

Arbitrate or Litigate? Choose Your Poison

By **Ralph A. Morris**

With the costs of defending employment discrimination lawsuits continuing to escalate, employers continue to search for alternatives. One alternative is a method of resolving disputes without involving the judicial system: arbitration. In arbitration, an individual or a panel of independent persons is appointed to hear a claim and resolve the dispute. Parties can contract to resolve disputes through arbitration in advance or after a dispute arises. Once a claim arises, however, one party may want to enforce the decision to arbitrate while the other party would prefer litigation. In such cases, the party supporting arbitration will often seek a judicial order to compel arbitration. In many cases, this action is brought by the employer after a former employee has filed an administrative charge or a lawsuit, rather than requesting arbitration.

BACKGROUND

Historically, the judicial system was averse to arbitration and often refused to compel it. However, in 1925, Congress reversed the court's position through legislation, and passed the

Ralph A. Morris, a member of this newsletter's Board of Editors, is a Partner in the Chicago office of Schiff Hardin LLP. He specializes in labor and employment law and is also an Arbitrator and Mediator and is a member of the American Arbitration Association's panels for both. He wishes to acknowledge the work of **Ashley Thompson**, a third year law student at the University of Michigan Law School who worked on the article while a Summer Associate at the firm.

Federal Arbitration Act (FAA). The FAA was designed to encourage the enforcement of mutual decisions to arbitrate. Today, arbitration is becoming an increasingly popular method for settling employment-based disputes.

In two cases, the Supreme Court clearly established that employers can legally require their employees to sign arbitration provisions and then enforce the agreement. In *Gilmer v. Interstate/Johnson Lake Corp.*, 111 S. Ct. 1647 (1991), the Court compelled arbitration between an employee, who was bringing charges of age discrimination, and his employer, because the employee had signed an arbitration clause as part of his registration application to be a securities representative. The Court found that this arbitration clause was enforceable. *Id.* In a second case ten years later, *Circuit City Stores, Inc., v. Adams*, 121 S. Ct. 1302 (2001), the employee signed an arbitration provision as part of his employment application to be a sales counselor. When the employee later brought a discrimination claim against the employer in federal court, the Supreme Court again found that the arbitration provision was enforceable. *Id.*

MANDATING ARBITRATION

Following *Gilmer* and *Circuit City Stores*, employers have tried many different methods of mandating arbitration. Some employers require that potential employees sign an arbitration agreement as part of their initial job application. See *Johnson v. Circuit City Stores*, 148 F.3d 373 (4th Cir. 1998). Other employers have chosen to include the mandatory arbitration provision in an individual employment contract

signed by the employee. See *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (4th Cir. 2005). Still another method of mandating arbitration is by informing employees of an arbitration policy through the distribution of employee handbooks that include the arbitration provision. Employers need to be careful with this method, however, as courts have not always enforced arbitration agreements distributed this way. See *Moran v. Ceiling Fans Direct, Inc.*, 239 Fed. Appx. 931 (5th Cir. 2007). Another option is to require an employee to sign an arbitration clause before receiving a promotion, stock options, a new health care plan, or other employee benefits. See *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999). Finally, almost all collective bargaining agreements (CBAs) with a union include a grievance procedure, which concludes with arbitration. In this situation, the employer and the union (on behalf of the employee) can agree to make arbitration the method for resolving disputes between employers and employees without requiring the individual signature of each employee.

WHAT ABOUT COLLECTIVE BARGAINING?

Since a union signs a collective bargaining agreement on behalf of all represented employees, there has been some question as to whether the represented employees, who have not personally signed the CBA, should be held to a mandatory arbitration provision included in the agreement. In cases like this, the Supreme Court has said that employees should be required to arbitrate when a just cause termination dispute arises between the employer

and employee. The Court has declined, however, to answer whether employees should be held to CBA-mandated arbitration when a discrimination dispute arises. See, e.g., *Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391 (1998). Instead, the court has said that if any such arbitration clause could ever be enforceable, the mandatory arbitration language used in the CBA would have to be "clear and unmistakable" so that union employees understand when they will be required to arbitrate disputes and what trial rights have been waived by the CBA. Since the arbitration clause in the CBA at issue in *Wright* was not "clear and unmistakable," it was unenforceable. Following this decision, some circuits have found that an arbitration clause can be enforceable through a collective bargaining agreement if the provision meets this standard. See *Carson v. Giant Food, Inc.*, 175 F.3d 325 (4th Cir. 1999). However, other circuits have found that "mandatory arbitration clauses in collective bargaining agreements are unenforceable to the extent they waive the rights of covered workers to a judicial forum for federal statutory causes of action." See *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 90 (2nd Cir. 2007). In February 2008, the Supreme Court agreed to take the Second Circuit case which should answer this question and finalize whether arbitration can be required for discrimination disputes based on a CBA. *14 Penn Plaza LLC v. Pyett, U.S.*, No. 07-581, review granted 2/19/08.

ARBITRATION PROCEDURE

Once an employer decides to mandate arbitration, it must also decide upon an arbitration procedure. Some employers will look to professional organizations, such as the American Arbitration Association (AAA), to create the detailed procedures involved in the arbitration. The AAA is well-regarded and, therefore, choosing to follow its established procedure will lend credibility to an employer's desire to craft a fair and enforceable arbitration procedure.

Even if an arbitration procedure is established beforehand, many questions

may still arise once the two parties have begun the arbitration. Courts have generally agreed that these questions should be answered by the arbitrator or arbitrators themselves rather than the courts. For example, in *Panepucci v. Honigman Miller Schwartz & Cohn LLP*, 103 F.E.P. Cases 1179 (6th Cir. 2008), a former partner with the law firm brought suit against the firm for discrimination. The Sixth Circuit first addressed the question of whether the plaintiff was compelled to arbitrate the claim. *Id.* at 1184. After the court found that the arbitration provision was enforceable, it refused to address her further arguments about the division of attorney's fees. *Id.* The court said, "Such matters are left to the arbitrators" *Id.*

There are also limits on the employer's right to determine the arbitration procedure. If the arbitration provision creates an arbitration process that is too burdensome on the employee, the court will likely determine that the arbitration agreement is unenforceable. For example, in *Hooters of America*, the employer required employees to sign an arbitration agreement as a condition for "raises, transfers, and promotions." *Id.* at 935-36. Hooters determined the arbitration procedure to be used. It required that the employee "provide the company with a list of all fact witnesses" but did not require that Hooters provide the employee with the same information. *Id.* at 938. The procedures also allowed Hooters to choose three out of the four arbitrators, "cancel the agreement to arbitrate," and "modify the rules." *Id.* at 939. As a result of this "one-sided" procedure, the court found that "Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith." *Id.* at 938. Decisions like this emphasize the importance of understanding the restrictions the courts have created on the types of provisions that can be included in an arbitration agreement.

In general, the arbitration agreement cannot "require the claimant to forgo substantive rights afforded under the statute." See *Booker*, 413 F.3d at 79. For example, the arbitration agreement must not unfairly limit the damages a plaintiff can receive. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Supreme Court held that since Title VII specifically provides claimants with the opportunity to receive statutory punitive damages, a mandatory arbitration procedure could not prohibit an award of punitive damages.

THE EEOC

Mandatory arbitration also does not preclude the Equal Employment Opportunity Commission (EEOC) from bringing a suit against the employer. *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754 (2002). The agency is a government authority charged with investigating and litigating charges of discrimination under Title VII. The EEOC has always taken the position that it was designed to work in the public interest. As a result of the EEOC's mission, the Court held in *Waffle House* that the EEOC is entitled to bring its own claim against an employer in court, despite the fact that the employee involved may be bound to an arbitration agreement. The EEOC can also request damages, including punitive and compensatory damages, on behalf of the plaintiff, even if the plaintiff has already arbitrated his or her dispute. *Id.*

Another common point of contention is the extent of discovery. An advantage of seeking arbitration is that the arbitration procedure is not strictly governed by the federal rules of discovery. In most cases, this makes the discovery process much more simple and also less expensive. In *Booker v. Robert Half*, the employee appealed the decision to compel arbitration and argued that since the arbitrators may provide him with "inadequate" discovery, the procedure was invalid. 413 F.3d at 82. The court rejected this argument and said that a lack of clarity on the rules of discovery in the

arbitration agreement will not alone make the provision unenforceable. *Id.* at 3.

The courts have also considered who will be required to cover the cost of arbitration and attorney fees. In federal court, if a plaintiff successfully brings a Title VII discrimination claim, the plaintiff is entitled to attorney's fees. However, the same is not automatically true in arbitration. In *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549 (4th Cir. 2001), the court held that a provision splitting the arbitration fees between the employer and the employee in arbitration was valid, if considered on a case-by-case basis. Later, the Supreme Court held that the arbitration clause need not address costs at all, and, therefore, the arbitration procedure is not required explicitly to protect the plaintiff from what could potentially be steep arbitration costs. *See Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79 (2000).

RIGHT TO A JURY TRIAL

Another arbitration issue which has been considered by the courts is whether the signing of an arbitration agreement constitutes a waiver of one's constitutional right to a jury trial. Since mandatory arbitration requires that a claimant pursue his case in front of a single arbitrator or a panel of arbitrators instead of a jury, some plaintiffs have claimed that mandatory arbitration is a violation of their Seventh Amendment right to a jury. Most courts which have addressed this argument, however, have found that the issue cannot be considered by the court because only state actors can violate the Constitution and a private employer is not a state actor. *See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198 (2nd Cir. 1999). Since the Supreme Court has not yet ruled on this issue, it may reappear in the future.

There are many advantages to requiring employees to sign an arbitration agreement. First and foremost, many companies feel that a commitment to

arbitrate sends a positive message to employees. Employees may feel that an established arbitration procedure means that the company intends to admit its own errors and compensate an employee for any harm done as quickly and cheaply as possible. Arbitration is also more private because the decisions and awards do not set precedent and are not made public. Arbitration also typically involves less discovery, so it can be less costly than litigation. This will be especially true as electronic discovery becomes more prevalent in litigation. The rules of evidence do not strictly apply in arbitration either, so there is more flexibility to introduce hearsay evidence. Arbitration can also be less burdensome for potential witnesses due to the limited discovery and more flexibility in scheduling.

Despite these many advantages, arbitration also has drawbacks that must be considered before deciding to mandate arbitration. Since arbitration is less costly, it is quicker and easier, and consequently, more employees may dispute their terminations. Also, if the arbitrators reach an unfavorable decision for the employer, there is less opportunity for an appeal. (At least, however, the decision does not become binding precedent.) Arbitrators also have limited jurisdiction when it comes to remedies. (The *University of Michigan Journal of Law Reform* devoted an entire issue to a discussion of Mandatory Arbitration. Volume 41, Issue 4, Summer 2008. It contains a very comprehensive discussion of the pros and cons of Arbitration in an employment setting. It also discusses a Due Process protocol that an employer might choose to follow.)

CONCLUSION

Due to the increase in the number of employment disputes now settled by arbitration, the court will have many more opportunities to address the law as it relates to arbitration. (It is also possible that the United States Congress may again weigh in on this issue. There is currently a bill being considered in the House and Senate, the Arbitration

Fairness Act (HR 3010) and (S 1782) which would invalidate agreements to use arbitration in the employment sector (along with consumer and franchise contracts) unless both parties agree to use arbitration after a dispute arises.)

This area will continue to evolve. If you are interested in learning more about arbitration, there are many resources available to employers. The American Arbitration Association offers a Web site (www.adr.org) where employers can find rules and guides developed for arbitration in the employment context. Your in-house or local Labor & Employment attorney will also know more about arbitration. It is important before you decide whether, and how, to implement an arbitration agreement with your employees, that you consult with someone who will have the up-to-date knowledge necessary to make your arbitration agreement enforceable and valid.