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#### Let's Arbitrate – or Not: Advantages and Disadvantages of Employment Arbitration

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California courtrooms are daunting to companies sued for discrimination, harassment, or other employment claims. Studies show that California employers face a higher level of exposure to employment claims than any other state. Headlines routinely report California juries returning multi-million dollar verdicts against employers.

Not all employment disputes, however, must be resolved in a courtroom. If an employer and an employee agree, they can resolve their dispute in arbitration. While it may seem self-evident that an employer would prefer arbitration over civil litigation in all cases to avoid the whims and prejudices of a California jury, in actuality arbitration is a mixed bag for employers. This article reviews some of those advantages and disadvantages.

#### What Is Arbitration?

Disputes in arbitration are resolved by a neutral third-party, the arbitrator, who hears and assesses the evidence just like a judge or jury would. Many arbitrators are former judges, although it is not necessary that arbitrators be former judges, or even that they be attorneys, so long as the parties agree on the arbitrator. The parties in an arbitration have the opportunity to present witnesses and other evidence, just as they would in court.

While arbitration is a formal process, the rules and procedures are generally less formal than in court, particularly as it relates to the rules of evidence. Arbitrators are generally more lax with the admission of evidence, admitting hearsay and other evidence that would be excluded in a courtroom. Witnesses in arbitration testify under oath, just as they would in court. At the end of the case, the arbitrator issues a decision, which the winner can then seek to have converted into a civil judgment.

#### Arbitration Advantages for the Employer

**No "Runaway Jury" Award:** Arbitrators are usually former judges or retired attorneys, who are less likely than a jury to become inflamed by an employer's conduct and seek to punish the employer. Juries tend to bring more emotion and more collective anti-employer bias to their decision-making. As a result, arbitrators are typically less likely than juries to issue large punitive or emotional distress damages awards.

**Confidentiality:** Employment disputes often involve embarrassing facts, which the employer would prefer to keep private. One of the key advantages to arbitration for employers is the privacy it affords. Unlike court actions, arbitration proceedings and decisions normally do not become a matter of public record. Thus, if an employer were to lose an arbitration, it is less likely that other employees or plaintiffs' counsel would learn of the outcome and file copycat suits.

**Expedient, Convenient, Less-Expensive Forum:** Generally, arbitrations are scheduled, conducted, and concluded more quickly and less expensively than in court, especially since the State's budget crisis has lengthened delays in the courtroom. The reason arbitration is generally faster and cheaper is that arbitrators can cut through the red tape and procedures involved in court cases. For example, instead of resolving a "discovery" dispute through lengthy written motions, which is generally required in court, an arbitrator can resolve the dispute in a short conference call with counsel.

**Protection from Employment Class Action Litigation:** One of the biggest liability threats to employers is wage-and-hour and other employment-related class actions. A single employee can file a lawsuit seeking to represent a whole class of similarly-situated employees, many of whom would otherwise have no interest in suing their employer.

Employers can avoid class actions by having their arbitration agreements with employees contain class action waivers, which are enforceable if properly written. Plaintiffs' lawyers are much less financially incentivized to pursue a claim on behalf of a single employee, whose personal recovery may be small, than they are to pursue claims on behalf of a class of employees, whose potential recovery is exponentially higher. (Although beyond the scope of this article, while arbitration agreements can avoid class actions, arbitration

agreements may not be able to avoid claims under California's Private Attorney General Act ("PAGA"). PAGA actions bear many of the same characteristics as class actions.)

#### Arbitration Disadvantages

**Employer Pays for the Arbitrator:** Employers are generally required to pay all of the arbitrator's fees, which can be substantial. Many arbitrators have daily fees of \$5,000 or more, which in multi-day arbitration hearings can add up. Plaintiffs' lawyers rely on that expense to leverage settlements with employers.

**Unpredictability:** With a jury, one might expect that at least a majority of jurors will get it right, even if some jurors do not. In arbitration, all of your eggs are in one basket – the arbitrator's – and if the arbitrator gets it wrong, there is no safety net of another voice. Arbitration awards are appealable only in narrow circumstances, so there is typically no recourse when the arbitrator reaches the wrong result.

**Middle of the Road Awards:** The parties select the arbitrator. As a result, arbitrators likely feel some debt of gratitude to both sides. Perhaps as a result of this, or their desire not to send anyone home a loser, arbitrators are known for "splitting the baby" on their awards, resulting in no clear winner.

**Dispositive Motions:** Arbitrators are regarded as less likely than civil judges to grant dispositive motions (e.g., a motion for summary judgment) that would end the case in the employer's favor. Instead, arbitrators are more likely to allow the case to proceed to a full hearing.

#### The Last Word

For most employers, particularly those facing potential exposure to class actions, the advantages of arbitration outweigh the disadvantages. Employers who choose to implement arbitration agreements as a part of their risk management strategy should be certain the agreements comply with California law, or the agreements will be deemed unenforceable.

Should you have any questions regarding any of the above, or any other employment-related issue, please feel free to contact Rutan attorneys Edson McClellan or Kenneth Zielinski.

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