



ADR IS ON THE RISE IN EMPLOYMENT CASES

By Jeffrey S. Grubman, Esq.

While there is a long history of utilizing arbitration in the labor union context, the majority of employment disputes have historically been litigated in federal court. Federal courts tend to be more formal than state courts, requiring full legal briefing on all motions and involving judges appointed by the President of the United States with tenure for life and extraordinarily bright law clerks to assist them. As a general rule, it is more expensive to litigate cases in federal court than state court, and the most expensive cases to litigate are class actions. The employment law area has long been fertile ground for class actions. Also, in recent years, collective Fair Labor Standards Act overtime cases have been quite active in federal courts throughout the country.

Large employers apparently have tired of the expense and perhaps the dissatisfying results arising from court actions. Accordingly, many have started including binding arbitration clauses as well as class action waivers in their employment agreements. In fact, the percentage of companies using arbitration clauses to preclude class action claims soared to 43 percent in 2014 from 16 percent in 2012, according to a survey of nearly 350 companies conducted by management-side law firm Carlton Fields Jordan Burt LLP. That same survey found that the percentage of class action lawsuits that address employment issues slipped to 23 percent in 2014 from 28 percent in 2011 and that class action suits from workers cost employers \$462.8 million in 2014, down from \$598.9 million in 2011.

Courts historically have been supportive of binding arbitration clauses. Legal claims in certain industries, such as securities claims by investors against broker

dealers, have been resolved through binding arbitration for decades. It now appears that employment disputes are moving in that direction. In 2011, in the case of *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court upheld class action waivers entered by customers of AT&T. The U.S. Supreme Court has not yet agreed to hear cases applying the logic of the *Concepcion* case to class action waivers in the employment context. Nevertheless, while the National Labor Relations Board has ruled that class action waivers violate the National Labor Relations Act, the trend among the lower courts is to uphold class-action waivers and to uphold traditional arbitration clauses. (See, e.g., *Jasso v. Money Mart Express Inc.* (N.D. Cal. 2012) and *Morvant v. P.F. Chang's China Bistro, Inc.* (N.D. Cal. 2012).)

Given this, both defense and plaintiff employment lawyers should hone their skills in arbitration. This includes giving thought to choosing arbitrators based on the subject matter of a case, the arbitrator's experience, prior award history and how he or she manages the arbitration process. Each arbitrator is different, and research is always a good idea, including speaking to attorneys involved in past arbitrations on similar issues.

Once parties have selected their arbitrator(s), they should understand that there are distinct differences between litigation and arbitration. Because the arbitrator acts as judge and jury, counsel should provide the arbitrator(s) with a well-written and concise pre-hearing brief setting forth the key legal and factual issues. Also, nothing frustrates an experienced arbitrator more than hearing and seeing cumulative evidence. Once an attorney establishes a point through

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testimony or documentary evidence, she should move on. Using effective demonstrative evidence helps to keep the case moving.

Finally, many courts throughout the country require parties to participate in mediation before they may proceed to trial. Even though this will rarely be required by an arbitrator, counsel should give serious consideration to participating in mediation before the final arbitration hearing. Certain ADR organizations offer the parties the opportunity to mediate their case with a neutral on its panel other than the neutral who has been selected to serve as the arbitrator on the case. The two neutrals will never discuss what transpired at the mediation.

Mediation is uniquely suited for employment disputes, as parties tend to be very emotional and usually benefit from telling their story to an experienced mediator. Once the litigant enjoys the cathartic effect of telling his story and receives some reality testing from an experienced mediator, the case is very likely to settle. ■

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