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The Pros and Cons of Employment Arbitration Agreements

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In recent years, the area governing employment arbitration agreements has evolved rapidly. That evolution accelerated in June, when the

California Supreme Court issued a watershed decision in *Iskanian v. CLS Transportation*, which addressed the enforceability of class and representative action waivers contained in employment arbitration agreements. In light of this new case, employers are well-advised to reevaluate the pros and cons to utilizing these agreements.

Should the Company Utilize Arbitration Agreements? A Recent Empirical Study Says, "Yes."

A recent 2014 study by Dr. Mark D. Gough of Cornell University published in the *Berkeley Journal of Employment and Labor Law* examined nearly 700 recent employment discrimination cases, approximately 480 that reached verdict in litigation and approximately 210 that were decided in arbitration. The results were astonishing. The data revealed that employees pursuing litigation in courts were nearly 40 percent more likely to win, and received average awards nearly twice as large as employees in arbitration.

Further, the study found that the average amounts awarded to successful discrimination plaintiffs in court were much higher than awards in arbitration. The average award to a successful discrimination plaintiff was \$802,487 in court, versus \$412,052 in arbitration, that is, litigation awards were 97 percent higher. If this concluded the analysis, the decision would be easy. However, the study is just the first step in analyzing arbitration agreements.

Practical "Pros" and "Cons" to Utilizing Arbitration Agreements

Pros

► **Class Action Waivers.** Arbitration agreements provide employers a potential mechanism to avoid class action litigation if they include well-drafted class action waivers.

► **Arbitration is typically faster.** One study found that it takes an average of two and a half years for state courts to decide a civil rights employment dispute, while cases decided in arbitration take approximately one year.

► **Arbitration may limit discovery burdens.** Informal discovery procedures usually reduce discovery abuses and related costs.

► **Scheduling flexibility.** Often benefits company witnesses.

► **Confidentiality.** Arbitration proceedings are generally not open to the public.

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► **Limited Appeal Rights.** Arbitration minimizes protracted litigation on appeal and related attorneys' fees.

Cons

► **Arbitrator Fees.** In many states, including California, the employer must pay all of the arbitrator's fees, which sometimes exceed the value of an employee's claim.

► **Disfavored Dispositive Motions.** Arbitrators (who are paid by the hour) are perceived to be less likely to grant summary judgment motions, which decide the case before a full hearing, than overworked trial judges.

► **"Splitting the Baby?"** Arbitrators are viewed to be more likely than judges to "split the baby" and award at least something to the employee, which often triggers the award of attorney's fees in employment cases.

► **Certain Claims Inarbitrable.** Courts have held that certain employment claims are not subject to arbitration.

► **Numerous Individual Arbitrations?** An arbitration agreement that contains a class action waiver may lead to numerous individual arbitrations instead of one class action, which could become costly since the employer has to pay each individual arbitration fee.

Conclusion

Employment arbitration agreements remain a difficult issue for California employers. However, no employer should ignore the subject because of its complexity. With the assistance of experienced counsel, an employer can determine whether a well-drafted arbitration agreement could improve the company's outcome in employment disputes.

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