

IS YOUR DEALERSHIP TAKING ADVANTAGE OF EMPLOYMENT ARBITRATION?

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You may have recently heard something about arbitration agreements in the news, and you might be wondering whether your dealership should do anything about it. Some quick background: over the last decade, the use of arbitration agreements in the workplace has come under close scrutiny. The National Labor Relations Board (NLRB) challenged the legality of class action waivers, a commonly used provision in arbitration agreements that requires potential plaintiffs to bring claims on an individual rather than a class-wide basis. Meanwhile, on the heels of the #MeToo movement, politicians have sought to exclude sexual harassment claims from the private arbitration forum.

Still, arbitration agreements have largely survived the onslaught. In fact, just a few months ago, the U.S. Supreme Court held that class action waivers in employment arbitration agreements do not violate the National Labor Relations Act (NLRA) and are, in fact, enforceable. Likewise, while states such as New York have made every effort to block employers from arbitrating sexual harassment claims, federal law still permits the arbitration of all manner of employment disputes, including discrimination and harassment claims.

Given these developments, it may be time to consider whether your dealership is taking full advantage of employment arbitration. Of course, arbitration is not the right fit for every dealer. Let's consider some of the pros and cons of employment arbitration.

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WHAT ARE THE ADVANTAGES OF ADOPTING A MANDATORY ARBITRATION POLICY?

There are four main advantages to arbitrating workplace disputes:

1. Arbitration can expedite the resolution of employee claims. While litigation normally takes a couple of years, an arbitration may be completed within several months.
2. Arbitration 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.
3. Arbitrations are generally more confidential than the court system. Lawsuits are a matter of public record; arbitrations are not.
4. Arbitrations may be used to deter class and collective actions against the dealership. Indeed, following the Supreme Court's recent decision, employers may expressly include provisions in arbitration agreements that require employees to bring claims on an individual basis, and prohibit employees from filing or otherwise joining employment class actions.

WHAT ARE THE DISADVANTAGES?

At the same time, there are some disadvantages to take into account:

1. Employers can often prevail early in court proceedings by filing pretrial motions and convincing a judge to dismiss the case well before it goes to trial. Many judges with crowded dockets are eager to grant such motions when it is clear that the employee cannot prevail at trial. Arbitrators, however, are usually far less inclined to dispose of a case on such a motion. Some feel that the aggrieved employee is always entitled to their "day in court," even if the case is weak or non-existent. Also, it is not in an arbitrator's financial interest to dispose of a case in the early stages, as they are generally paid more if the case proceeds to a full hearing.

2. 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 as the wrong decision can have grave consequences.
3. 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 to which they might be entitled. It simply moves the resolution of those disputes to a different and—we believe—more efficient forum.
4. Because the law in this area is still developing, the courts may, in future decisions, restrict arbitration of some kinds of employment claims. They 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

You should at least consider the benefits of implementing a mandatory employment arbitration policy within your dealership. Whether arbitration is ultimately best for your dealership depends on a number of factors, including your organization's culture and size.

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, reach out to any member of the Fisher Phillips [Automotive Dealership Practice Group](#).

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