

Solution to Class Action Wage Claims: Arbitration

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Across the nation and in Indiana, class action wage claims are exploding. And why not? Federal and Indiana law provide for awards of two or three times the amount of unpaid wages, plus attorneys' fees for successful plaintiffs. If an employee has a claim for even nominal wages, his or her lawyer has an incentive to bring the matter as a class action, as doing so significantly increases the potential attorneys' fee award. The class action strategy is ideal for wage cases, which often focus on an employer's compensation system as a whole rather than on an individual employee's unique situation.

How do employers deal with the growing problem of class action wage claims? Some are turning to mandatory arbitration agreements with employees. An agreement to arbitrate is a written agreement between an employer and an employee that requires employment disputes to be decided by an arbitrator selected by the parties rather than by a judge or jury in court. The parties generally are able to retain an arbitrator with a background in employment law. The process is intended to provide for more efficient resolution of disputes.

Historically, there has been much confusion over whether/to what extent arbitrations may be brought as class actions. Class action arbitrations have been permitted under some circumstances, and the American Arbitration Association, a well-known arbitration service, has developed rules for class arbitrations. Some employers have adopted arbitration agreements that prohibit class arbitrations. Nationally, some state legislatures have expressed concern and have limited the use of arbitration in the employment context. In Indiana, arbitration seems to remain a favorable way to resolve employment disputes.

As far as arbitration is concerned, the last year has been good to employers. In April 2010, the U.S. Supreme Court concluded that two parties could not be forced to participate in a class arbitration because their arbitration agreement was silent on the issue of class actions. See, Stolt-Nielsen SA v. AnimalFeeds International Corp., U.S. Supreme Court Case No. 08-1198. In April 2011, the U.S. Supreme Court ruled that federal law prohibits states from conditioning the enforceability of arbitration agreements on the availability of procedures to bring an arbitration action as a class action. See, AT&T Mobility, LLC v. Concepcion, U.S. Supreme Court Case No. 09-893.

Practice Tip:

As things currently stand, employers may be able to reduce the risk of class action employment claims by entering into carefully drafted arbitration agreements with their employees. Whether an arbitration agreement is enforceable likely will depend on state as well as federal law, however, the following generally should be considered:

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- The agreement should be drafted in language the employee reasonably would be expected to understand.
- Consider requiring non-binding negotiation (or use of an internal grievance process) and/or non-binding mediation prior to binding arbitration.
- Require confidentiality of the arbitration process.
- Prohibit class arbitrations.
- Identify which claims are covered, and which are not (for example, you probably would not want to require arbitration of claims for injunctive or other equitable relief for breach of non-compete agreements).
- Decide whether you want state or federal law to govern, or some combination depending on this issue.
- Be reasonable as to location of the arbitration, responsibility of costs of the arbitration, discovery, etc., keeping in mind the difference between employer and employee bargaining leverage and resources.
- Do not exclude remedies allowed by applicable law.
- Consider using the American Arbitration Association or other service that has established rules and procedures that you may incorporate into your agreement simply by referring to them, but review the rules and procedures with legal counsel to determine whether desired changes should be considered before finalizing the agreement.
- Address how the arbitrator's award will be reviewed and enforced.

If our labor and employment attorneys can be of assistance in helping you consider and/or implement an arbitration program, please let us know.

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