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Mandatory arbitration can work for employers and employees

"Your employment jury trial scheduled next week has been bumped because of an ongoing criminal trial," the attorney told his client, an employee suing his employer.

Waiting 14 months was not enough. All that money and time getting ready for trial: wasted.

What if the employee's claim had been arbitrated? Studies confirm that arbitration would have: (1) resolved this claim cheaper and faster for the employee and employer, (2) decided liability and damages like a courtroom decision, and (3) helped to preserve a positive working relationship between employee and employer.

Arbitration — a binding decision by an expert neutral decision-maker through a more informal process in an office setting — has become an increasingly popular forum to resolve employment disputes.

A University of Michigan Journal of Law Reform study of 21 major corporations found arbitration clauses in 93 percent of the employment contracts.

If rolled out correctly, with fair and balanced procedures, arbitration can be an excellent way to resolve workplace disputes. Arbitration is not some new concept. For years, the vast majority of collective bargaining agreements have used arbitration to resolve disputes.

The number of companies offering arbitration of employment disputes is growing in part because the U.S. Supreme Court recognizes the benefits of arbitration. Since the 1980s, the court has issued rulings encouraging arbitration of nonunion employment claims to reduce court backlogs.

More recently, the Supreme Court concluded that unions and employers also can require unionized employees to arbitrate statutory employment claims.

EMPLOYMENT LAW

D. Michael Reilly

For a successful arbitration program, the process should be fair because it's the right thing to do, and because courts will invalidate unfair provisions regardless. The first step should contemplate an "independent internal review" process. Clients instituting this found that employees resolved many workplace issues informally and quickly, improving morale. This has the effect of reducing the number of lawsuits.

If this first step does not work, however, then the employee can request arbitration by an independent expert with a process that assures that all remedies available in court are in arbitration, allows each side to participate in the selection of the arbitrator and to engage in discovery and present witnesses, and makes sure that costs incurred by the employee are not higher than costs a court would impose.

Studies confirm that a fair arbitration process reaps many advantages for both employee and employer, including:

— **Arbitration is faster.** Nearly every study reviewing the issue has concluded that arbitration is faster than litigation, resolving cases sometimes in half the time. Oftentimes arbitrations can be held within 90 days — much less than the typical 20-month trial process.

— **Median awards in arbitration and in trial are quite similar.** In arbitration, the decision is delegated to a neutral party, selected by the employee and employer, with expertise in employment issues. There is no jury in arbitration. This reduces the uncertainty of jury trials because juries can be unpredictable and bring biases to the decision-making process. These same risks exist to a lesser degree when using a private arbitrator, but can be mitigated by a thorough pre-selection investigation of the arbitration panel.

— **Arbitration results in lower attorney fees and costs, and fewer disputes.** Bringing a claim in arbitration costs about 30 percent to 50 percent less than what a jury trial would cost. The average cost of an employment jury trial may exceed $200,000, while employment arbitration may cost in the range of $40,000 to $60,000 because there is a more informal process, and no appeal. Data also confirms that companies rolling out arbitration programs do not experience an increase in arbitrated claims, as long as the company includes the two-step dispute resolution process advocated here. In fact, 85 percent of employment disputes are resolved before arbitration, without lawyers.

— **Arbitration is usually private.** In arbitration, there are no public records or hearings, and the media generally do not have access to the details. Employees can avoid public disclosure of medical and employment records. Employers can avoid public disclosure of past disputes or issues.

Studies confirm that arbitration programs designed to resolve employment disputes with fair procedures should provide benefits to employee and employer alike.

D. MICHAEL REILLY *is director of the Labor and Employment Practice Group at Lane Powell PC, and can be reached at reillym@lanepowell.com.*