Labor Letter

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Arbitration Can Save Time and Money

By James R. Holland II (Kansas City)

As American businesses slowly emerge from the worst downturn since the Great Depression, employers should steer clear of roadblocks that can undermine their progress.

One such roadblock is employment litigation. Growing numbers of employers are avoiding this roadblock by implementing policies that substitute an arbitration hearing for a courtroom trial.

Arbitration generally is less costly and less time-consuming than a jury trial and can be more favorable to employers for a number of reasons. While far from being a silver bullet, most employers would be well advised to at least consider implementing an effective arbitration policy.

Litigation Takes Its Toll

It was only in recent decades that large numbers of employment disputes began migrating to courtrooms. The era of employment litigation kicked off with the Civil Rights Act of 1964. Discrimination lawsuits were decided without a jury until 1991, when a change in the law allowed plaintiffs to seek jury trials. This resulted in an explosion of employment cases. Plaintiffs' lawyers preferred trying cases before a jury rather than a judge, based on the belief (let's face it – the reality) that it's easier to win a jury's sympathy for a plaintiff-employee than for a large corporate employer.

For employers, going to court is almost always a costly and ineffective way to resolve employment disputes. The process is time-consuming and disruptive, and a simple discrimination lawsuit can easily cost an employer more than $100,000, even if the company "wins." And the tendency of jurors to sympathize with employees puts employers at a disadvantage in virtually any courtroom.

Arbitration To The Rescue

By the late 1990s, having experienced the harsh courtroom environment, many employers started turning to arbitration to trump the wild card of a runaway jury.

In arbitration, cases normally are tried before a single arbitrator, rather than before a judge and jury. The arbitrator typically is a highly qualified and experienced attorney or retired judge, who is sworn to apply the law fairly and impartially. The arbitrator also is required to apply the law in the same way a judge in a courtroom does.

Arbitration offers employers many advantages. For one, it generally consumes significantly less time than a trial does. A typical employment case can drag on for years in the court system. While there is no guarantee as to how long it takes to get a case through arbitration, it almost always is less than the court option.

Then there's the cost factor, which is more crucial than ever during these challenging times. While employers typically pay all of the cost of the arbitration process (with the exception of the employee's attorney), employers generally will spend less than they would if they were forced to litigate the same case in a courtroom. Most arbitrators charge an hourly or daily rate and an arbitrator's fees in a simple, single-plaintiff arbitration usually start around $10,000. Even with this cost, employers tend to save at least the equivalent cost of the arbitrator through the more efficient process that arbitration offers.

But perhaps most importantly, arbitration saves the company the risk of a runaway jury that might award high punitive damages and damages for emotional distress. While juries frequently award hundreds of thousands of dollars for emotional distress, arbitrators generally won't add much for such "soft damages." Arbitration decisions remain private, but it is widely perceived that employers win more often in arbitration and awards are smaller.

It should be pointed out that the arbitration process is in no way "rigged" to favor employers. The law ensures that the process protects the legal rights of employees, who still can assert all claims available under the law.

Arbitration is also cost effective because the arbitrator's decision is almost always final and binding. Of course, should the arbitrator exceed his or her jurisdiction or authority, either party may file a petition to vacate, amend or correct the arbitrator's award in a court of competent jurisdiction. Such claims are very difficult to establish and are infrequently filed.

Overall, arbitration serves both employers and employees well, throughout the country and across the spectrum of business and industry.

Establishing An Effective Arbitration Policy

For employers who have embraced the value of arbitration in a potential employment-related dispute, the first question might be, "What is the best way to set up an effective arbitration policy for my company?"

The most common way to implement an arbitration policy is to publish it in the employee handbook. Companies that take this approach should have employees sign for receipt of the handbook *and* sign a separate acknowledgement that the policy applies to them.

The policy can be either voluntary or mandatory. The U.S. Supreme Court ruled in 2001 that employers can require employees to take all employment-related disputes to arbitration rather than to court. In overturning the 1999 decision of the U.S. Court of Appeals for the 9th Circuit, the Supreme Court stated that "there are real benefits to arbitration in the employment context, including avoidance of litigation costs." *Circuit City Stores v. Adams.*

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Writing An Employee Handbook Your Employees Will Read – And Heed

Part 2

By D. Albert Brannen (Atlanta)

In Part 1 of this article (*Labor Letter* March, 2011) we looked at some of the important points to keep in mind when writing an employee handbook. In this conclusion, we'll cover ten of the most important policies that should be included.

No Discrimination, Harassment and Retaliation

With harassment verdicts against employers routinely running into millions of dollars, employers need written policies prohibiting all types of workplace discrimination, harassment and retaliation. Such policies should, at a minimum:

- cover **all** applicable protected classifications, such as race, color, national origin, sex (including pregnancy and same sex), religion, age, disability and other categories, including categories that may be protected by state or local laws or regulations;
- contain specific examples of prohibited conduct;
- explain the consequences of policy violations;
- outline a specific reporting procedure;
- include a "bypass" reporting procedure; and,
- prohibit retaliation against those who report violations.

Problem Solving or Grievance Procedures

An effective problem solving procedure can help to avoid liability for discrimination, harassment, retaliation, safety complaints, and union activity, as well as improve employee morale. Such policies should include a step-by-step procedure for addressing employee concerns. Employees should follow the "chain of command," of course, but they should also have access to a "bypass" procedure for reporting concerns if for some reason they cannot follow the standard procedures. In recent years, the best advice has been to establish a "special" direct procedure for claims of discrimination, harassment and retaliation – outside of the "normal" chain of command.

At-will Statements

Employee handbooks and written policies should contain the necessary legal disclaimers in prominent places. For example, a handbook should state that it is not a "contract" and that employment is "at-will" under state law and can be terminated at any time, for any reason, with or without cause, and without advance notice. Similar language should be included on the employment application and on a separate "acknowledgement of receipt" of handbook form signed by each employee and retained in the employee's personnel file.

Rules of Conduct

Avoid both oral and written promises of "progressive" discipline and lists of specific work rules with levels of discipline. Instead, rules of conduct should state that employees can be discharged immediately for a variety of things. That statement should be followed by a list of broadly defined acts of misconduct, such as absenteeism or tardiness; breach of

confidence or security; conflict of interest; damage to property; fighting, threats or weapons; fraud, dishonesty or false statements; harassment; insubordination; misuse of property; sleeping or inattention; solicitation or distribution; substance abuse; theft; unlawful activity; unsafe work practices; or other applicable misconduct. "Poor performance," although technically not "misconduct," also should be included as a basis for termination.

Drugs and Alcohol

Drug and alcohol policies should require as a condition of employment that applicants or employees not have drugs or prohibited amounts of alcohol "in their systems." Avoid policies that refer to being "under the influence" or "impaired" since those terms create a higher legal burden. Your policy should state the consequences for testing positive or otherwise violating the policy, and reserve the right to test "at any time" (assuming your state law allows it – some don't) and to conduct searches.

Workplace Security and No Weapons

In view of the increase in workplace violence, every employer needs policies that address workplace security and weapons. A workplace security policy should state that any employee who commits or threatens any violent act against any person while on company premises or at work will be subject to immediate discharge. The policy also should cover off-site conduct and procedures for reporting and investigating violent acts or threats. This policy should also reaffirm your right to conduct background checks at any time during employment. Of course, compliance with the Fair Credit Reporting Act is still required even with such language in the handbook.

Safety

Safety continues to be a workplace priority and your handbook should contain essential safety rules and procedures. In addition to listing specific safety rules and procedures, include at least general references to your

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Part 2

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safety "program," your safety committee, recordkeeping requirements, training procedures, and the overall importance of safety in your facility. Safety policies should reflect compliance with current standards and regulations and a "safety coordinator" should be specifically identified in the handbook.

Electronic Communications

With the extensive use of email and other electronic communications systems, employers should state their policies about the use of such tools. Among other things, you should specify the company's right to access such "systems" for business-related reasons; prohibit (or limit) personal use of such systems; prohibit insulting or offensive communications such as sexually explicit or offensive messages, jokes or cartoons, propositions or love letters, ethnic or racial slurs or any other harassing or disparaging messages; and require employees to follow the employer's encryption procedures.

Should a lawsuit arise, electronically stored and even deleted information likely will be accessible to the opposing party. In view of the recent changes to the Federal Rules of Civil Procedure, you should also include references to your document retention and "litigation hold" policies.

Confidential Information and Conflicts of Interest

Employers should have appropriate policies in their handbooks that protect their intellectual property, business relationships, information and similar assets. These policies should prohibit conflicts of interest and unauthorized use and disclosure of confidential information and trade secrets. A confidential information policy should state, among other things, that unauthorized use or disclosure of such information may result in discipline, up to and including immediate discharge or civil or criminal actions by the employer, as appropriate.

Family and Medical Leave

The Family and Medical Leave Act requires employers with 50 or more employees within a 75-mile radius to provide eligible employees with a leave of absence for family or medical reasons, benefits continuation and reinstatement to the same job if the employee returns to work prior to the expiration of the leave. It also requires covered employers to include a family and medical leave policy in their handbooks, post a prescribed notice and follow certain unique notification procedures.

Conclusion

We've tried to provide some general guidance to employers on making their employee handbooks more likely to be read and understood by their employees, and identified 10 important policies every employer should have in their handbook to cover their assets. But no one article can cover it all. This is one of the most important employee-relations projects your company can embark on. While it's a lot of work to get a handbook that does everything you need it to do, it's well worth the effort.

Let us know if you'd like our help.

For more information contact the author at dabrannen@laborlawyers.com or 404.231.1400.

MARCH MAYHEM – "CHAMPION" CROWNED!

In the March edition of our Labor Letter, we unveiled the field of 64 biggest employer headaches and had employers across the country complete their brackets to whittle these down to a Final Four. Our April edition revealed the Final Four employer headaches: 1) Supervisors Failing to Document Warnings; 2) Employees on Intermittent Leave; 3) Hostile Work Environment Allegations; and 4) Employee Theft. Over the past month, we've taken your votes and we can now crown our champion: **Employees on Intermittent Leave** edged out Supervisors Failing to Document Warnings in a hotly-contested battle that came down to the wire. Thank you to the many who participated!

Arbitration Can Save Time and Money

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Nevertheless, it's usually in an employer's best interest to make arbitration policies voluntary, and to allow employees to opt out if they so desire, to avoid the sense that the policy is being forced on them. Most will not see any need to opt out.

The policy should include the procedure that will be followed if arbitration is required, and should specify the guidelines for selecting an arbitrator. Generally, you can ensure getting a highly knowledgeable and skilled arbitrator by starting with a list from the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association (AAA) and requiring that those persons on the list be, for example, retired state or federal court judges, or attorneys who have practiced at least 20 years in employment law and have an AV Martindale-Hubbell rating.

The policy also should include pre-arbitration procedures for discovery and pre-hearing motions. For example, both sides can be allowed to conduct discovery, including taking depositions. Your policy can limit these procedures (e.g., allowing attorneys to conduct written discovery, but not take depositions), but such limits take away some rights from the employee and open the door to possible court challenges down the road.

To make an arbitration policy binding requires that employees have the same substantive rights and remedies as they would if they were making the case to judge and jury. So, if the employee prevails, the arbitrator could order the company to pay the employee's attorney's fees if the substantive law under which the claim is brought allows for such a recovery.

You can establish an arbitration policy that covers every employee, or you can pick and choose the employees to be covered. For example, some businesses implement arbitration provisions only for high-level employees who have employment contracts. In such cases, the arbitration policy typically becomes part of the employment contract.

Even if your human resources department is highly skilled it's not a good idea to have your HR department or someone else in the company write an arbitration policy. This is a legal document. To effectively and properly implement an arbitration policy, legal counsel should always be involved.

Pushback Can Derail Best Interests

It's no surprise that plaintiff attorneys don't like arbitration. There have been a number of cases where plaintiff attorneys have challenged arbitration outcomes, claiming that the outcomes were unconscionable and that the case should be tried in front of a jury. Sometimes these tactics are successful and the arbitration process is derailed.

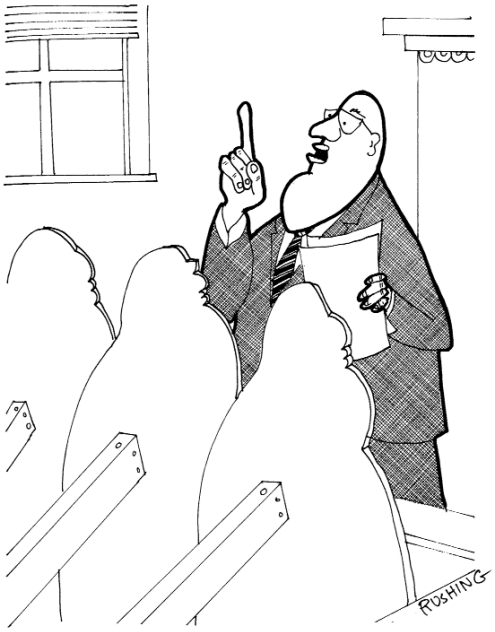
Even some employers resist implementing arbitration provisions. Their thought is, "For me to have a binding arbitration provision, I'll still have to pay for the entire cost of an arbitrator." So they decide to live with the risk of a lawsuit, and the resulting jury trial, even though it could cost them millions of dollars.

In short, employers could be putting their companies at risk if they don't at least consider implementing an arbitration clause.

The Bottom Line

American businesses are getting hit with more and more rules and regulations in the wake of the Great Recession. Many of these rules will cost your business money. Because of this, it's more important than ever to try to limit your exposure to employment litigation costs by implementing effective arbitration policies.

For more information contact the author at jholland@laborlawyers.com or 816.842.8770.



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