JURY WAIVERS AND ARBITRATION AGREEMENTS

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JURY WAIVERS

I. Jury Trials and the Risk of a "Runaway" Verdict

A. The Jury System

1. The 7th Amendment to the United States Constitution provides a right to a jury trial "in suits at common law." Some employment-related statutes, such as Title VII, also provide a right to a jury trial.

2. The underlying principle is a "jury of one's peers," but jurors are more likely to empathize with the plaintiff (employee or former employee) than with the defendant employer.

3. Juries typically have fairly broad discretion when awarding damages.

B. Some Jury-Related Statistics

1. According to one study, roughly 40 percent of Americans believe that if a lawsuit is filed, the defendant must be guilty.

2. According to a study conducted by the U.S. Department of Justice, plaintiffs in employment discrimination cases are almost twice as likely to win a case tried to a jury as they are to win a case tried only to a judge.

3. In 2003 the nationwide median for compensatory jury awards in employment related cases was $250,000.

4. In June, 2006, a California jury awarded two former FedEx drivers of Lebanese descent $61 million on their national origin discrimination claims.

5. In January, 2005 an appeals court in Florida reinstated a jury award of $1.5 million to a sexual harassment plaintiff.

6. A former police officer in Akron Ohio won a jury verdict of $1.72 million on his claim that he was terminated due to his race.

7. A Texas jury awarded a plaintiff over one million dollars on his claim that he was terminated in violation of the FMLA.

II. Jury Waivers

A. General Information

1. The right to a jury trial can often be waived.

2. Jury waivers have historically been enforced in commercial contracts.

B. The right to a jury trial should be "knowingly and voluntarily" waived.

1. When deciding whether a waiver was knowing and voluntary, courts may consider:

a. Disparity in bargaining power

b. Level of business sophistication

c. Previous employment

d. Opportunity to negotiate the terms

e. General educational background

f. Amount of time given to read the contract

g. Conspicuousness of the waiver

1) Typeface

2) Location within the document

2. What can an employer do to help ensure a jury waiver is enforced?

a. Allow employees to negotiate other terms

b. Use large typeface for the waiver

c. Separate the waiver from other documents

d. Write the waiver in terms the average person can understand

e. Clearly state the waiver's scope

C. Continue to monitor court decisions and other legal developments

ARBITRATION

III. How Arbitration Works

A. Arbitration is a method for resolving disputes in which an arbitrator, instead of a judge or jury, decides the case.

B. The parties usually mutually select the arbitrator by striking names from a list or some other method.

C. The parties and the arbitrator typically agree on timing for discovery and when the hearing is to be held.

D. Arbitration agreements often state where arbitration will take place, set parameters for discovery, and state who is to pay applicable fees.

E. Hearings are typically less formal than a hearing held in court. Rules of evidence are not strictly enforced.

F. Arbitrators can usually issue subpoenas to compel discovery and the attendance of witnesses.

G. Most arbitrators issue a written award.

H. The arbitrator's decision is final and binding on the parties.

IV. Federal and State Law Regarding Arbitration

A. The Federal Arbitration Act or "FAA."

1. States that a written provision in "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

2. Embodies a federal policy favoring arbitration.

3. The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

B. State Law

1. Kentucky

a. K.R.S. § 336.700 purports to prohibit employers from requiring arbitration agreements as a condition of employment.

b. Courts have held that K.R.S. § 336.700 is preempted by the FAA.

2. Ohio

a. Section § 2711.01 of the Ohio Revised Code provides that "any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or thereafter arising, ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

b. In Ohio "[i]t is the policy of the law to favor and encourage arbitration and every reasonable intendment will be indulged to give effect to such proceedings." Campbell v. Automatic Die & Products Co., 162 Ohio St. 321, 329,123 N.E.2d 401 (1954), cert. denied, 349 U.S. 929 (1955).

V. The Pros and Cons of Mandatory Arbitration Agreements

A. Positives

1. Less risk of an excessive verdict.

2. More control in selecting the decision maker.

3. Typically a faster process than litigation in court.

4. Discovery tends to be more streamlined and there is more control of the process.

5. The employer can often require that the hearing be conducted at a pre-specified location, such as the employer's home city.

6. It may be possible to include a waiver of the right to bring a class or collective action.

7. Defense costs are typically lower.

8. Some plaintiff's counsel abandon claims once they learn that their client signed an arbitration agreement.

9. Private as compared to public forum.

10. Often a more relaxed process.

B. Negatives

1. Summary judgment is not available.

2. An arbitrator may be less receptive to "hard-edged" or "technical" legal arguments.

3. Reduced discovery.

4. Parties must pay for the arbitrator's service.

5. Employer may have to expend legal fees to enforce agreement.

6. Adverse award, for all practical purposes, can't be appealed.

7. Arbitrator may be inclined to "split the baby" and give both parties something.

8. May not be able to join and/or bind other parties.

9. May be harder to compel discovery or control misconduct by the other side.

10. Arbitration is not always quicker or cheaper than court.

VI. <u>Is Arbitration Right For You?</u>

A. Does arbitration and alternative dispute resolution fit with the "culture" of your company?

B. How large is your workforce? The larger the workforce, the greater the risk of litigation and, presumably, the great potential benefits from arbitration.

C. What is the turnover rate for employees? Arbitration systems may be more advantageous where turnover is high.

D. Is most of your turnover due to terminations or natural attrition? A high rate of terminations will likely generate more litigation.

E. What is the nature of your company? For example, a non-profit charitable organization may want to present its case to a jury whereas an insurance company may be better off defending itself before an arbitrator.

VII. Recent Cases

A. Standard contract analysis applies to waiver under an arbitration agreement.

A class of employees waived their right to a jury trial pursuant to a provision of their employer's dispute resolution policy. The court held that the waiver did not have to be evaluated under a heightened "knowing and voluntary" standard. Instead, a standard contract analysis was applied because agreements subject to the Federal Arbitration Act are governed by contract principles. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005), cert. denied, 126 S. Ct. 2020 (2006).

B. Arbitration agreement failed under general contract principles because it was an unconscionable contract of adhesion and lacked consideration.

During the job application process, an employee signed an agreement with an arbitration service hired by the Company. The agreement was found to be a contract of adhesion because it contained terms that unreasonably favored the Company, including too much control over the selection of the arbitrator, and because the employee possessed inadequate bargaining power. The court also found that the contract lacked consideration. Under the agreement, the Company did not promise to submit its employment-related claims to arbitration. Therefore, the only possible consideration was that the Company agreed to review the job application in exchange for the employee's promise to arbitrate employment-related disputes. The court held that a promise to review a job application is not adequate consideration. Saylor v. Wilkes, 613 S.E.2d 914 (W.Va. 2005).

C. A challenge to a contract as a whole, and not just to the arbitration clause, must go to the arbitrator rather than the court.

The Supreme Court held that a challenge to a contract as a whole, and not just the arbitration clause contained in the contract, must go to the arbitrator, rather than the court, for decision. Additionally, the Court held that arbitration provisions are enforceable apart from the rest of the contract. Buckeye Check Cashing v.

Cargegna, 126 S. Ct. 1204 (2006).

D. Damages clause can be severed from otherwise valid arbitration agreement.

An arbitration agreement that precluded punitive damages was unconscionable, but the trial court correctly severed the unconscionable clause and enforced the rest of the agreement against the employee. The court stated, "This one unenforceable provision does not infect the arbitration clause as a whole. The district court did not unravel a 'highly integrated' complex of interlocking illegal provisions, but rather removed a punitive damages bar that appears to have been grafted onto an intact and functioning framework, for the [American Arbitration Association] commercial rules--incorporated by reference in the clause--already contain provisions on remedies that do not prohibit punitive damages." Booker v. Robert Half, Inc., 413 F.3d 77 (D.C. Cir. 2005) (quoting Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1248 (4th Cir. 1999)).

E. Intervening plaintiffs in a suit filed by the EEOC could not be compelled to arbitrate their claims.

In a case where the EEOC filed a suit against an employer on behalf of an employee, intervening employees did not have an independent cause of action against the employer, so they could not be compelled to arbitrate their claims. EEOC v. Physician Servs., 425 F. Supp. 2d 859 (E.D. Ky. 2006).

F. Claims must be arbitrated under unsigned written agreement.

Claims filed by more than 300 employees of Gulfstream Aerospace Corp. were subject to arbitration despite the employees' argument that there was no binding agreement or that the agreement was unenforceable because it was not signed. A signed agreement is not necessary for the dispute resolution process to be valid under the Federal Arbitration Act. It is sufficient that the agreement was in writing. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005), cert. denied, 126 S.Ct. 2020 (2006).

G. Arbitration denied where case was already 10 months into litigation.

Employees of a Kansas Kentucky Fried Chicken franchise were not required to arbitrate their Fair Labor Standards Act claims because the case had already been in litigation for 10 months. The court found that KFC's request to compel arbitration was inconsistent with the goals of arbitration. Because so much of the case had already been litigated, no cost or time would have been saved by permitting arbitration. Robinson v. Food Service of Belton, Inc., 415 F. Supp. 2d

1227 (D. Kan. 2005).

H. Employees who signed an employment form and a company policy acknowledgment form are required to arbitrate their claims.

All of the Company's employees were e-mailed an online employment guide, but had to scroll through the guide to find the arbitration policy. The accompanying "Receipt and Agreement" form that they were required to sign did not mention the arbitration policy. Four of the employees also signed employment applications that included a paragraph above the signature line that described the Company's arbitration policy. Under New Jersey law, an arbitration agreement must be in clear language and provide notice that the right to sue is being waived. Focusing on the notice requirement, the court held that the employees who merely signed the "Receipt and Agreement" form could proceed with the lawsuit while those who signed both the "Receipt and Acknowledgment" form and the employment application were required to arbitrate their claims. Carfagno v. Ace Ltd., No. 04-6184, 2005 WL 1523530 (D.N.J. June 28, 2005).

I. An e-mail to employees was not sufficient notice of a new arbitration policy.

An e-mail sent to all employees stated that arbitration was the last step of a new dispute resolution policy. The actual policy was not part of the e-mail, but was posted on the Company intranet. The e-mail did not state that arbitration replaced the right to seek resolution in a judicial forum or that continuing work constituted binding acceptance of the new policy. The e-mail also did not require the employees to check a box at the bottom of the message or return an acknowledgment form. Based on these facts, the court held that the employees did not have sufficient notice that the e-mail was contractual in nature and served as a waiver of their right to access a judicial forum. Campbell v. General Dynamics Government Systems Corp., 407 F.3d 546 (1st Cir. 2005).

J. Arbitration agreement that did not treat awards by the arbitrator as final is unenforceable.

A court can only modify or correct an arbitration award if: (a) there was an evident material miscalculation of figures or an evident material mistake in the description of a person, thing or property referred to in the award; (b) the arbitrator has awarded upon a matter not submitted to him or (c) the award is imperfect in matter of form not affecting the merits of the controversy. "Courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." An arbitration agreement may not modify these standards and an agreement that purports to do so is

unenforceable. Ignazio v. Clear Channel Broadcasting, Inc., 165 Ohio App. 3d 32 (2005).

K. Employee must arbitrate despite her refusal to sign arbitration agreement.

Employee must arbitrate her race discrimination claims even though she refused to sign the arbitration agreement when the employer implemented an arbitration program. One of the documents distributed to all employees stated that by "accepting or continuing employment" employees agree to arbitration. The court held that the form made it clear that by continuing employment the employee was accepting the terms of the arbitration program and noted that her employer advised her that her refusal to sign would not affect the applicability of the arbitration program. Berkly v. Dillard's Inc., 88 EPD ¶ 42,415 (8th Cir. 2006)

L. Employee must arbitrate her defamation claim.

An arbitration agreement was found to be valid where both the employer and employee signed the agreement, the agreement stated that continued employment constituted acceptance of the agreement, and the employee continued her employment after signing the agreement. The arbitration agreement applied to claims of "personal injuries arising from a termination," which included the employee's defamation claim. In re Dillard Dep't Stores, Inc., No. 05-0250 (Tex. 2006) available at http://www.supreme.courts.state.tx.us/historical/2006/jan/050250.htm.

M. The Uniformed Services Employment and Reemployment Rights Act does not preclude the enforcement of arbitration agreements.

In enacting the Uniformed Services Employment and Reemployment Rights Act (USERRA), Congress did not express an intent to override the Supreme Court's ruling that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). Therefore, USERRA does not preclude the enforcement of an arbitration agreement with respect to claims arising under USERRA. Garrett v. Circuit City Stores, Inc., 449 F.3d 672 (5th Cir. 2006). But see, Breletic v. CACI, Inc., 413 F. Supp. 2d 1329 (N.D. Ga 2006)(holding that USERRA claim does not have to be arbitrated because USERRA grants a right to pursue claims in court).

N. Class-action waiver in an arbitration agreement is enforceable under California law.

A class-action waiver contained in an arbitration agreement between Circuit City and one of its former customer service managers was not procedurally or substantively unconscionable. The manager was given 30 days to opt-out of the agreement, but failed to do so. Additionally, the inability to arbitrate class-action claims was not likely to cause Circuit City to be able to avoid liability for alleged overtime violations. Gentry v. Super. Ct., 37 Cal. Rptr. 3d 790 (Cal. Super. Ct. 2006), review granted and opinion superseded by Gentry v. Super Ct., 135 P.3d 1 (Cal. 2006).

O. Arbitration policies must expressly exclude NLRA charges.

U-Haul maintained a mandatory arbitration policy that applied to all disputes relating to or arising out of employment. The National Labor Relations Board held that the policy violated the National Labor Relations Act because it did not expressly exclude unfair labor practice charges that may be filed under the NLRA. U-Haul Co. of California, 347 NLRB No. 34 (2006).