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We are proud to announce that Peg has been included in The Best Lawyers in America for 2012. For a complete description of the selection process for inclusion in Best Lawyers, please refer to the following: http://www.bestlawyers.com/About/BL_Methodology.aspx

ARBITRATING EMPLOYMENT CLAIMS: CAN YOU? SHOULD YOU?

Margaret M. Sheahan

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Trends ebb and flow on whether employers should require workers to resolve disputes by means of arbitration. There are pros and cons to each answer. Knowing the limits of the "solution" should be a starting point for an employer considering the question.

Arbitration allows parties to submit a dispute to a mutually agreed decision maker in a simplified process tailored to their needs. It is often a preferred alternative to litigation in a court or processing through a government agency. Because arbitration is a form of contract, it is almost always available for parties to elect in a particular dispute. This article's focus, however, is on the general policy that all employment disputes will be arbitrated. Construction contracts and financial services transactions typically include arbitrations provisions. In the employment context, grievance arbitration is a standard provision of collective bargaining agreements. Some non-union employers make it a condition of hire or continued employment for workers to agree to submit disputes to arbitration. The presumed benefit for the employer is that disputes will all be subject to a uniform private system, less cumbersome and more immediate, cost-effective and final than public administrative or judicial proceedings. Important questions, however, are what escape from litigation and cost does this tactic really offer, and how good is

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speed and finality for the employer?

Despite the Federal Arbitration Act's clear statement of the American policy in favor of arbitration, the law does not protect all employment disputes employers may think they have required to be submitted to arbitration. For example, the existence of an arbitration agreement binding the employee and the employer does not preclude the EEOC from pursuing relief for the employee through a judicial action based on the employee's claim. Also, some courts have determined that an arbitration agreement is ineffective to bar an employee from judicial action to vindicate rights under a specific statute if it does not give specific notice about its application to claims under that statute, such as USERRA or the Employee Polygraph Protection Act. The failure of an arbitration agreement to permit all the relief an administrative or judicial claim could provide for a statutory violation may make the arbitration agreement ineffective as to that statute, for example, the FLSA's minimum wage and overtime claims. Can the arbitration agreement prevent class actions or group relief? Most lawyers looking at the field would have thought so after a recent US Supreme Court decision, but the NLRB has since held that it cannot do so if it does not permit any avenue for employees (unionized or not) to work collectively to challenge a term or condition of employment. Suffice to say, the continued judicial and executive branch legal debate over the question of mandatory arbitration's extent and limitations is likely to continue and no employer should feel completely confident that no employment claims can be maintained outside the arbitral forum.

As for cost containment, the state of modern arbitration is not the bargain it used to be. In the traditional collective bargaining setting, grievance and arbitration is still a relatively inexpensive process compared to full blown court litigation. It is certainly more swift in almost every instance. In the much more common private sector setting of a non-unionized workforce, however, the arbitration alternative is much more complicated. Private arbitration now often permits some discovery, e.g., production of relevant documents and depositions, provides multiple days for the presentation of evidence and argument, involves transcribed records of proceedings and requires briefing by the parties' counsel. Unlike the governmental claim handling, moreover, the parties (typically the employer at least in the first instance) have to pay for the space and the time of the arbitrator. The price tag can be just as hefty sometimes as the public alternative.

While the popular conceptions of the sweeping scope and lower cost of the arbitration process may be "less than advertised," the finality of the arbitration process is not. An arbitration award cannot be directly appealed to a higher authority as a trial court decision most often can be. A disappointed arbitration party may apply to a court to vacate an arbitration award but only very limited grounds permit a court to do so. Generally, there must be fraud or gross misconduct on the part of the arbitrator. Mistake of law or fact are simply not enough. An employer appalled with the outcome of an arbitration proceeding likely just has to live with it and with the

interpretation of its policies and practices that it represents and portrays to its workforce. The arbitration route leaves much less, if any, room for managing the dispute's ultimate resolution through settlement and compromise after hearing than the judicial system provides.

Arbitration is a very good solution to some employment challenges. When applied on a one-size-fits-all basis, however, it can be less so. This writer's advice is that employers considering such a policy should avoid nasty surprises by careful consideration of the upsides and downsides in advance.

Community Corner

Did you catch "60 Minutes" on Feb. 19? Scott Pelley's lead article on that episode covered the Workplace, Inc.'s "Platform 2 Employment" program targeting the special problems facing the long-term unemployed. Peg Sheahan is proud to serve on the Workplace, Inc.'s Board of Directors and its Executive Committee. We applaud Workplace, Inc. President Joe Carbone and his staff for their innovative work in this area, fast becoming a model for efforts to assist this growing population throughout our country.

Thank you for reading!

Sincerely,

Mitchell & Sheahan, P.C.