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Rethinking Mandatory Arbitration of Employment Disputes

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In 1991, Congress amended Title VII of the Civil Right Act of 1964 to permit employees to demand jury trials for alleged violations of the statute. Before the 1991 act, Title VII plaintiffs were not entitled to a trial by jury and were limited to remedial damages, *e.g.*, back pay, reinstatement, front pay, and injunctive relief. The 1991 act amended Title VII to create the right to a jury trial and to allow employees to recover compensatory and punitive damages. Employers reacted swiftly to these changes in the law by requiring their employees to enter into mandatory arbitration agreements in which the employees waived their right to pursue in a court of law any claims arising out of their employment and instead submit such claims to final and binding arbitration. The general sentiment among employers at the time was that they would be much better off having employment claims decided by neutral arbitrators instead of juries. Arbitrators were less likely than juries to be swayed by emotions or anti-corporate sentiments and more likely to base their decisions on the facts before them. Employers also believed that, even if an arbitrator were to find in favor of the employee, the damages awarded against the employer would be lower and more realistic than those awarded by juries and that arbitrators (unlike juries) generally would be hesitant to award punitive damages. In essence, employers were relying on arbitration to eliminate the "lottery ticket" mentality among employees who were considering pursuing employment claims.

In addition to allowing employers to avoid jury trials, binding arbitration agreements promised a host of other benefits for employers. At the time, arbitration of employment claims was considered to be faster than litigating those same claims in court. While parties often waited years for a trial date on overflowing judicial dockets, a hearing date before an arbitrator could be set relatively quickly. Getting claims resolved more quickly meant employers could reduce the internal effect of lingering litigation on its workforce and business.

Employers also expected that arbitration would be cheaper than court litigation. For example, the parties' rights to engage in various forms of discovery, such as depositions and written discovery — which can be a costly — were generally limited in arbitration of employment claims. Moreover, in addition to limited discovery, arbitration of employment claims typically did not include expensive motion practice and other costly pretrial preparation related to a jury trial (such as preparation of jury instructions, motions *in limine*, etc.). Indeed, to achieve additional cost savings, some employers included "loser pay all" provisions in their mandatory arbitration agreements. Thus, if the employer prevailed, the entire cost of the arbitration would shift to the employee.

Too Good to Be True?

As with most things that sound too good to be true, however, employers soon discovered that the benefits of mandatory arbitration agreements existed more in theory than in practice. As it turns out, some arbitrators are better than others. Employers found themselves before arbitrators who were unfamiliar with the laws governing employment claims and often less receptive than judges to technical legal arguments, such as statutes of limitations and failure to exhaust administrative remedies. To make matters worse, once these arguments were rejected by the arbitrator, they were gone for good because judicial review of arbitration awards is extremely limited. In most jurisdictions, an arbitrator's award can only be overturned if it is contrary to public policy or the product of fraud or collusion. Employers also discovered that, with the proliferation of arbitration, many arbitrators had very busy schedules but no imperative to clear cases from their "dockets" as many judges do, and parties found themselves waiting just as long as they might in a court of law to have their claims resolved. Employers also discovered that arbitrators displayed a tendency for "splitting the baby," allowing each party to prevail on one or more claims or imposing liability but awarding minimal damages.

No Real Cost Savings

In addition, while employers may have realized some cost savings in arbitration by not paying for summary judgment motions and other pretrial motions, employers also lost the opportunity to dispose of cases through a pretrial mechanism other than settlement. Many arbitrators believe they do not have the authority to dispose of claims through motions to dismiss or for summary judgment and thus do not entertain such motions. Employers who were lucky enough to find an arbitrator willing to consider such motions rarely saw them granted. It became abundantly clear that virtually every arbitration case goes to hearing if not settled.

No Litigation Relief

Perhaps the biggest disappointment for employers, however, was that they ended up litigating employment claims in court anyway, despite the fact that their employees had signed mandatory arbitration agreements. Employees frequently do not inform their lawyers that they have signed an arbitration agreement. Moreover, even when aware of the existence of such agreements, many plaintiffs' lawyers choose to ignore them and file lawsuits anyway. Thus, employers found themselves forced to go through the added expense of filing motions to compel arbitration.

Employers' Motions Denied

Worse still, courts often denied the employers' motions to compel arbitration. Apparently, the very aspects of arbitration that employers found so attractive proved troublesome for the courts. For example, courts have refused to enforce agreements that deprive employees of the discovery tools and remedies that would have been available to them had they filed their claims in a court of law. Courts have also invalidated agreements that impose costs on employees that they would not have had to bear had they filed their claims in court – such as arbitrator fees and costs imposed by "loser pays" provisions. Some agreements have not been enforced because they imposed more restrictive time frames for asserting claims than the statute of limitations that would apply in a court of law.

Thus, in order to make their mandatory arbitration agreements enforceable, employers were obliged to revise their agreements to make the arbitration process almost identical to the process available to employees in court. As a result, employers lost many of the cost and time savings they thought they could achieve through arbitration.

HOW TO COPE

So what is an employer to do? The answer lies in looking at the two basic components of a mandatory arbitration agreement: 1) the employee gives up his or her right to pursue employment claims in a court of law, allowing the employer to avoid a trial by jury on those claims; and 2) the employee agrees instead to submit her claims to final and binding arbitration. Courts have not taken issue with the notion of an employee waiving her right to a jury trial as long as the waiver is knowing and voluntary. Courts have, however, taken issue with replacing court litigation with arbitration because of the limited discovery, hidden costs, diminished remedies and restrictive periods provided for in some mandatory arbitration agreements. In effect, it is the "arbitration" part of the arbitration agreement that has been causing all of the problems.

Given this, employers would be better off simply having employees waive their right to a jury trial and leaving it at that. Employees would still be able to file suit in court, but the matter would be heard before a judge only and not a jury. In a bench trial, employers still get a neutral finder of fact who is not prone to rendering decisions based on emotion and who is less likely to impose excessive damages awards. However, the employer also gets a fact finder who will consider pretrial dispositive motions, such as motions to dismiss and summary judgment motions, and when warranted, grant them. Because the employer is still in court, there also is an appellate process through which a trial judge's decision can be reviewed for clear error, or even *de novo*, depending on the circumstances. At the same time, enforcing an employee's waiver of her right to a jury trial is far easier than enforcing an arbitration agreement because, by eliminating arbitration from the mix, the procedural aspects of the arbitration process upon which courts have relied in refusing to enforce arbitration agreements are no longer a factor.

CONCLUSION

Employers truly interested in turning back the clock on the 1991 amendments to Title VII would be well served to cease using mandatory arbitration agreements and instead have their employees execute waivers of their right to jury trials. It is juries that employers generally fear, not the courts themselves. Prior to the 1991 amendments, employers felt no imperative to exempt themselves from the civil justice system available in the courts. Thus, employers do not now need to flee the court system altogether in order to avoid jury trials, and there is certainly no reason for them to require their employees to agree to the wholesale replacement of court litigation with mandatory arbitration.

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