Is Your Dealership Taking Advantage Of Employment Arbitration?

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Many dealerships try to reduce the risk of high-dollar litigation and runaway jury awards by invoking mandatory arbitration for their applicants and employees. Employees who think that they were paid or treated unfairly are then required to bring the matter to an arbitrator rather than file a lawsuit in federal or state court. The arbitrator conducts a hearing and listens to both parties and their witnesses, just as a jury would in a lawsuit.

But unlike a jury, the arbitrator can rely on his or her in-depth knowledge of employment law in reaching a decision, rather than the emotions and sympathies typically used by jurors to rule in favor of the employee. In the end, the arbitrator is more likely to reach the correct outcome under the law and is less likely to issue the kinds of awards that make the front page of your local newspaper.

While arbitration agreements have come under attack by plaintiffs' attorneys and the National Labor Relations Board, we have had recent success enforcing them for many of our dealership clients, even in states where arbitration is traditionally disfavored. In doing so, we have been able to prevent employees from bringing claims that they were treated unfairly (although perhaps not unlawfully) in front of sympathetic juries. Moreover, by invoking arbitration, we have been able to make employees bring their claims on an individual basis and have prevented them from bringing costly and time-consuming class and collective actions.

Given these recent decisions, it may be time to consider whether arbitration is the appropriate way to handle claims brought against your dealership. If you already have an arbitration agreement in place, now is the time to update it to take advantage of recent legal developments.

What Are The Advantages Of Adopting A Mandatory Arbitration Policy?
1. Arbitrations can expedite the resolution of employee claims. They can usually be completed within several months while litigation normally takes a couple of years.

2. It has the potential to be less costly than litigation. Because discovery is more limited than in a lawsuit and can be expedited, attorneys' fees can often be reduced. One federal judge, who deals with employment-related lawsuits on a daily basis, has written: "...our current legal system for resolving disputes is losing the respect of the public and is rapidly approaching failure...The arbitral process...nearly always exceeds the judicial process in speed, efficiency, and in expense. We should view it not with suspicion but with relief. Arbitration and other alternative methods of dispute

view it not with suspicion but with relief. Arbitration and other alternative methods of dispute resolution provide for ordinary citizens and businesses what our court system no longer produces with any regularity: Affordable, speedy justice."

3. It avoids the unpredictability of a jury trial. Cases are decided by professionals who are familiar with employment law rather than by a group of jurors who are almost always more likely to relate to the employee than to a company. Arbitrators are trained to base their decisions on legal principles rather than emotion.

4. It is generally more confidential than the court system. Lawsuits are a matter of public record. Arbitrations are not.

5. It may prohibit employees from pursuing class or collective actions. While the current administration continues to take the position that class-action waivers in arbitration agreements violate the National Labor Relations Act, the overwhelming majority of federal courts to have considered the issue have held that it does not. In fact, in the last year, four different federal appellate courts held that class action waivers are enforceable in arbitration agreements used for employment disputes.

What Are The Disadvantages?

1. Some employers worry that they may experience an increase in claims and arbitrations if they make it easier for an employee to take a case to arbitration. But there are no studies that have shown this to actually be the case, and it has been our experience that arbitration policies do not increase the number of complaints filed.

2. Plaintiffs' attorneys realize that most employment claims are covered by insurance and insurance companies do not like to spend money to defend claims. These attorneys also know that whether they are in court or in arbitration, even if they have a weak case, if they can run up the defense costs by filing motions, the insurance company will eventually cry "uncle" and settle the case. More and more plaintiffs' attorneys are learning this trick, increasing the time it takes to resolve a claim and adding substantially to the cost of processing arbitration claims.

3. In court, employers often prevail early in the proceedings without going to trial by filing a motion for summary judgment. Judges with crowded dockets are not at all reluctant to grant such motions and dismiss the case where it is clear that the employee cannot prevail at trial.

Arbitrators, however, appear to be far less inclined to dispose of a case on such a motion. Some feel that the aggrieved employee is always entitled to his or her "day in court" even if the case is weak or non-existent. It is also possible that the reluctance to throw out a case is due to the fact that it is not in an arbitrator's financial interest to dispose of a case without a full hearing.

4. There is a risk that arbitrators might ignore the facts and dispense their own idea of justice, despite what the law says. Once an arbitrator makes a decision, it is very difficult to convince a court to reverse it. Therefore, it is important to take great care in the selection of the arbitrator.

5. Employees and applicants presented with an arbitration agreement may well be suspicious and reluctant to sign. Therefore, it is important that employees understand that the policy does not prevent them from pursuing any legal claim that they might have or deny them any compensation that they might be entitled to. It simply moves the resolution of those disputes to a different and, we believe, a more efficient forum.

6. Because the law in this area is still developing, the courts may, in future decisions, restrict arbitration of some kinds of employment claims and could hold some arbitration agreements to be invalid. Therefore, your arbitration agreement should be drafted very conservatively to reduce the likelihood that a court would find it to be unfair to employees. It should also be reviewed periodically to ensure that it remains in compliance with the developing law.

Our Advice
In our judgment, the pros outweigh the cons for most employers, and especially for dealerships. While an arbitration policy will not solve every employee-related claim, and while there are still some unanswered questions about mandatory arbitration, an arbitration policy is an effective means of resolving employment claims without the expense and uncertainty of a jury trial.

Studies have confirmed that jurors have a bias in favor of plaintiff employees in employment cases. Although it is possible that the law might change in the future, community attitudes probably will not. Most employers would be well advised to take this opportunity to ensure that at least some claims will not be decided by juries.

If you have questions about whether an arbitration agreement is right for your dealership, or if you need to update your arbitration agreement to take advantage of recent developments in the law, let us know.

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