

Greater Columbia Business Monthly, June 2001

Using Arbitration Clauses in Employment Agreements

By David E. Dubberly

On March 21, 2001, in Circuit City Stores, Inc. v. Adams, the U.S. Supreme Court ruled that agreements requiring employees other than transportation workers to resolve workplace disputes by arbitration are covered by the Federal Arbitration Act ("FAA"). This decision makes it clear that in most cases mandatory employment arbitration will be enforced if properly implemented, and it is likely to expand the use of arbitration clauses in employment contracts. Congress passed the FAA in the 1920s to require reluctant courts to enforce various kinds of arbitration agreements. Circuit City reversed a decision by the Ninth Circuit, the only federal appeals court that had concluded that the FAA does not cover any employment agreements. The Ninth Circuit is the federal appeals court with jurisdiction over nine Western states.

In Circuit City, Adams signed an employment application containing the "Circuit City Dispute Resolution Agreement," which required him to take any disputes against the company to binding arbitration. Two years after beginning his employment, Adams filed a lawsuit in state court against Circuit City asserting state law discrimination and tort claims. Circuit City responded by filing suit in federal court against Adams, seeking to enjoin the state court proceedings, and arguing that the FAA required enforcement of the arbitration provision. The federal trial court granted Circuit City an injunction, but on appeal the Ninth Circuit reversed that decision on the grounds that all agreements to arbitrate employment claims are exempt from the FAA.

In the aftermath of the Supreme Court decision, employers should re-evaluate the pros and cons of requiring employees to arbitrate claims arising from employment. Arbitration can lead to faster and less costly resolution of disputes. But choosing arbitration should be an informed decision; otherwise, it may not live up to an employer's expectations.

Advantages and Disadvantages of Employment Arbitration

Advantages. Compared to civil litigation, arbitration usually saves employers time and money.

- The use of arbitration allows employers to avoid jury trials. An arbitrator almost certainly will be more experienced in dealing with employment disputes and less likely to award excessive damages than jurors. Over 30,000 new employment discrimination cases are filed in federal courts every year. Statistically, employees win almost 50% of wrongful termination cases that go to trial, and the median jury award in such cases is over \$200,000.

- Discovery and motion practice are more limited in arbitration than in court litigation, reducing litigation expenses and demands on management and staff time. While limited discovery and motion practice may be disadvantageous to employers in defending some cases, the reduced expenses and disruptions usually outweigh any drawbacks.
- Arbitration is generally more informal and provides more privacy to the parties than litigation in court. The informality of arbitration contributes to relatively speedy hearings, and arbitrators typically render prompt decisions. In contrast, the median time between the date a lawsuit is filed and the commencement of a civil trial is over two years.

Disadvantages. Although arbitration may provide more rapid and less costly resolution of employment disputes, other aspects of arbitration may diminish these benefits.

- An easily accessible, relatively inexpensive, private forum for employee claims may result in an increase in the number of claims. Some employees who believe they have been treated unfairly may not be willing to pursue their claims by filing an action in court, but they may be willing to pursue arbitration.
- Arbitrators are generally less inclined to follow established principles of law and burdens of proof and are more concerned with perceptions of fair treatment. Some arbitrators tend to compromise even strong cases for employers by ordering reinstatement of former employees with limited monetary relief.
- Arbitrators are also less receptive than courts to technical and “procedural” defenses (e.g., statutes of limitations) and rarely eliminate claims on motions to dismiss or motions for summary judgment.
- The scope of judicial review of an arbitrator’s decision is much more limited than the scope of review of a decision by a trial judge or a jury. Thus, an employer may find itself bound by an unfavorable arbitration award, whereas if it were in federal or state court, an unfavorable decision could be appealed and possibly overturned.

Suggestions for Employers Interested in Arbitration

In addition to deciding that arbitration agreements with non-transportation workers are covered by the FAA, the Circuit City Court reiterated that arbitration programs that do not provide the same remedies that an employee would otherwise get in court would not be upheld. Also, lower federal courts have made clear that to be enforceable, arbitration agreements must incorporate basic fairness standards. For example, in Hooters of America, Inc. v. Phillips, a 1998 decision, the Fourth Circuit struck down an employer’s arbitration scheme because it effectively denied an employee the right to bring her claims in an impartial forum and limited the legal remedies that she would be entitled to receive for sexual harassment. The Fourth Circuit is

the federal appeals court with jurisdiction over five Mid-Atlantic states, including the Carolinas. And in January 2001, in Bradford v. Rockwell Semiconductor Systems, the Fourth Circuit concluded that arbitration agreements that require employees to share the costs of arbitration may be invalid if the employee's share of the costs "are so prohibitive as to effectively deny access to the arbitral forum."

While the Circuit City decision gives employers the opportunity to reduce litigation costs by requiring arbitration, in light of cases like Hooters and Bradford, we caution employers to avoid the temptation to implement arbitration procedures that increase their odds of winning or improperly limit their potential exposure. We recommend that employers interested in requiring arbitration adopt policies that include the following provisions:

- The arbitration will be heard by an independent and impartial arbitrator chosen by agreement of both the employee and the company.
- Either the employee or the company may make a reasonable request for copies of relevant documents from the other party, and both parties will provide each other with a list of the witnesses they intend to call to testify at least 10 days before the arbitration. No depositions or other discovery will be allowed unless ordered by the arbitrator.
- The company will pay the costs of the arbitration, or the employee's share of the costs will not exceed an amount equal to one day's pay.
- The employee and the company may be represented by legal counsel at each party's own expense. The company strongly encourages employees to consult with legal counsel of their own choosing if they have any question about whether they should be represented by counsel. The employee and the company will be responsible for the fees and costs of their own legal counsel, and any other expenses and costs, such as costs associated with the attendance of witnesses or obtaining copies of hearing transcripts.
- The arbitrator has the authority to award any remedy that would have been available to the employee had he or she litigated the dispute in court under applicable law. The arbitrator will issue a written opinion with a statement of reasons for the award.

Finally, to protect the employer's rights to enforce non-compete and non-disclosure agreements, arbitration policies should not apply to claims by the company for an injunction or other relief for unfair competition and/or the use or unauthorized disclosure of trade secrets or confidential information. The company should retain the right to seek relief for these wrongdoings in court.