



Feature

Employee Dispute Resolution Programs Jury Trial Waivers Instead of Arbitration Clauses

By Nancy Hatch Woodward

There was a time when mandatory arbitration seemed like a panacea for employers when it came to employment disputes. Yet in practice, a number of problems not anticipated by employers has caused them to look at jury trial waivers as a way to cut the costs of employment disputes.



“Employers do not necessarily want a return to the court system either,” says Stephen F. Fink, a partner at Dallas’ Thompson & Knight, LLP. He explains that after the Civil Rights Act of 1991, which made jury trials and compensatory and punitive damages widely available, the number of cases brought against employers tripled, and instead of employers’ winning most of them, as they had before

1991, they were now losing almost half the cases. Especially troubling was the fact that juries were—and remain—so unpredictable.

“That is why arbitration appeared to be such a good alternative,” Fink notes, “but the reality has not really shown that to be the case.”

According to Chad Shultz, a partner in the Atlanta office of Ford & Harrison, LLP, arbitration has always been a hard sell to employees because they feel that the employer is somehow trying to take advantage of them. The employer is the one who hires and pays for the judge, and employees think the cards are stacked against them.

Cost has also contributed to arbitration’s fall from favor. Employers are responsible for hiring and paying the arbitrator and any settlement that is decided upon. It can easily be as or even more expensive than a typical lawsuit.

In addition, says Shultz, “Many of these cases would never go to trial if they went through the court system, instead of arbitration. They would either get a summary judgment or be dismissed.”

The lack of an appeals process poses yet another problem. Plaintiffs and defendants may appeal when they have gone

through the courts, but not with arbitration. This is even true if you believe that the decision was not consistent with the law. “There is no obligation on an arbitrator, like there is on a judge, that their decision has to follow the law,” notes Shultz.

Finally, a recent Department of Justice study showed that employers fare better in verdicts returned by judges than juries. According to the study, winning plaintiffs in employment discrimination cases received a median award of \$218,000 from juries, but only \$40,000 from judges.

Unpredictable juries

For the last five years, Ford & Harrison, as part of its management program, has brought in managers to view a videotaped trial. The managers are divided into groups of 8 or 10, they all watch the video, and then they deliberate the same way a jury would. The results are completely unpredictable. “You can have a group of 50 managers, all from the same company, and break them into five or six juries, and none of them will have the same results,” says Shultz. Even though they have all seen the same exact trial presented the same way by the same lawyers and witnesses, some groups may come back and want to award the plaintiff lots of money, and others will be adamant that there is no case there at all.”

Fink notes that there are just too many variables involved in a jury trial. It often depends on the personalities and life experiences of the people on the jury. Fink also suggests that there is a built-in bias for the employee in these cases because all jurors have been, expect to be, or know people who are employees.

Nor do juries have to explain their decisions. “Because there is no explanation, employers may not realize what they did wrong if the ruling goes against them,” observes Fink, “or what they did right if it goes for them.” He also notes that jury verdicts are also harder to get reviewed on appeal, but a judge must explain the reason for his/her decision.



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Jury trial waivers

Employers hope to mitigate this unpredictability by having their employees sign a jury trial waiver. Shultz believes that employees will fight jury trial waivers like they did arbitration clauses, and there is still some question as to whether or not they will be enforceable in court. Some courts say they are, but there will be courts that will not like them, says Shultz. Still, he argues, “almost all jurisdictions enforce mandatory pre-dispute arbitration agreements in employment cases. Jury trial waivers are less restrictive of employee rights than these, so it is likely that waivers will be broadly enforceable too.”

Waivers should be only one part of a company’s overall employee dispute resolution program. First, employees should be able to go to their supervisor or line management to try to resolve their problems. The next step should be a mediation process that the company pays for. Then, if their issues are still not resolved, they can pursue a claim in court through a bench trial.

To set this up for new employees, Shultz suggests having a statement on the employment applications that basically says, “I understand that if I ever have a claim against this company,

I will waive my right to a jury trial.” This way, employees know from the start that it is a condition of their employment. In addition, says Shultz, if they sign it and then later claim that they were not hired when they believe they should have been, you can enforce the jury waiver in that case too.

There are two ways current employees can handle this situation. Fink advises dealing with it the same way most employers have mandatory arbitration clauses. You announce it and have your employees sign a statement saying they understand and agree to the terms. In many states, if employees do not sign, but continue to work the following day, they have essentially agreed to the new policy. Having them sign it is preferable though.

Both Shultz and Fink said that it is helpful to offer current employees the employer-paid mediation process in return for their signing the waiver. That can be useful if an employee fights the waiver later in court. If the employee refuses to sign the waiver, you can let him/her know that mediation will not be an option. “If employees trust you and think you are an honorable company,” Shultz notes, “they will agree to the resolution process.”

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