seventh Circuit further noted that Congress had chosen to amend Title VII to add "applicants" to that law, but had not done so with regard to ADEA.

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NEWS AND EVENTS

Recognition - Fiona W. Ong has been recognized by Lexology as its top "Legal Influencer" for employment in the U.S. Publishing in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide, Lexology instituted its "Lexology Content Marketing Awards" to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis.

Webinar - The Employment Law Alliance, of which Shawe Rosenthal is the Maryland representative, is presenting a free 90-minute webinar "Employment Law in the United States: A Year in Review" featuring Teresa D. Teare as a speaker, on February 4, 2019 at 1:00 p.m. EST. This webinar presents an overview of key employment laws as well as forecasts the issues expected to be paramount in the upcoming year for US corporations or multinational companies doing business in the United States. Corporate Counsel and Human Resource professionals will benefit from attending this engaging webinar discussion on: Wrongful Termination; EEO/Discrimination; Wage-Hour; Privacy; and Workplace Leaves.

Victories – J. Michael McGuire won a labor arbitration involving an energy company's termination of three employees. As the arbitrator noted in his ruling, "The record evidence shows the Grievants' harassment of their supervisor was premeditated, severe, and malicious. It is commonplace for an employee to not like his or her supervisor for a variety of reasons. It is absolutely not acceptable, however, to harass that supervisor to the point where he or she might have to go out on a medical leave or even resign."

Teresa Teare and Paul Burgin won a motion to dismiss a complaint of religious discrimination filed against an insurance company in the U.S. District Court for the Eastern District of Virginia. The Plaintiff, an applicant for employment, claimed she was denied a position after she stated she could not work Saturdays because of her religion. The Court agreed with Teare and Burgin that the plaintiff failed to allege facts that showed she was qualified for the position or that she did not get the job because of her religion. As such, plaintiff failed to state a claim as a matter of law. The court denied the plaintiff's request to amend the complaint because the facts she alleged in her opposition to the motion also were insufficient to state a claim.

Submission of Public Comment - The Employment Law Alliance (ELA), of which Shawe Rosenthal LLP is the Maryland member, submitted its comment to the National Labor Relations Board's Notice of Proposed Rulemaking regarding the definition of joint employers. Parker E. Thoeni is a contributing author of the ELA comment, which discusses the practical implications of the proposed rule, as well as the ELA's view on the Board's use of the rulemaking process. The ELA generally supports the Board's efforts to utilize the notice and comment process *in this instance* in clarifying the joint employer standard. However, the ELA cautions the Board that due to the incredibly fact-specific nature of labor-management disputes, the rulemaking process is unlikely to be appropriate for general application in the future. Additionally, the ELA notes that in this instance, there are application-specific concerns for most entities, which the Board may wish to consider prior to implementation of the proposed Rule.

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TOP TIP: Avoiding Jury Trials Through Written Agreements

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.

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- 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).

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- Oh, the Weather Outside Is Frightful (I Think I Need a Sick Day)!! by Elizabeth Torphy-Donzella, January 3, 2019.
- Extraordinary Employee Misconduct: Hitting on Arrestees! by Fiona W. Ong, January 9, 2019.
- RIFs Are Not the Easy Solution for Problem Employees by Fiona W. Ong, January 16, 2019 (featured on HRSimple.com).
- Now that You Know that a RIF Is Not a "Magic Bullet" (Performance Management Advice for Managers in Five Easy Pieces) by Elizabeth Torphy-Donzella, January 25, 2019.

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