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### **REPORT FROM COUNSEL MARCH 2015 ISSUE**

#### **ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS**

The Federal Arbitration Act requires courts to enforce clauses in commercial contracts that require arbitration of disputes. The U.S. Supreme Court has ruled that transportation workers engaged in interstate commerce are exempt from the Act. For other types of workers, the effect of the Supreme Court ruling was to reaffirm the enforceability of mandatory arbitration provisions in agreements entered into by workers engaged in interstate commerce.

##### ***Interstate Commerce Requirement***

The Act's requirement that workers be engaged in interstate commerce is not especially difficult to meet, given the interconnectedness of the economy. When a nurse at a hospital tried to avoid binding arbitration of her wrongful discharge claim by arguing that her employment agreement had no impact on interstate commerce, the argument failed. The court pointed out that the nurse's employment depended on the constant use of supplies purchased from other states and that the hospital treated many out-of-state patients. More often than not, similar connections can be made between most jobs and the flow of interstate commerce, especially for large employers.

##### ***Level Playing Field***

To say that employers and employees generally may bind themselves to arbitration is not to say that there is no judicial oversight. In the time since the Supreme Court cleared the way for mandatory arbitration, courts have been occupied with creating a level playing field when employers make the signing of an arbitration agreement a condition of employment. If its terms weigh too heavily in favor of the employer, the agreement, or at least the offending part, may be ruled invalid.

Finding that an arbitration agreement was "utterly lacking in the rudiments of evenhandedness," one federal court refused to enforce an agreement that allowed only the employer to choose the panel from which an arbitrator would be selected. Supposedly the parties were to achieve a fair result by using an alternate strike method to arrive at one arbitrator, but, given that the whole pool was selected by the employer with no constraints, "an impartial decisionmaker would be a surprising result." It may be possible to avoid this particular defect by stating in the agreement that the parties will use an arbitration service that takes measures to find an unbiased arbitrator having no potential conflicts of interest.

### *Paying the Costs*

Splitting the costs of arbitration evenly between the parties may seem reasonable on its face, but some courts have invalidated such clauses as being too burdensome for individual employees. Aside from considering the respective abilities of the parties to pay what can sometimes be substantial up-front costs for arbitration, there is a concern that the prospect of shouldering those costs has a “chilling effect” on employees' rights to have their grievances heard. Alternative approaches include payment of all costs by the employer, waiver of the employee's share on a case-by-case basis if it is beyond the employee's means, or capping an employee's share at the level of costs that would be incurred in court.

### *To Arbitrate or Not?*

Even before an arbitration clause is agreed to, and perhaps later scrutinized by a court, the parties need to consider some distinctions between mandatory arbitration and litigation. Since it is easier to request arbitration than to file a formal complaint in court, use of arbitration may mean an increase in disputes to be resolved. A decisionmaker in arbitration, if he or she is familiar with the industry in question, could understand complex issues better than a jury would. In arbitration, the dispute itself and the terms of any award frequently are kept confidential, affording the parties more privacy than a trial in open court. Finally, some of the same features that make arbitration a simpler and more streamlined approach, like limited factfinding and having no right to appeal, could weigh in one party's favor and against the other, depending on the circumstances of the case.

## **EMPLOYMENT LAW GUIDEBOOK**

The U.S. Department of Labor publishes a guidebook to provide businesses with general information on the laws and regulations that the Department enforces. The guidebook describes the statutes most commonly applicable to businesses and explains how to obtain assistance from the Department for complying with them.

The authority of the Department of Labor extends to many statutes, but the following are several that affect most employers: Employee Retirement Income Security Act (ERISA); Occupational Safety and Health Act (OSHA); Fair Labor Standards Act (FLSA); and Family and Medical Leave Act (FMLA).

The *Employment Law Guide: Laws, Regulations and Technical Assistance Services* can be accessed at [www.dol.gov/compliance/guide](http://www.dol.gov/compliance/guide).