Arbitration Can Save Time and Money

Insights
5.01.11

As American businesses slowly emerge from the worst downturn since the Great Depression, employers should steer clear of roadblocks that can undermine their progress.

One such roadblock is employment litigation. Growing numbers of employers are avoiding this roadblock by implementing policies that substitute an arbitration hearing for a courtroom trial.

Litigation Takes Its Toll
It was only in recent decades that large numbers of employment disputes began migrating to courtrooms. The era of employment litigation kicked off with the Civil Rights Act of 1964. Discrimination lawsuits were decided without a jury until 1991, when a change in the law allowed plaintiffs to seek jury trials. This resulted in an explosion of employment cases. Plaintiffs' lawyers preferred trying cases before a jury rather than a judge, based on the belief (let's face it – the reality) that it's easier to win a jury's sympathy for a plaintiff-employee than for a large corporate employer.

For employers, going to court is almost always a costly and ineffective way to resolve employment disputes. The process is time-consuming and disruptive, and a simple discrimination lawsuit can easily cost an employer more than $100,000, even if the company "wins." And the tendency of jurors to sympathize with employees puts employers at a disadvantage in virtually any courtroom.

Arbitration To The Rescue
By the late 1990s, having experienced the harsh courtroom environment, many employers started turning to arbitration to trump the wild card of a runaway jury.

In arbitration, cases normally are tried before a single arbitrator, rather than before a judge and jury. The arbitrator typically is a highly qualified and experienced attorney or retired judge, who is sworn to apply the law fairly and impartially. The arbitrator also is required to apply the law in the same way a judge in a courtroom does.

Arbitration offers employers many advantages. For one, it generally consumes significantly less time than a trial does. A typical employment case can drag on for years in the court system. While there is no guarantee as to how long it takes to get a case through arbitration, it almost always is less than the court option.

Then there's the cost factor, which is more crucial than ever during these challenging times. While employers typically pay all of the cost of the arbitration process (with the exception of the employee's attorney), employers generally will spend less than they would if they were forced to litigate the same case in a courtroom. Most arbitrators charge an hourly or daily rate and an arbitrator's fees in a simple, single-plaintiff arbitration usually start around $10,000. Even with this cost, employers tend to save at least the equivalent cost of the arbitrator through the more efficient process that arbitration offers.

But perhaps most importantly, arbitration saves the company the risk of a runaway jury that might award high punitive damages and damages for emotional distress. While juries frequently award hundreds of thousands of dollars for emotional distress, arbitrators generally won't add much for such "soft damages." Arbitration decisions remain private, but it is widely perceived that employers win more often in arbitration and awards are smaller.

It should be pointed out that the arbitration process is in no way "rigged" to favor employers. The law ensures that the process protects the legal rights of employees, who still can assert all claims available under the law.

Arbitration is also cost effective because the arbitrator's decision is almost always final and binding. Of course, should the arbitrator exceed his or her jurisdiction or authority, either party may file a petition to vacate, amend or correct the arbitrator's award in a court of competent jurisdiction. Such claims are very difficult to establish and are infrequently filed.

Overall, arbitration serves both employers and employees well, throughout the country and across the spectrum of business and industry.

Establishing An Effective Arbitration Policy

For employers who have embraced the value of arbitration in a potential employment-related dispute, the first question might be, "What is the best way to set up an effective arbitration policy for my company?"

The most common way to implement an arbitration policy is to publish it in the employee handbook. Companies that take this approach should have employees sign for receipt of the handbook *and* sign a separate acknowledgement that the policy applies to them.

The policy can be either voluntary or mandatory. The U.S. Supreme Court ruled in 2001 that employers can require employees to take all employment-related disputes to arbitration rather than to court. In overturning the 1999 decision of the U.S. Court of Appeals for the 9th Circuit, the Supreme Court stated that "there are real benefits to arbitration in the employment context, including avoidance of litigation costs." *Circuit City Stores v. Adams.*

Nevertheless, it's usually in an employer's best interest to make arbitration policies voluntary, and to allow employees to opt out if they so desire, to avoid the sense that the policy is being forced on

allow employees to opt out if they so desire, to avoid the sense that the policy is being forced on them. Most will not see any need to opt out.

The policy should include the procedure that will be followed if arbitration is required, and should specify the guidelines for selecting an arbitrator. Generally, you can ensure getting a highly knowledgeable and skilled arbitrator by starting with a list from the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association (AAA) and requiring that those persons on the list be, for example, retired state or federal court judges, or attorneys who have practiced at least 20 years in employment law and have an AV Martindale-Hubbell rating.

The policy also should include pre-arbitration procedures for discovery and pre-hearing motions. For example, both sides can be allowed to conduct discovery, including taking depositions. Your policy can limit these procedures (e.g., allowing attorneys to conduct written discovery, but not take depositions), but such limits take away some rights from the employee and open the door to possible court challenges down the road.

To make an arbitration policy binding requires that employees have the same substantive rights and remedies as they would if they were making the case to judge and jury. So, if the employee prevails, the arbitrator could order the company to pay the employee's attorney's fees if the substantive law under which the claim is brought allows for such a recovery.

You can establish an arbitration policy that covers every employee, or you can pick and choose the employees to be covered. For example, some businesses implement arbitration provisions only for high-level employees who have employment contracts. In such cases, the arbitration policy typically becomes part of the employment contract.

Even if your human resources department is highly skilled it's not a good idea to have your HR department or someone else in the company write an arbitration policy. This is a legal document. To effectively and properly implement an arbitration policy, legal counsel should always be involved.

Pushback Can Derail Best Interests

It's no surprise that plaintiff attorneys don't like arbitration. There have been a number of cases where plaintiff attorneys have challenged arbitration outcomes, claiming that the outcomes were unconscionable and that the case should be tried in front of a jury. Sometimes these tactics are successful and the arbitration process is derailed.

Even some employers resist implementing arbitration provisions. Their thought is, "For me to have a binding arbitration provision, I'll still have to pay for the entire cost of an arbitrator." So they decide to live with the risk of a lawsuit, and the resulting jury trial, even though it could cost them millions of dollars.

In short, employers could be putting their companies at risk if they don't at least consider implementing an arbitration clause.

The Bottom Line

American businesses are getting hit with more and more rules and regulations in the wake of the Great Recession. Many of these rules will cost your business money. Because of this, it's more important than ever to try to limit your exposure to employment litigation costs by implementing effective arbitration policies.

For more information, contact the author at JHolland@fisherphillips.com or 816.842.8770.

Related People

James R. Holland, II
Regional Managing Partner
816.842.8770
Email