

Recent Court Decisions Shine a Renewed Light on the Desirability of Employee Arbitration Agreements

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Some employers have embraced the use of employment arbitration agreements as a way to manage and mitigate the rising costs, risks and liabilities associated with employment-related claims. Historically, employment arbitration agreements require employees to present employment-related claims, such as employment discrimination, wrongful discharge, harassment, or claims for wages or compensation to an arbitrator, in lieu of proceeding to court. Plaintiff's lawyers have attempted, sometimes with success, to invalidate employment arbitration agreements. Consequently, some employers have become less willing to adopt them.

Recent court decisions significantly increase the enforceability of employee arbitration agreements, and also make enforceable a properly drafted waiver of an employee's right to file a class action in court. Such "class action waivers" in arbitration agreements may enable an employer to avoid the tremendous expense and potential liability posed by discrimination and unpaid wage class actions filed in the courts.

Increased enforceability of arbitration agreements. In *AT&T Mobility LLC v. Concepcion* (2011), the U.S. Supreme Court (USSC) struck down a line of California cases that had invalidated arbitration agreements on grounds of unconscionability because they contained class-action waivers that the California courts considered to be in violation of public policy. The USSC held that the Federal Arbitration Act (FAA) requires states to enforce such agreements. More importantly, the Court reaffirmed the principles that (1) state courts must comply with the FAA, and (2) state rules concerning alleged violations of state public policy may not avoid a duty to arbitrate.

More recently, in *Nitro Lift v. Howard* (2012), the USSC reversed an Oklahoma Supreme Court decision that had refused to enforce an arbitration provision in an employment contract because the contract contained non-compete provisions that the state court considered to be in violation of state public policy. The USSC held that the FAA required submission of the dispute concerning the noncompete to the arbitrator, notwithstanding the state court's determination that the provision violated state public policy.

In *Hatkoff v. Portland Adventist Medical Center* (2012), the Oregon Court of Appeals applied this deference to the FAA when it dismissed an employee's discrimination claim because of his failure to comply with a mandatory arbitration procedure in the employee handbook. The Court rejected the employee's claims of unconscionability because the arbitration process provided reasonable time limitations and made available many, but not all, of the rights that would be available to the employee in a court proceeding.

Waivers of class actions. In *American Express v. Italian Colors* (2013), the USSC held, in the context of a consumer class action, that explicit class-action waivers in an arbitration agreement were valid and binding, despite the claim that the cost of arbitrating an individual claim may be greater than the potential recovery. *Italian Colors* thus sets the stage for enforcement of class-action waivers in employment arbitration agreements. Federal courts



that have addressed the issue since *Italian Colors* have enforced class-action waivers in arbitration agreements. Most importantly for Oregon employers, the Ninth Circuit recently weighed in and dismissed a wage-and-hour class action because the plaintiff had signed an arbitration agreement containing a class-action waiver, *Richards v. Ernst & Young, LLP* [9th Circ., August 21, 2013]. A dissenting voice has come from the National Labor Relations Board, which held in *D.R. Horton* (2012) that class-action waivers violate employee rights to engage in "concerted activities" for their "mutual aid or protection." However, nearly every federal court that has considered the issue has rejected the NLRB's view.

What should employers do? The cases point to the importance of preparing and properly implementing a carefully drafted arbitration agreement. The waiver of the right to bring class or collective actions must be explicitly stated and perhaps highlighted in the agreement. The agreement must not contain unreasonably short time limits or unreasonable limitations on remedies that could be argued as unconscionable. And implementation of employment-arbitration programs should be managed in ways to avoid claims that employees or job applicants were improperly advised of their rights concerning the agreement, or were forced to sign under duress.

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