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Arbitrating Employment Disputes

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ARBITRATING EMPLOYMENT DISPUTES

The Basics: What Is Arbitration and How Does It Work?

Arbitration takes places when parties in a dispute enter into an agreement to have one or more arbitrators render a binding decision, rather than having a suit filed in court and the decision made by a jury and a judge. Arbitration is a creature of contract, and the parties create it and determine its procedures by agreement, subject to applicable laws and rules of administering institutions.

In the context of employment disputes, arbitration might arise from the terms of a collective bargaining agreement between the employer and a union, from a requirement that an individual agree to arbitration as a condition of employment, or in the case of government employment, from law and policies applicable to local, state or federal employees. Potentially, if none of these conditions apply, an employer and an employee, or a group of employees, could agree to have a dispute resolved through arbitration on individually negotiated terms.

Most union contracts have an arbitration clause, and where there is not a union, employment arbitration mostly is based on employers' requiring that work disputes be resolved through arbitration. Such requirement is characterized as "mandatory arbitration," or disparagingly as "forced arbitration." Such a mandatory agreement to arbitrate was found by recent research in more than one-half of nonunion private sector companies, particularly in those with larger work forces. Among companies with more than 1,000 employees, nearly one-third were found to mandate arbitration, instead of litigation, to resolve employment disputes.

General legal principles of arbitration procedures are set forth in the Federal Arbitration Act, Chapter 9 of Title 1 of the United States Code (FAA), but the provisions of the Act do not apply to

transportation employees engaged in foreign or interstate commerce, 9 U.S.C. § 1. When the FAA does not apply, general provisions are set forth in Chapter 171 of the Texas Civil Practice and Remedies Code, in particular Subchapter C.

The requirement that employees resort to arbitration rather than suing in court was upheld by the United States Supreme Court in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), but has remained controversial and the subject of strong opposition by groups of employees. About 20,000 workers of Google walked out of their jobs protesting employment practices, and Google agreed to discontinue the use of mandatory arbitration as of March, 2020, in all its worldwide operations.

Whether an employer could require not only that disputes be arbitrated, but that the arbitration be limited to individual claims, barring arbitral class actions, separately also has been subject to strong opposition. Limiting mandatory arbitration to individual claims was upheld in a 5-4 opinion by the U.S. Supreme Court in *Epic Systems Corp. v. Lewis*, ___ U.S. ___, 138 S.Ct. 1612, 200 L.Ed.2d 889 (2018). In another 5-4 decision, the Supreme Court more recently held that any ambiguity in an arbitration clause is resolved against an arbitration class action, unless there is a clear contractual basis specifically allowing a class action, *Lamp Plus, Inc. v. Varela*, ___ U.S. ___, 139 S.Ct. 1407, 28 L.Ed.2d 636 (2019).

Last September, the U.S. House of Representatives passed the Forced Arbitration Injustice Repeal (FAIR) Act. The proposed law defines "employment dispute" as one "arising out of or related to the work relationship or prospective work relationship," and would prohibit mandatory arbitration provisions and also would prohibit interference with the rights of employees to participate in arbitration of a joint, class or collective action of an employment or civil rights dispute,

Title search: Arbitration Intersects With Employment Law

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