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Arbitration Is Not Litigation

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Arbitration Is Not Litigation

Few, if any, would doubt as a general proposition that arbitration is not litigation, but the distinction usually is not clear. No matter on which side one might be in an employment dispute, careful consideration of the specific differences can bring about a substantial, and potentially very favorable, result.

The discussion here is general and does not necessarily apply to labor union arbitration, which might address terms to be included in a collective bargaining agreement or the interpretation and application of the union contract.

The most common misconceptions–that arbitration is much more expensive,and that arbitrators do not render clear results but tend to "split the baby"–are particularly deceptive and unhelpful.

Litigation can be a necessary and reasonable choice, but considering that getting to trial often can be uncertain and dilatory, and that litigation procedure can be frustrating, it is very prudent to be fully informed and consider how to proceed.

Establishing an Arbitration

In litigation, one of the two parties in conflict makes the choice of filing a lawsuit, and thereafter both parties proceed in accordance with the applicable rules of the court with jurisdiction. Arbitration of an employment dispute requires the voluntary or implied consent of both parties in an agreement to arbitrate, made either at the commencement or during the employment relationship. When an employment already has been terminated, there still can be a voluntary agreement to arbitrate.

An employment agreement might include, as a condition of employment, an agreement by the employee not to sue in court, but to resolve disputes through arbitration or some other binding process. Under federal law enacted last year, however, employees retain the right to present claims of sexual harassment or assault in federal or state court despite any such agreement. There are present and developing special circumstances for class and collective actions that are beyond the purpose of this paper.

If there is not an enforceable arbitration agreement, parties in an employment discrimination dispute can independently agree to arbitrate the dispute. How an arbitration will proceed under mandatory or voluntary circumstances depends on the terms of the agreement and whether an administering institution will be utilized. The most commonly used institutions are the American Arbitration Association, JAMS, and CPR (the International Institute for Conflict Prevention and Resolution).

Rules of Procedure

Although statutory law is applicable to issues to be arbitrated, the provisions of state and federal rules of procedure do not control an arbitration. Accordingly, parties to an arbitration can utilize discretion in how an arbitration can be conducted. It is common to refer in an arbitration agreement to the published rules of the AAA, JAMS, CPR or another institution.

Parties might be able to agree to deviate from or modify institutional procedural rules or fashion their own set of rules for their arbitration. If an institution is named in an arbitration, however, the institution might require a specific statement relieving the institution from any responsibility. In that case, and if the parties determine to set their own rules in what is called an *ad hoc* arbitration, specific notice to the arbitrator must be given and the arbitrator's consent obtained.

Selecting the Maker of the Decision

In litigation, a jury can be utilized to determine the facts of a conflict, or the determination of facts and application of the law might both be made by the judge of the court in which a case is filed.

The parties have some discretion in whether a jury will be utilized and who will serve on the jury. The party initiating the case has scant, if any, choice of the judge.

An arbitration is conducted before one or three arbitrators, with use of a sole arbitrator being the more common in employment cases.

The arbitration agreement provides the method for selecting the arbitrator or the three-arbitrator panel, often by referring to the method used by the

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