Is It Time For You To Adopt An Arbitration Policy?

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When you fire an employee, there is always the concern that your termination decision will end up under the microscope of litigation – the human resources equivalent of Monday-morning quarterbacking. But instead of having that employment dispute resolved in a courtroom, you may want to consider adopting an arbitration policy that substitutes an arbitration hearing for a courtroom trial.

When you go to arbitration, your case will generally be tried before a single arbitrator, as opposed to a judge and jury. The arbitrator typically is a highly qualified and experienced attorney or retired judge, who is sworn to apply the law in a fair and impartial manner. While no dispute-resolution system is perfect, arbitration of employment disputes has a lot to recommend it.

Leveling The Playing Field
The idea that employment disputes should be resolved in a courtroom is a relatively recent phenomenon. The Civil Rights Act of 1964 ushered in the modern era of anti-discrimination laws. But with limited remedies the impact on litigation was softened somewhat. The flood of lawsuits effectively started in 1991 with the amendment of the 1964 Civil Rights Act to allow for jury trials in most discrimination, harassment and retaliation cases. And it's not only large employers who are hit with lawsuits. The most common targets are employers with between 15 and 100 employees.

From an employer's perspective, going to court to litigate an employment dispute has significant disadvantages: the process is expensive, slow, time consuming and disruptive, and is often an ineffective way to resolve the claim. Litigation is often the classic "no win" proposition. When faced with a lawsuit, your options are to spend money to settle, or spend money to defend the case with no guarantee of result.

If an employer is unwilling to settle the claim (because the claim is totally groundless, the employer is concerned about the precedent settlement would set, or some other reason), the employer either pays its attorneys a great deal of money and wins, or pays its attorneys a great deal of money and loses, which in turn results in paying even more money to the employee and his attorney. The cost of defending a simple discrimination case is rarely less than $100,000, even if the employer "wins." Employers choosing to litigate claims also face a disadvantage in the courtroom because most jurors have a natural sympathy for the employee asserting the claim. The result is the employer faces an uneven playing field in the courtroom.

Many employers have attempted to curtail costs and resolve disputes more efficiently by adopting arbitration policies, and taking employment claims to arbitration. Courts allow for the arbitration of employment disputes – provided the process protects the legal rights of employees and the arbitration policy is carefully drafted to comply with the law. Under a well-drafted arbitration policy, employees retain all protections they have under the law. They can still assert all claims available under the law. The employer typically pays most of the cost of the arbitration process, yet still saves money over litigation.

The most common way to implement a policy is to publish it in your employee handbook, and have employees either sign or initial their consent to the arbitration policy. The policy can be either voluntary or mandatory. The arbitration process can also be established through individual employment contracts. Some employers include an arbitration agreement as part of their written application for employment.

Getting It Enforced

While many employers have embraced arbitration of employment disputes, there are opponents to the idea of arbitrating rather than litigating. The principal opposition to employment arbitration comes from plaintiff attorneys who file lawsuits against employers. They commonly challenge the enforcement of arbitration policies, and an employer who is served with a lawsuit in which the employee/plaintiff is subject to an arbitration policy may have to engage in some legal wrangling to ensure that the lawsuit is dismissed and the arbitration agreement is enforced. Because the law generally allows, and even favors, arbitration, courts normally enforce the policies, but they must be properly drafted to include all the necessary safeguards.

For most employers, an arbitration policy can be of great value in helping reduce the costs and risks of employment disputes. If you want to explore adopting an arbitration policy for your company, give your Fisher Phillips attorney a call.

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