

insights

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23 tips for drafting employment arbitration agreements

In light of a critical U.S. Supreme Court decision affecting an employer's ability to enforce employment arbitration agreements, careful drafting is critical.

Arbitration agreements may be useful when an employee raises employment-related disputes during employment or after. Employers may want to consider an enforceable agreement that has such claims heard by a single, mutually-selected arbitrator to avoid class action litigation, jury trials, the higher cost of court litigation and undue delays that often result in the loss of witnesses and eroding recollection of events. These possible advantages may outweigh concerns about increasing arbitrator fees over the last decade.

The U.S. Supreme Court in [*Epic Systems Corp. v. Lewis*](#) ruled that arbitration agreements barring employees from filing or participating in class actions are enforceable, and that agreements subjecting employees to individualized settlement procedures subject to the Federal Arbitration Act (FAA) takes precedence over collective rights under the National Labor Relations Act. As long as the agreement is fair to both parties and not unconscionable, it is enforceable.

Although the California Supreme Court in 2014 endorsed this view based in [*AT&T Mobility, LLC v. Concepcion*](#), California recently enacted a law effective January 1, 2020 prohibiting an employer, "as a condition of employment," from requiring an applicant or employee to waive the right to file a complaint before any state or governmental agency or a civil action. A California employer may not discriminate or retaliate against an applicant or employee who refuses to sign an agreement waiving any forum or procedure in any governmental agencies or civil action. While the California law would otherwise prohibit class action waivers, it is not intended "to invalidate a written agreement that is enforceable under the Federal Arbitration Act (FAA)."

Although the U.S. Chamber of Commerce has now sued the State of California seeking to nullify the law, that litigation may take years to resolve. In the interim, employers and their counsel need to carefully consider options in drafting arbitration agreements that address the new law that may help in compelling a court complainant to arbitrate the claims. Anyone creating, revising or reviewing agreements to arbitrate employment disputes should consider the following:

1. The agreement should be a separate document, even if the Employee Handbook repeats the same language.
2. The agreement should state that it is subject exclusively to the FAA, and preempts any state arbitration law(s).
3. The agreement should, in simple and clear language, waive the employee's right to file a civil action and the right to a jury to hear any dispute.
4. The agreement should not waive the employee's right to file a complaint with the EEOC or state discrimination agency, the NLRB or any other governmental agency (including claims for unemployment and workers' compensation).
5. The agreement should subject any post-administrative agency complaint or claim to individual arbitration before a single, mutually-selected neutral.
6. The agreement should state that the employer is responsible for all costs of the proceeding, except for those that the employee would otherwise bear in a civil proceeding, such as filing fees.

7. While the agreement should waive the right to file or participate in a civil court class action, employers that have larger workforces should consider providing that when a dispute arises, the parties can mutually agree to class arbitration. In appropriate circumstances, allowing a qualified arbitrator to decide issues affecting numerous current and former employees in a single proceeding may be far less expensive than defending hundreds or even thousands of individual arbitrations involving the same dispute.
8. If included in the agreement, class arbitration should be considered before choosing an arbitrator to ensure that the selected neutral has the requisite experience with class action law and procedures. Selection should be limited to a retired judge.
9. To ensure fairness, the agreement should allow for pre-hearing written discovery and depositions—perhaps in limited number for each side—of key witnesses. Prior approval of the arbitrator should apply to any limitations or restrictions affecting the procedures of the hearing itself, such as how long after the selection of the arbitrator the hearing must be held or the number of days of the hearing.
10. Full disclosure of the organization that will provide a list of neutrals and the rules that apply, by reference or attachment, also ensures fairness. Two applicable websites are provided by [JAMS](#) and the [American Arbitration Association](#). The agreement should note that these rules are available from human resources.
11. The agreement should state that the arbitrator is to issue a written award that, subject to limited appeal rights in the FAA, is final and binding.
12. The agreement should specify that the arbitrator may consider and award all forms of relief available in a civil action (including attorneys' fees), except those that have been waived.
13. The agreement should be subject to the substantive laws of the state in which the employee works. The drafter should determine whether requiring the arbitration to be held in a state other than where the employee works complies with state law. The California Labor Code, for example, renders an agreement unenforceable if it subjects the dispute to the laws or forum of a foreign state unless the employee was represented by counsel in negotiating the terms.
14. When a dispute arises, either party may need to seek injunctive relief in court for interim protection of individual or employer interests. For example, the employee may want to prevent the employer's efforts to blacklist him in the industry and the employer may want to prevent the employee from using its trade secrets. Carving out the right to seek an injunction typically will not render the agreement unenforceable.
15. The agreement should state that any dispute regarding the agreement is valid and enforceable, and whether the dispute is covered by the agreement is to be decided by the arbitrator. The U.S. Supreme Court recently so held in [Henry Schein v. Archer & White Sales, Inc.](#)
16. At least in California (unless state courts decide otherwise), the agreement should state that entering into it is **not** a condition of employment and that the employer will not deny the applicant or employee the job opportunity based on whether or not the agreement is signed. In many other states, employment may be conditioned on the employee's signing of an agreement to arbitrate disputes.
17. The employee should specifically recite that they are entering into the agreement voluntarily and without coercion, and that they have had an opportunity to read and understand the agreement and to have any questions answered before signing.
18. In many jurisdictions, employment or continued employment alone may be adequate to satisfy the need for legal consideration in enforcing the agreement. In other jurisdictions, including California, where signing the agreement may not be a condition of employment, a small payment that is not otherwise an employee benefit may be adequate consideration and an incentive to sign the document.
19. Employees sometimes claim that they did not understand what they were signing. An arbitrator may refuse to enforce an agreement filled with legalese, long paragraphs and complex sentences. Short sentences in plain language that can be understood and explained are essential.
20. The agreement should be printed in large enough font size to be readable. The California Supreme Court this year recommended 12-point font as a minimum requirement.
21. Employees who have signed even carefully worded agreements often claim that the employer presented the agreement in an orientation packet along with numerous documents, or presented it to sign without adequate time to read or review. Avoid such circumstances; they raise a red flag and may lead an arbitrator to refuse enforcement.
22. Employees whose first language is not English sometimes claim that they could not read or understand the agreement they signed. Making the agreement available in the employee's native language is an inexpensive solution that will avoid such claims.

23. Employers are increasingly considering the option of pre-arbitration mediation when the parties agree. Where circumstances of the dispute make early resolution likely, a single day with a qualified mediator—with or without an informal exchange of documents—may settle the claim. Few court decisions, if any, have addressed the fairness of mandating the mediation, or whether the employer must pay the mediator's fees or if they may be split.

Addressing each of these elements when drafting arbitration agreements will enhance fairness and the prospect of enforcement of the agreement.

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