Does Your Dealership Arbitrate? Recent Developments in Workplace Arbitration Agreements

Insights
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Employers – and, in particular, car dealerships – have relied on binding arbitration agreements to resolve employment disputes for decades. Arbitration offers a confidential setting in which businesses can efficiently litigate delicate personnel matters, or so the thought went. But several developments in the last year may prompt your dealership to revisit your employment arbitration agreements.

The End of Mandatory Arbitration of Sexual Harassment Claims

Many employers adopted binding arbitration agreements specifically to resolve claims of sexual harassment. The arbitration setting kept lurid details of alleged sexual misconduct off the public docket, allowing both the accuser and the accused to maintain some sense of privacy over highly sensitive personal matters.

But employers are no longer able to mandate arbitration of sexual harassment claims. In February, Congress passed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act." This law amended the Federal Arbitration Act (FAA) to prohibit employers from unilaterally enforcing arbitration of sexual assault or sexual harassment claims. As a result, any employee subject to an arbitration agreement may now unilaterally choose to bypass the agreement and file sexual harassment claims in federal or state court.

This does not mean the end of employment arbitration – after all, the Act only applies to claims of sexual assault and harassment. It does, however, keep one of the more common employment claims out of arbitration and poses interesting dilemmas for arbitrating other claims.

For example, while the Act allows employees to opt-out of arbitrating a sexual *harassment* claim, it does not preclude employers from mandating arbitration of related sex *discrimination* or *retaliation* claims. In theory, employers may end up litigating the same facts in multiple forums with potentially contradictory results.

We are therefore encouraging dealers to revisit their existing arbitration agreements. Depending on the language of the agreement and the definition of covered disputes, it could be open to challenge. Some states – or judges – may not simply strike the harassment provision of an agreement, but instead invalidate the entire agreement based on substantive unconscionability. Dealers may

therefore choose to carve out harassment claims from arbitration, include a jury trial waiver for such claims, or end arbitration altogether.

Arbitration May Be Used to Avoid Class, Collective, and PAGA Actions

For years, the United States Supreme Court has made clear that parties may agree to resolve their disputes via individual arbitration rather than class or collective actions. In 2011's *AT&T Mobility, LLC v. Concepcion*, the Court held that the FAA prevented a state law that deemed class action waivers unenforceable from being applied. Then, in 2018's *Epic Systems Corp. v. Lewis*, the Court reaffirmed that the FAA requires courts to enforce collective action waivers in arbitration agreements. These decisions gave employers a critical tool in defending costly class and collective active lawsuits.

But there remained a work-around in California. There, employees could bring representative actions under the state's Private Attorneys General Act (PAGA) that had a similar effect as a class or collective action, but could not be made subject to arbitration.

However, this past June, the Supreme Court again stepped in to reaffirm the right to enforce individualized arbitration. In *Viking River Cruises, Inc. v. Moriana*, the Court held that an employer may compel individualized arbitration of an underlying PAGA claim. It also ruled that PAGA provides no mechanism for a court to adjudicate non-individual PAGA claims once an individual claim has been committed to arbitration.

The decision confirms one of the primary benefits of employment arbitration – particularly for large employers subject to class and collective action claims. Again, dealers should review their existing arbitration agreements to ensure that language requiring individualized arbitration conforms with what was endorsed by the Court in *Viking River Cruises*, and that the agreement includes a severability clause that would allow the employer to preserve the ability to arbitrate despite potentially problematic provisions. T

Arbitration Agreements Should be Kept Separate from Employee Handbooks

Those dealers that chose to utilize binding arbitration should also keep in mind certain principles to ensure the agreement is enforceable.

Just a few months ago, the Fourth Circuit Court of Appeals refused to enforce an arbitration agreement that existed solely within a dealership's employee handbook (*Coady v. Nationwide Motor Sales Corp.*). Indeed, as is common with most employee manuals, this dealer's handbook reserved the right to make and enforce new policies and to enforce, change, abolish. or modify existing policies as it determined necessary, with or without notice. Because the handbook gave the dealer the absolute right to modify its policies, the Fourth Circuit held that the arbitration agreement contained within the handbook was "illusory" and thus unenforceable.

Of course, there is a simple solution. While employers are free to include dispute resolution policies that provide for mandatory arbitration within their employee handbooks, they must also maintain signed arbitration agreements which serve as a stand-alone contract from which arbitration can be compelled.

In light of these developments, dealers are encouraged to revisit their current employment arbitration agreements with their workplace law counsel. Arbitration remains remain an efficient way to litigate most employment disputes. However, as the law continues to develop as to what *is* and *is not* subject to arbitration, dealers must ensure their arbitration agreements are up to date and enforceable.

Conclusion

We will continue to monitor workplace law developments as they apply to employers in the auto dealer industry, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney on our Auto Dealership Team.

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Matthew R. Simpson
Partner
404.240.4221
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