A Case For Confidentiality: Why Recent Arguments Against Arbitration Anonymity May Be Misguided

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The assault on arbitration is old news. Recently, however, courts and commentators alike have seemed to stake out a new area for contest in the ongoing back and forth debate about this valuable litigation alternative: confidentiality clauses. For decades, confidentiality clauses have been a staple of most arbitration agreements, as well as most contracts. So as proponents of excluding confidentiality clauses argue that these clauses tend to "silence employees" or "hide wrongdoings" begin to emerge at both the national and state level, we should take care to critically examine these arguments and remember that confidentiality clauses have been the status quo for good reason.

To do that, however, we first need to understand why these arguments are being made, why there may still be good reason for confidentiality clauses despite these arguments, and how to account for these dueling perspectives in our own practices moving forward.

Why Are Confidentiality Clauses Suddenly Being Challenged?
To understand the controversy surrounding confidentiality clauses in arbitration agreements, we first have to understand the arguments against them. Most notably, some have argued that confidentiality clauses in arbitration agreements tend to help hide past employer wrongdoings. For example, this argument was seen in the Washington case *Zuver v. Airtouch Communications*, where the court reasoned that a confidentiality clause "hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations" which, themselves, would be confidential.

Similarly, some have also argued that these clauses make discovery more expensive for employees overall. This was the position recently taken by a California court in *Ramos v. Superior Court*, where it reasoned that a confidentiality clause "would prevent an employee from contacting other employees to assist in litigating (or arbitrating) an employee's case." According to the court, "such a limitation would not only increase an employees' costs unnecessarily by requiring them to conduct depositions rather than informal interviews, it also defeats the purpose of using arbitration as a simpler, more time-effective forum for resolving disputes."

Lastly, at least one case has even argued that confidentiality clauses in arbitration agreements violate employee rights under the National Labor Relations Act by preventing individuals from discussing the terms and conditions of their employment, such as those that led to the arbitration

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in the first place. This argument seems particularly doomed for failure in light of the Supreme Court's recent *Epic Systems Corp. v. Lewis* decision. Ultimately though, this argument is still being fleshed out in an on-going case involving Pfizer, Inc. before the National Labor Relations Board.

All in all, these arguments always tend to take on a central theme — namely, that confidentiality clauses in arbitration agreements disproportionately favor employers and make the arbitration process, as a whole, less favorable to employees than the traditional court system. The real question is: "Is that true?"

Is The Case Against Confidentiality Actually Warranted?

In short, probably not. Ultimately, a likely reason for these new attacks could be the recent emergence of the #MeToo Movement, where it came to light that certain bad actors had been using arbitration agreements, and the confidentiality provisions therein, to silence employees while sweeping a host of sexual harassment claims under the proverbial rug. And while the #MeToo Movement was certainly laudable for this scrutiny of bad actors, we should be always cautious about unwittingly losing the forest for the trees while in the pursuit of worthwhile goals.

First and foremost, confidentiality clauses have always served the interests of both sides by preserving closely held rights to privacy. From employees, this includes the right to shield their past allegations from the prying eyes of disapproving prospective employers who might think twice (albeit illegally) before hiring an applicant who had sued their prior boss. It also includes the right to protect against disclosure of the sensitive information that may come out during the course of an arbitration, such as an employees' private medical records.

The importance of this was shown in the Colorado case, *A.T. v. State Farm*, where the court reasoned that "because an arbitration record is potentially public in nature and plaintiff failed proactively to preserve it as confidential, we agree that the plaintiff's medical information disclosed in the past arbitration proceeding was not confidential." Indeed, in that case, the existence of a confidentiality clause could well have protected the individual's medical records from being disclosed and used against them in a subsequent unrelated case.

Apart from that, confidentiality clauses actually do very little, if anything, to "hide past employer wrongdoings." In the majority of cases, complaints are still filed in court before the parties are ultimately ordered to arbitration – making the allegations themselves still part of the public record. Similarly, when arbitrations are complete, parties are often still required to return to court to confirm the outcome of the arbitrator's eventual decision. And as recent cases from both California and New York show, such as *Ovonic Battery Co., Inc. v. Sanyo Electric. Co.* and *Century Indemnity Co. v. AXA Belgium*, courts are generally unwilling to go against the "presumption in favor of access" to these arbitration decisions, making the outcomes also a part of the public record.

As a result, what limited "hiding" does occur in arbitrations is really no different than what has already occurred in traditional public courts for decades. Indeed, even in court, it's generally standard practice to enter into a protective order, wherein the parties agree to keep

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communications, documents, medical records, and other discovery matters confidential and away from prying public eyes. If matters are particularly sensitive, courts can also entertain requests to have records sealed. And even when matters ultimately settle in court, as they most often do, confidentiality clauses in the resulting settlement agreements are also the norm.

Consequently, when we step back and look at the matter objectively, we see that there's really nothing particularly uncommon or nefarious about the confidentiality clauses found in arbitration agreements in particular.

So Where Do We Go From Here?

Ultimately, despite the recent back and forth, confidentiality clauses in arbitration agreements are still the status quo and it is unlikely that that will change anytime soon. A few bad apples and exceptions aside, in many cases, the confidentiality of arbitration is no different than the confidentiality you'd find in most courts. And even when it's not, the benefits almost always flow both ways. However, for companies that want to potentially bolster the strength of their own confidentiality provisions against these recent attacks, here are a few tips to keep in mind:

- First, you can always include an express provision stating that employees are still entitled to the same relevant non-privileged information in discovery that they otherwise would be in a court of law. Although this is generally assumed in most arbitration agreements anyway, an express provision would likely help stave off the "access to past arbitrations" argument seen in Washington's *Zuver v. Airtouch Communications*
- Second, you can also include a provision announcing that employees are still able communicate with other witnesses or employees during the arbitration to help gather evidence. Again, while this is generally assumed, having an express clause to this effect could help against the "silencing" and "increased costs" arguments like those seen in California's *Ramos v. Superior Court*
- Third, feel free to include a provision letting employees know that they can still talk about protected work place discussions, such as "nothing in this confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment." Indeed, in the ongoing NLRB case against Pfizer, the employer pointed to just such a provision when defending against the claim that its own confidentiality clause perpetuated alleged violations of the NLRA.

Are these provisions always necessary? Probably not. In a lot of cases, these things go without saying. What works for one employer in one arbitration agreement may not work when placed in an entirely different context. As the split in authority over confidentiality clauses in arbitration agreements widens, however, it's important to know what the arguments are and how to defend against them — points to keep in mind as you move forward in crafting, amending, or eliminating your company's own confidentiality clauses and arbitration policies.

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