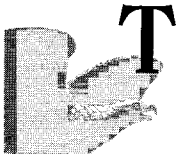
Supreme Court Supports Arbitration in the Workplace



The U.S. Supreme Court has ruled that employers can enact and enforce binding arbitration agreements in the workplace [*Circuit City v. Saint Clair Adams*, 2001 WL 273205]. This would mean that employees working under an arbitration agreement would forgo their rights to sue in court for employment-related complaints.

Has the Court opened the door for employers to add mandatory arbitration agreements to their employment policies? Attorney Joshua Javits, a partner in the Washington, D.C. office of Ford & Harrison, LLP, says that the ruling certainly seems to give employers a green light. "The court endorsement of mandatory arbitration should lead to more and more employers adopting such programs," he notes. "This is especially true for employers who had been reluctant to introduce arbitration before, because they had been afraid that employees, should they file discrimination or harassment claims, would get two bites of the apple: one through the arbitration procedure, and the second through court litigation."

Still Some Obstacles

However, the ruling doesn't mean employers have a free hand when it comes to setting up and enforcing arbitration policies. "First," Javits points out, "the Supreme Court did not overturn the Ninth Circuit decision in *Duffield v. Robertson, Stephens & Co.* [144 F.3d 1182 (1998)], which held that mandatory arbitration of Title VII claims are not valid. All the Supreme Court addressed in its recent ruling was that the Federal Arbitration Act (FAA) had a legislative history that endorses the inclusion of mandatory arbitration of employment disputes, in addition to other commercial type disputes. So, employers in the Ninth Circuit certainly need to be aware that they may still face this obstacle."

Javits also stresses that employers need to be aware that there are a whole series of obligations they must meet when they implement mandatory arbitration of employment disputes:

✓ **Explicit coverage.** Employees must be clearly notified of the types of claims (e.g., Title VII, ADA, FMLA) that are covered by the arbitration program. If the employer fails to clearly notify employees, the courts might be unwilling to enforce the program.

✓ **Employee endorsement.** Employers would be wise to have employees look over the written policy and sign a statement that they have been notified of the policy, are aware of the program's specific details, and have agreed to it. In fact, a recent California case, *Romo v. Y-3 Holdings, Inc.* found that having an employee sign an acknowledgment that she received, read, and understood a copy of the company's handbook, which contained the arbitration policy, in and of itself was not proof enough that she had agreed to mandatory arbitration (see From the States, page 7, for more information).

Of course, asking a current employee to sign away a right raises questions of consideration. Jerry P. Roscoe, a principal with ADR Associates, LLC, (Washington, D.C.) says that if you try to introduce it to current employees, you have to offer them some form of consideration for giving up their right to go to court. The consideration may be in the form of a day off or extra pay (though some courts feel that the company is equally bound by the arbitration and so no extra consideration is required), but does that consideration mean that a current employee has to sign the agreement? Can the employer fire a worker for not signing it?

"An employer would be hard pressed to terminate someone if they refused to sign the agreement," says Roscoe. "Even in an at-will state, it would probably be frowned upon. But, perhaps the more important consideration is the bad will that it can create with your current employees."

The ruling does mean that going forward it may be permissible to require sign-off from new hires. If they refuse to sign, you do not have to hire them.

✓ **Time to think.** Employers should give employees time to look over the policy and seek legal advice, if they want to. That would also help the enforceability of the provision, because courts are looking at the issue of whether the employees voluntarily and knowingly waived their rights to go to court.

✓ **Due process.** There are due process requirements of the arbitration itself. For example, the choice of the neutral arbitrator must be made in a fair way, and the arbitrator must have authority to impose the kind of relief that is in the statutory provision that the arbitrator is enforcing. For instance, if it is an age discrimination dispute, the arbitrator has to have the authority to provide the kind of relief that a court would apply, such as attorney fees, punitive damages, reinstatement, and/or any other type of relief.

✓ **Discovery.** The program must allow for a certain amount of evidence collection. Arbitration is a more expedited and efficient procedure than court litigation and it often limits discovery of evidence. However, there has to be at least some opportunity for the employee to get documents and information to support his or her claim.

Who Pays the Piper?

Another controversial issue that has not been resolved in the courts is who pays for the arbitrator. A case from Washington, D.C., *Cole v. Burns Int'l Security Services* (105 F. 3d 1465, 1478, 1997), said that the employer must pay 100 percent of the arbitrator's fees. The rationale for that, explains Javits, is that if an employee were to go to court, the court procedure is free, because the public pays for the court time and for the judge. What the D.C. Circuit said was that for employees to enjoy all the protections of the law that are being enforced, whether Title VII or age discrimination, they ought to be able to enforce their right in a forum that is also free. Other courts and critics disagree, pointing out that if the employer pays 100 percent, the arbitrator might well be biased in favor of the employer.

The Final Say?

Though the Supreme Court has said that mandatory arbitration is final and binding, Javits notes that employers should be aware that there are narrow grounds for appeal of an arbitrator's opinion. Some possible grounds could be corruption of the arbitrator or the arbitrator's serious misreading of the underlying statutes that he or she is enforcing. So it is possible that a final arbitration could land in court if the arbitrator is found to have made serious mistakes.

Editor's note: Employee advocates believe that a great number of arbitrators lack the legal expertise necessary to handle the complexities of employment law disputes. Many arbitrators do not have law degrees. Therefore, it is extremely important that employers choose their arbitrators carefully. If an employee can show that the arbitrator had no business handling his or her case, it could provide the basis for a day in court.

Should You Have an Arbitration Provision?

Perhaps the first question that employers should be asking themselves, right now, is not how fast they should include a mandatory arbitration provision in their employment agreements, but rather, why they need one.

"Think about what it is you are really trying to accomplish," advises Jerry P. Roscoe, a principal with ADR Associates, LLC, an organization based in Washington, D.C., which provides mediation and arbitration services nationwide. "The benefits of arbitration are pretty well known. You get some benefits in time and lower transaction costs, and you get to choose the finder of fact, the arbitrator.

"The problem, however, is that these benefits are bought at a cost to the employer. When companies initiate an arbitration program, there is usually a great deal of resentment on the part of current employees. They feel they are being asked to give up something of value. Employees want to know why their employers are asking them to do this. What is so bad about the employers that they need to have this policy, and what is so good about the process for employers that makes them want to choose arbitration? So it really sets in employees' minds two biases: one against the employer and one against the process."

There are other problems too, says Roscoe. Arbitration really does little to address the underlying problems in the workplace that led to the employee filing a claim in the first place. In addition, companies find that the process is often a lose/lose situation, no matter who wins. "If the employee loses, he, oftentimes will go back into the workplace not feeling much better about the situation that brought him here in the first place," notes Roscoe. "So, he goes back to work and tells his co-workers about how poor the arbitration process was and how biased the arbitrator was. And if any of them take a closer look at the statistics, they will find that most company arbitrations end up in favor of the company. Moreover, if the employee loses, nothing is really done to cure the workplace dispute itself.

"But even when the employee wins, the company may lose again with employees. The employee may go back into the workplace feeling vindicated. He may say, 'Look, I was right, this company is bad. The arbitrator has validated my view. Now, the rest of you need to go through arbitration as well.' And, again, this may happen because nothing is done to address the underlying problems in the workplace."

Add Some Mediation

Roscoe believes the best approach is to introduce it only to new hires and add a mediation program to the process as well. Mediators do not issue a final decision, but try to get the parties to settle their differences themselves.

Whereas arbitration may generate negative feelings among employees, adding mediation to the process is usually viewed in a much more favorable light. "Employees get a sense that you are adding to their benefits and rights when you bring in a mediation program," explains Roscoe. "One reason is that it softens the blow of the arbitration program, and it also gives the company and the employees an opportunity to address the issues that are really going on in the workplace, which gave rise to the claim in the first place."