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Guidance for Employers Considering Mandatory Arbitration Agreements with Class and Collective Action Waivers

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The authors of this article discuss two recent United States Supreme Court cases that help clarify the legal landscape pertaining to arbitration agreements. In addition, the authors provide guidance for employers considering arbitration agreements with class and collective action waivers.

Two recent United States Supreme Court cases have helped clarify the legal landscape pertaining to arbitration agreements. It behooves employers seeking alternatives to managing their litigation risks in employee class and collective actions to consider anew the potential solution of rolling out mandatory workplace arbitration agreements with class and collective action waivers.

The two questions the Supreme Court recently answered were:

- Is a class action waiver in an arbitration agreement enforceable where a plaintiff's costs of individually arbitrating a federal statutory claim exceed the potential recovery?¹
- If an arbitration agreement is silent on whether disputes may be arbitrated as class actions, and the parties leave the issue to an arbitrator to decide, what court relief is available if the arbitrator interprets the agreement to permit class arbitration?²

Though neither arose in an employment context, both cases provide guidance to employers contemplating arbitration agreements with their employees.

CLASS ACTION WAIVERS

In *American Express Co. v. Italian Colors Restaurant*, the Supreme Court ruled that class action waivers in arbitration agreements are enforceable under the Federal Arbitration Act (FAA), even if individual arbitration is economically unfeasible, thus effectively precluding vindication of federal statutory rights. This bears particularly on wage-hour cases, where individual claims often are small. The *AmEx* decision builds upon the court's seminal class-waiver decision, *AT&T Mobility LLC v.*

¹ *American Express Co. v. Italian Colors Restaurant*, 570 U.S. ____ (June 20, 2013).

² *Oxford Health Plans LLC v. Sutter*, 569 U.S. ____ (June 10, 2013).

Conception, which ruled that enforcement of a class arbitration waiver under the FAA trumped a California statute that sought to preclude class waivers.

AmEx, however, did not arise in an employment context, and plaintiffs' lawyers likely will contend that it cannot apply to wage-hour collective actions under the Fair Labor Standards Act (FLSA), because that federal statute expressly permits collective actions. Possibly anticipating such an argument, Justice Scalia's *AmEx* opinion essentially forecloses it by relying, among other Supreme Court precedent, on *Gilmer v. Interstate/Johnson Lane Corp.* There, the *AmEx* majority stated, "we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act (ADEA), expressly permitted collective actions." This, the Court said, "brings home the point" that collective actions are not necessary to the effective vindication of statutory rights. ADEA imports the collective action language from the FLSA, which leads to the conclusion that this reasoning applies equally to FLSA collective actions.

SILENT ARBITRATION CLAUSE INTERPRETED BY ARBITRATOR TO PERMIT CLASS ARBITRATION

Oxford Health Plans LLC v. Sutter involved a dispute between doctors and a health plan over reimbursement for service. The arbitration agreement at issue stated in part that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court," but said nothing about class or collective arbitration. The parties submitted the dispute to arbitration under American Arbitration Association rules, and the arbitrator ruled that the matter could proceed as a class arbitration, because, in his view, the language permitted arbitration of the same "universal class of disputes," including class cases, that it barred the parties from bringing in court. *Oxford Health* argued to the Supreme Court that the arbitrator exceeded his authority under the FAA because the agreement said nothing about class arbitration, relying heavily on the Court's 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* In *Stolt-Nielsen* the Court ruled that an arbitration panel exceeded its powers under the FAA by imposing class arbitration where the agreement was similarly silent on whether class arbitration was authorized.

To the surprise of many, the Court disagreed. It distinguished *Stolt-Nielsen* by noting that the parties in that case "had entered into an unusual stipulation that they had never reached an agreement on class arbitration." Thus, the Court said, the arbitrator's imposition of class arbitration was not based on a reading of the contract or the parties' intent, but on a policy choice in favor of class proceedings.

Not so in *Oxford Health*. Noting a "stark" contrast with the facts of *Stolt-Nielsen*, the Court said that the *Oxford Health* arbitrator did base his decision, "through and through," on the parties' contract, which the parties had authorized him to interpret. And because he "did what the parties had asked," he could not be said to have exceeded his powers, regardless of what the Justices may have thought about the merits of his ruling. In other words, so long as he was interpreting the agreement, the arbitrator had the right to be wrong.

The teaching of *Oxford Health* is clear: employers who want to require employees to arbitrate disputes but not on a class basis must make sure the agreement explicitly states that class or collective arbitration is not permissible. Doing so in the employment arena, however, runs right smack into the National Labor Relations Board's *D.R. Horton* decision.

D.R. HORTON – CLASS OR COLLECTIVE ACTIONS AS PROTECTED CONCERTED ACTIVITY

Employers who have or are contemplating arbitration agreements with class or collective action waivers need to be mindful of the NLRB's *D.R. Horton* decision, currently pending on appeal before the United States Court of Appeals for the Fifth Circuit. In contrast to the Supreme Court's seeming endorsement of class waivers in arbitration agreements in *Conception* and *AmEx*, the NLRB issued a sweeping decision in early 2012 outlawing employment agreements and policies requiring class or collective action waivers in employment disputes as a condition of employment. In the NLRB's view, class or collective action waivers violate employees' rights under Section 7 of the National Labor Relations Act to engage in concerted activities for mutual aid and protection. The NLRB also ruled that the arbitration requirement was impermissible because it did not explicitly carve out employees' rights to file unfair labor practice charges with the NLRB.

Efforts to “draft around” *Horton* by letting employees “opt out” of agreements received a more recent set-back by an NLRB Administrative Law Judge (ALJ) in *Mas Tec Services Co.*³ Applying *Horton* reasoning the ALJ ruled that even an “opt-out” provision cannot save an arbitration policy requiring waiver of class or collective actions. Although employees could opt-out of the policy within 30 days, the ALJ concluded that “an employer may not lawfully require its employees to affirmatively act in order to obtain or maintain these [Section 7] rights [to engage in collective or class actions].” As the ALJ explained, employees who did opt out would be precluded from engaging in protected concerted activity by virtue of their inability to cooperate with employees who did not opt-out, and thus would be disadvantaged. Furthermore, the ALJ concluded that employees may be reluctant to exercise their opt out rights for fear of reprisals by MasTec.

The Fifth Circuit heard argument in *D. R. Horton* on February 5, 2013, and a decision is expected shortly. But while many employers rightly perceived *Horton* as an obstacle to implementing an arbitration procedure with class and collective action waivers, and have been waiting to see how the Fifth Circuit will rule, a series of events have given some employers the courage to move forward with plans even before the Fifth Circuit’s ruling.

- First, numerous federal district courts (in excess of 30 at last count) explicitly have declined to follow the *Horton* decision. These courts join many others in dismissing class and collective actions, and compelling instead individual arbitration under the parties’ arbitration agreement.
- Second, the legal validity of *Horton* and subsequent NLRB decisions is in substantial doubt due to decisions by two federal appellate courts ruling that ostensible recess appointments by the President to the NLRB were constitutionally defective because the appointments were not made while Congress was actually in recess. In *Noel Canning v. NLRB*, the United States Court of Appeals for the D.C. Circuit held on January 25, 2013 that the appointments of Sharon Block, Terence Flynn, and Richard Griffin to the Board on January 4, 2012 were not valid “recess” appointments under the Constitution, because Congress was not in recess when the appointments were made, and the vacancies did not “happen” while Congress was in recess, as required by the Constitution. Subsequently, on May 16, 2013, the Third Circuit Court of Appeals held in *NLRB v. New Vista Nursing & Rehabilitation*, that Member Becker’s intrasession appointment by President Obama in 2010 violated the Constitution’s “Recess Appointments Clause.” By ruling that Member Becker’s appointment was invalid, the Third Circuit’s decision expands the scope of controversial Board case law (including *D.R. Horton*, among others) that may be challenged on the grounds that it was not issued by a panel of three properly appointed members.
- Third, many see the Supreme Court’s decision in *AmEx* as setting the stage for the rejection of the NLRB’s theory in *Horton*, long believed by many in the management community to be wrongly decided and politically motivated. In holding that Federal Rule of Civil Procedure 23 does not establish an “entitlement” to class proceedings for the vindication of federal statutory rights, the Supreme Court noted:

One might respond, perhaps, that federal law secures a nonwaivable opportunity to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration. But we have already rejected that proposition in *AT&T Mobility*.

This same “opportunity” to assert Section 7 rights by way of a class or collective action underpins the NLRB’s reasoning in *Horton*, and the Court’s ultimate ruling upholding an arbitration agreement under the FAA even if it prevents “effective vindication” of a federal statutory right, seemingly portends the rejection of *Horton*. The legal uncertainty as to arbitration class and collective action waivers in the employment context will remain until the appeals are exhausted. Clearly, however, the judicial trend has been strongly in favor of enforcement of such waivers.

PROS AND CONS OF IMMEDIATELY IMPLEMENTING AN ALTERNATIVE DISPUTE RESOLUTION POLICY THAT INCLUDES NON-CLASS FINAL AND BINDING ARBITRATION

Pros

- The potential elimination of private employment class actions for wage-and-hour, employment discrimination, and other labor and employment claims, resulting in a significant reduction in risk.
- A reduction in the number of claims filed – as a significant incentive for employees and former employees (and their attorneys) to file certain claims is eliminated by restricting claims to bi-lateral (as opposed to class) resolution.
- A reduction in employment practice insurance premiums relating to class actions and individual claims corresponding to an overall reduction in the number of both types of claims and litigation fees relating to an arbitration proceeding of an individual claims versus civil litigation (on a class or individual claim).
- Because arbitration agreements – when implemented correctly – constitute individual agreements between an employer and employee, the employer may selectively choose to enforce or not enforce the agreement based on individual circumstances, without creating a precedent or jeopardizing the enforceability of other agreements.
- Generally, lower arbitration litigation costs as compared to civil litigation costs for the same matter.
- A more streamlined system for the resolution of employment claims than traditional civil litigation in the federal and state court system.
- A reduction in the cost and man hours spent in discovery through limited discovery under the express terms of an arbitration policy.
- A reduced risk for a “runaway” verdict that might be awarded by a jury.
- A more confidential forum that generally provides private proceedings with less publicity than court proceedings.
- A quicker more definitive resolution for employment claims, given more streamlined proceedings and the limited grounds available to appeal the arbitrator’s decision.
- More flexible scheduling of witnesses than would be permitted by a court.

Cons

- If *D. R. Horton* is upheld, employers may mandate arbitration of most employment disputes, but cannot preclude class or collective arbitration.
- Possible challenges may remain regarding whether FLSA collective action waivers are unenforceable under the theory that the right to bring a collective action is a substantive right under the FLSA, and thus, like other provisions of the statute, cannot be waived. At least one Federal judge in the Southern District of New York had determined that a class or collective action waiver was unenforceable as to FLSA collective actions, but that decision, *Rainere v. Citigroup, Inc.*, was recently reversed on appeal following the reasoning of the Supreme Court’s *AmEx* decision (which was also a Second Circuit case). Although the Second Circuit is now aligned with the decisions of many other courts and several other Circuits, further appeals or challenges may remain.
- Notwithstanding the presence of a mandatory, binding arbitration agreement, some employees will file a lawsuit directly in court. In this situation, enforcing an arbitration agreement in court adds a procedural step that may increase litigation

costs related to pre-trial motion practice. In addition, courts may refuse to compel arbitration based on state laws regarding contract formation, including claims of insufficient consideration, illusory promises, unconscionability, or other grounds. In some cases, challenges to the enforceability of an arbitration clause proceed to the appellate court level, generating significant legal fees prior to reaching the merits of the dispute.

- Although many federal district courts in California have upheld arbitration agreements and dismissed class and collective actions, state courts in California are split on how to balance the FAA against California public policies and statutory schemes providing for class and collective actions, and continue to invalidate arbitration agreements on unconscionability grounds. While it is possible to draft arbitration programs that will satisfy challenges under California law, the area remains unsettled until the California Supreme Court provides clarity. In this regard, all eyes are on the *Iskanian v. CLS Transport* case, where the California Supreme Court is expected to rule on whether state public policy and statutory schemes (such as the Private Attorney General Act) are trumped by the FAA. No less than 14 amici briefs have been received by the court, and a ruling is expected this year.
- With regard to individual disputes, from an employee perspective, arbitration is easy, fast and cheap. As a result, more employees pursue arbitration on a *pro se* than might consider doing so in a more complicated, expensive court setting.
- An arbitration policy generally will be ineffective and unenforceable with regard to the filing of administrative charges, and cannot prevent the United States Department of Labor, the Equal Employment Opportunity Commission, or similar agencies from bringing suit, including class and collective actions on behalf of employees.
- In order to avoid claims that arbitration agreements are illusory, employers should limit their right to change, alter or terminate arbitration agreements, and put restrictions in place that would prevent retroactive changes to agreements and allow ample notice before changes are implemented.
- For arbitration agreements to pass muster, particularly in California, there must be true mutuality of obligation. This means that employers may not be able to carve out fully claims for injunctive relief for violations of trade secrets, restrictive covenants, or other instances when they may wish to resort to a court instead of arbitration.
- A new arbitration agreement would obviously be ineffective against former employees that were never party to the agreement, such that conceivably an employer could end up in two forums – litigating a class or collective action against former employees while simultaneously or successfully arbitrating individual claims with current employees.
- Arbitrators are paid by the hour or by the day and administrative costs can be considerable for hearings lasting more than one to three days (i.e., arbitration administrative filing fees as well as meeting room, arbitrator and court reporter fees in arbitration versus only requested transcript fees from court proceedings).
- Arbitration proceedings are less likely to be decided by a dispositive motion than are court proceedings. Generally, there is a greater likelihood of a trial on the merits, which means greater frequency for the possibility of an unfavorable result simply by virtue of the increased number of trials.
- Arbitrators are less likely to accept procedural defenses.
- Arbitrators are more likely to allow hearsay and irrelevant witnesses and generally allow a fuller record than might be appropriate.
- Arbitrators typically are more prone to issue poorly reasoned (or poorly written) decisions. In addition, some feel pressure to “even the scorecard” to appear more neutral statistically, or are inclined to “split the baby” notwithstanding the law.
- As demonstrated by the Supreme Court in *Oxford Health*, judicial review is extremely limited, and courts are not likely to disturb an arbitrator’s decision and award if based on the contract between the parties, even if it is erroneous based on the facts or the law.
- Some employees may perceive that mandatory arbitration has minimized or infringed upon their rights.
- Implementing a Dispute Resolution Policy that includes arbitration can be time-consuming and costly.

- Some well-capitalized plaintiffs' counsel may relish the opportunity to bring a large number of individual FLSA cases to arbitration, recognizing that such a tactic may impose more settlement pressure than one collective action.

EMPLOYER CONSIDERATIONS

In deciding whether to pursue arbitration that includes a class or collective action waiver as a general policy, an employer should consider the following:

- Current NLRB law prohibits class or collective action waivers. While the law applies to union and non-union employers alike, employers that are particularly vulnerable to union organizing, or that may be facing challenges from unions and employee advocacy groups, may wish to wait until the NLRB's decision in *D.R. Horton* is overturned before proceeding with implementation plans.
- Has your company been sued in a class or collective action, and do you consider your organization at risk for additional lawsuits? In the wake of *AmEx* and *Concepcion*, the possible avoidance of class or collective actions in the future may outweigh the above-noted risks attendant to arbitration.
- Are there any class or collective actions pending now, at the pre-certification stage? It may be possible to enter into arbitration agreements with putative class members that include class action waivers (both in court and in arbitration) even with regard to an existing class action.
- With regard to non-class cases, how many employment-related lawsuits do you expect in a year? As the number of claims rises, the likelihood that your overall employment litigation costs will be reduced through arbitration increases.
- What is your organization's philosophy with regard to defending employment-related lawsuits? If you are committed to taking certain cases to judgment, rather than seeking settlement, the advantages of arbitration are magnified.
- In what jurisdictions are you generally sued by your employees? Some court jurisdictions are not employer-friendly, while others offer a significant opportunity for a favorable and cost effective result on summary judgment.
- Does arbitration make sense for all employees at all levels of your organization? Arbitration provisions may make sense for particular groups of employees, but not for others.
- How does arbitration fit within your overall employee relations strategy? The implementation of an arbitration policy may result in push back from employees. Thus, you should consider whether such a policy is in line with the organization's employee relations goals and philosophy.
- Should your arbitration program include an "opt-out" provision that allows employees to opt-out within a certain period of time after hiring? Such an approach, though apparently unhelpful to overcome an NLRB challenge, may help avoid successful challenges in California.

ELEMENTS OF AN ENFORCEABLE ARBITRATION PROGRAM

Formation & Consideration

Formation and consideration issues are controlled by state contract law, and proof generally requires demonstration of an offer, an acceptance and supporting consideration. The signature of the employee on the arbitration agreement (or an electronic acknowledgment of having reviewed and accepted the agreement's terms) generally is sufficient to satisfy the offer and acceptance requirement.

The existence of supporting consideration is more likely to be contested. For example, some states do not recognize continued employment as sufficient consideration to support an agreement to arbitrate future disputes. Thus, where current

employees (as opposed to new hires) are asked to sign an arbitration agreement, additional consideration may be required. Making the duty to arbitrate employment-related disputes binding on both employee and employer, however, often can solve consideration issues. Where both parties agree to arbitrate any future claims, the employers and employees mutual forbearance of the right to proceed in court acts as consideration to support the arbitration agreement. Making the duty to arbitrate employment-related claims mutual is required in California.⁴ Some states find that continued employment is sufficient consideration; others do not.

Employers should be cautious regarding language that reserves the right to modify, amend, or revoke the policy at any time with or without notice as such agreements have been attacked on the ground that the contract to arbitrate is illusory. This argument has some traction in various states, such as Ohio and Maryland, that continue to require mutuality of obligation to support contract formation. A policy instead should include a notice period and other processes that place limits on the timing and method for modifying the arbitration agreement.

Fairness

For an employer that operates in multiple jurisdictions, an effective arbitration policy must pass judicial muster in each such jurisdiction, or at least in those where a significant number of claims might reasonably be anticipated.

An arbitration agreement must clearly specify what claims are covered, the statute of limitations or time allowed to assert a claim, and the process to be followed to resolve a claim. In addition, the arbitration process itself must be considered “fair.” The California Supreme Court has spoken most clearly on what safeguards a pre-dispute employment arbitration provision or policy that is a condition of employment must provide to be enforceable under California law.⁵ In *Armendariz v. Foundation Health*, the California Supreme Court embraced the principles set forth in an earlier decision from the D.C. Circuit, *Cole v. Burns International Security Services, Inc.*,⁶ in requiring that certain safeguards be present before the right to a jury trial under California’s anti-discrimination statute could be effectively waived. In short, both courts held that an enforceable policy, at a minimum, must:

- Provide for the selection of a neutral arbitrator;
- Provide for meaningful (albeit limited) discovery;
- Allow for the recovery of all types of relief that would otherwise be available in court;
- Provide that the employer will pay substantially all of the forum costs (including the fees of the arbitrator); and
- Require a written award to allow for adequate judicial review.

In essence, California requires that the arbitral forum provide sufficient due process to allow reasonable access to a fair hearing and to allow for full redress of statutory claims. Additionally, California requires that the obligation to arbitrate be mutual, meaning that the employer must agree to arbitrate its claims against the employee. While other jurisdictions have enforced arbitration policies lacking some of these attributes, policies or provisions lacking these due process attributes are frequently challenged.

More recent California decisions also provide a roadmap for navigating around enforcement challenges. For example, agreements should be drafted to:

- Be signed by both the employer and the employee;
- Not unreasonably minimize available discovery tools;
- Include a copy of all the applicable arbitration rules;
- Avoid language preserving the employer’s right to amend, modify or cancel the agreement, in favor of language disallowing retroactive changes and providing 60- or 90-day notice periods before future changes are effective;

⁴ See *Armendariz v. Foundation Health*, 24 Cal. 4th 83, 6 P.3d 669 (2000).

⁵ See *Armendariz*, 24 Cal. 4th 83, 6 P.3d 669.

⁶ 105 F.3d 1465 (D.C. Cir. 1997).

- Preserve all applicable statutes of limitations; and
- Avoid confidentiality language that could be interpreted as restricting an employee's ability to build his or her case by talking with co-workers or seeking witness participation.

Class Action Waivers

Employers who choose to implement a class or collective action waiver, notwithstanding current NLRB law, should be certain that such a waiver is clear and conspicuous and includes class, collective, or other representative action claims. The policy should not only waive such actions filed in court, but also make clear that such actions may also not be brought before the arbitrator. The agreement should explicitly prohibit the arbitrator from presiding over class, collective or other representative claims. We recommend that employers considering such waivers also include clear language carving out the right of employees to file charges with administrative agencies (such as the NLRB). In addition, we recommend that employers include a disclaimer clarifying that employees, notwithstanding their waiver, have a right to file a class or collective action under the NLRA without fear of retaliation by the employer, and even though the employer has a right to enforce the waiver in court and compel arbitration. For example:

Notwithstanding the waiver of an employee's right to bring or participate in a class, collective or other representative proceeding, employees may have a statutory right (for example, under the National Labor Relations Act) to act concertedly on behalf of themselves and others to challenge this Policy in any forum, and if an employee acts concertedly to pursue any such proceeding, Company will not retaliate against an employee for doing so. Company is entitled, however, to enforce this Policy, including employee's agreement to arbitrate all claims and to forego pursuing any covered dispute on a class, collective or representative basis, and is entitled to seek dismissal of any such class, collective or representative action and otherwise assert this Policy as a defense in any proceeding.

Finally, employers should include specific severability language, making clear that in the event a waiver of class, collective or representative actions is found to be unlawful or enforceable, then the only forum for such an action would be court, not arbitration. Generally, most employers seek to avoid litigating class actions in the arbitral forum. While it was believed that the Supreme Court, in *Stolt-Nielsen*, provided clear support for the notion that class arbitration should only occur when the parties have clearly and explicitly contracted for that forum, the Court's more recent decision in *Oxford Health* clarifies that silence on that question may vest the arbitrator with discretion to decide whether class arbitration is appropriate, and courts should leave an arbitrator's decision to conduct class arbitration undisturbed.

Other Exclusions and Carve-Outs

To maximize the likelihood that an arbitration agreement will survive judicial or administrative challenge, the following exclusions and carve-outs should be considered:

- The right to file a workers' compensation or unemployment compensation claim.
- The right to file an administrative charge before a governmental agency, such as the EEOC, NLRB, or DOL, should be carved out of the agreement.
- Under the Department of Defense (DoD) Appropriations Act of 2010, federal contractors with contracts with the DoD in excess of \$1 million are required to exclude from arbitration policies any claims under Title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention. Such contractors also must certify that they have required the same from their subcontractors. Some exceptions apply, such as contractors that are merely providing commercially available "off-the-shelf" items.
- Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, certain types of whistleblower claims may not be subject to mandatory pre-dispute arbitration.

An employer may also wish to carve-out certain types of actions for strategic reasons. For example, certain limited types of emergency or temporary injunctive relief in court, as long as it can preserve mutuality. Also, an employer may maintain different types of plans – such as Severance Pay Plans, Short-Term Disability Plans, or other ERISA plans – that call for different types of dispute resolution procedures and that should be carved out of the arbitration policy.

Finally, while employers had contemplated carve-outs for cases that can be brought in small claims court as a way to respond to concerns that the arbitration policy inhibits the ability to pursue low-dollar-value claims, the Supreme Court's decision in *AmEx* appears to take this issue off the table. Based on the Court's ruling, the fact that arbitration agreement may make it impractical or even foolish to pursue a small-dollar claim on an individual basis is, in the words of Justice Kagan in the dissenting opinion, "too darn bad."

OTHER DISPUTE RESOLUTION PROGRAMS

When considering an arbitration policy, it is important to keep in mind other types of dispute resolution procedures that may be used together with arbitration, or as an alternative approach. Many employers conclude that such a pre-arbitration dispute resolution process – even if only voluntary – helps improve employee acceptance of mandatory arbitration as part of an overall alternative dispute resolution package. While certain states may allow for such pre-arbitration dispute resolution programs to be "mandatory," or a prerequisite to filing a demand for arbitration, California and other states would consider the imposition of a mandatory pre-filing process to be unconscionable. Examples of pre-arbitration dispute resolution procedures include:

- Establishing a formal internal dispute resolution procedure that allows for multiple steps of review and final appeal to a high-ranking member of management or a corporate officer.
- Establishing a binding "peer review board" that would provide a forum to employees to resolve disputes and issues. In our experience, peer review boards are surprisingly effective – peers can be tough on one another.
- Establishing and making more formal the "open door" policies and providing hot-line numbers and more open channels of communication.
- Developing an Ombudsman program for the receipt, investigation and review of complaints.
- Developing a "pre-termination" review process that includes multiple sign-offs, and an opportunity for internal "appeal" before final decisions are made.
- Providing an "appeal" process as part of employee feedback, evaluations, or disciplinary processes.

These types of programs speak more directly to issues of employee empowerment, open communication and "fairness," and avoid many of the trappings of a mandatory arbitration program. These types of programs can be implemented in lieu of mandatory arbitration, or may coexist with mandatory arbitration, serving as earlier steps in a multi-step dispute resolution process.

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