The Trend To Toss Arbitration: Is The Practice Past Its Prime?

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Is arbitration even worth it anymore? In the recent past, most employers would have said "yes" without a second thought. Curiously, however, some of the Nation's most prominent companies have recently been moving away from this practice and ending mandatory arbitration policies that had been in place for over a decade—begging the question of "why now?" Based on this sudden change, it's important to make sure you understand the reasons behind this trend, the pros and cons of arbitration itself, and the upcoming potential changes in the legal landscape to look out for.

What Is Arbitration And Can We Still Require It?
Arbitration is a valuable alternative to litigation. In short, agreements to arbitrate require the parties to pursue their claims before a private arbitrator (such as a retired judge) outside of the normal court system. By doing so, the parties are often able to keep the matters confidential and avoid the delays and costs traditionally associated with bringing claims through the courts. As a result, many employers often choose to require their employees to consent to mandatory arbitration as a standard condition of their employment.

With few exceptions, these employment arbitration agreements are permissible across the country. The Supreme Court has consistently upheld the validity of mandatory agreements, and local federal courts have generally followed its lead and applied a permissive standard when ruling on their enforceability. In one of the bigger victories in recent memory, the U.S. Supreme Court upheld the validity of class action waivers in last May's *Epic Systems* decision, permitting employers to require workers to bring their arbitration claims on an individual basis and blocking class arbitration claims. And just a few weeks ago, in its *Lamp's Plus* decision, the Court found that ambiguity in an agreement does not give rise to consent to class arbitration, making individual arbitration the default result. Given the clear benefit that can be found in arbitration generally and class waivers specifically, and given the receptive nature that courts have provided for enforcing such agreements, it should be a no-brainer to adopt them as widely as possible, correct?

Why Are Companies Moving Away From Arbitration?
Surprisingly, however, in the wake of this success, some high-profile companies have started to move away from mandatory arbitration agreements—the exact opposite of what you'd expect. The reason, seems to be two-fold.

Public Pressure In Wake of #MeToo Movement

Most notably, the recent the rise of the "#MeToo Movement" galvanized substantial swaths of the population against the practice after it was revealed that arbitration agreements—and the confidentiality associated therewith—kept victims of sexual harassment silent by blocking them from the public court system and sweeping their claims under the proverbial rug. Enraged and emboldened, social activists worked to shame companies for their use of the agreements and demanded an end to the practice.

Visibility of these disputes was high and several prominent companies soon found themselves in the crosshairs. For example, a group of Harvard Law students organized a protest against one of the Nation's largest law firms for its use of the agreements—threatening to deprive them of some of the industry's top talent. Around the same time, Google saw similar social outcry after over 20,000 employees worldwide orchestrated a coordinated "walk-out" to protest the company's alleged misuse of the agreements to stifle harassment claims. In the weeks and months following, both organizations agreed to change their policies, with other large companies quickly following suit in a presumed attempt to avoid the onslaught of social ire.

The Rising Cost Of Enforcing Arbitration Agreements

Apart from the negative publicity, other companies are choosing to forego enforcement of their arbitration agreements for economic reasons. Recently, employers have continued to find themselves mired in costly disputes over mundane decisions related to the arbitration agreement, such as where the arbitration should be held or who the arbitrator should be—costing unreasonably high amounts of time and money even before the parties start arguing about their actual claims.

Even when companies get to the actual arbitration though, they then find themselves stuck with the bill just for the arbitrator's time—sometimes as high as $50,000. Some employers who found victory with class waivers now find themselves barraged with dozens or hundreds (or even thousands) of individual claims, and are stuck footing the bill on the defense of all of these claims. And because choosing the arbitrator is generally done by both parties, parties report that arbitrators have a tendency to "split the baby" on the claims themselves, lest they run the risk of upsetting either side and jeopardizing their own future business. In short, some companies are coming to the realization that, in many cases, arbitration just isn't worth the hassle.

So What Should We Do?

As the adage goes, however, you should never throw the baby out with the bathwater. Arbitration agreements can still be a valuable tool to protect the interests of both parties. A few bad apples aside, in many cases, the confidentiality of arbitration can act as a shield for employees who prefer discretion and wish to cultivate a prominent career without having the looming shadow of past litigation forever tied to their names.

Accordingly, it's important to take note of a few things when determining whether arbitration agreements are right for your company. First, arbitration agreements don't have to cover all claims under the sun. You could easily choose to have an agreement in place for relatively banal claims, like

under the sun. You could easily choose to have an agreement in place for relatively banal claims, like wage and hour disputes, while still allowing employees to bring more sensitive claims, like harassment, in court. By doing this, you can show their employees that you understand, and firmly oppose, the past misuses of arbitration agreements that the #MeToo movement brought to light.

Second, arbitration agreements can always be drafted to give employees a choice. A big part of the stigma with these agreements comes from their mandatory or forced nature. Making arbitration voluntary, and explaining the pros and cons to employees openly, can eliminate this problem and make sure that both parties understand, and are satisfied with, the choice.

Conclusion

In short, you have a multitude of options when determining which form of arbitration agreement, if any, is right for your company. Context is important, and what's right for one company may not be right for another. As debate over the issue picks up, however, it's important to keep up to date on where the legal landscape stands.

Congress is currently considering legislation, known as the Forced Arbitration Injustice Reversal Act, which aims to potentially extinguish forced arbitration altogether. And while passage is unlikely in the current political climate, it's good to keep in mind that this is an issue on Congress's radar and one that may be subject to change in the near future—a fact that you should take into account as you move forward in crafting, amending, or eliminating your company's arbitration policies.

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