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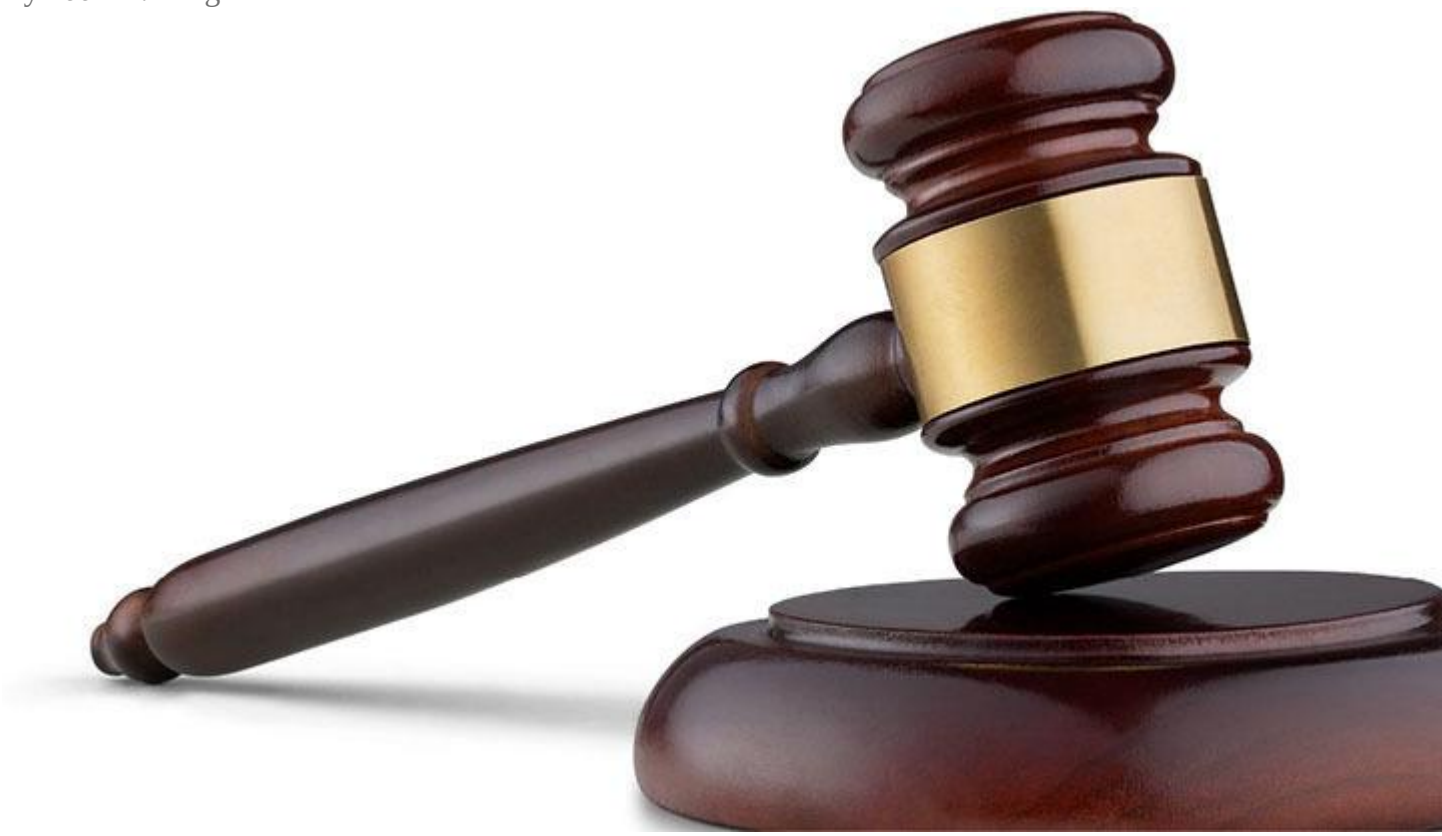
Some Pros and Cons of Arbitrating Employment Disputes

By Paul M. King



Arbitration clauses are becoming ubiquitous. They are included in the terms and contracts with companies ranging from Facebook and Instagram to Comcast and Verizon. They appear in agreements with professionals (such as lawyers), as well as retail (e.g., Gucci) and service contracts (e.g., Uber) for things we use every day. Arbitration clauses have also long been common in union contracts. They are becoming more prevalent in employment agreements of non-union employees. A recent study by the Employee Rights Advocacy Institute suggests that 80 of the top 100 companies in the United States use arbitration clauses in their employment agreements. This trend will likely continue given the United States Supreme Court's recent decision in Epic Systems Corp. v. Lewis. There, the Court held that arbitration clauses in employment agreements may require employees to pursue employment disputes in individualized arbitration proceedings, rather than as a group through a class action lawsuit. The

decision provides employers with greater certainty about insisting on arbitration as a method of dispute resolution and makes it easier for them to avert employee class action lawsuits.

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The question employers face is whether they should require their employees to arbitrate disputes. This article explores some pros and cons of binding arbitration clauses and some ways employers can improve their chances of having enforceable arbitration clauses.

The Pros and Cons of Arbitration

While there is much to like about arbitration, each employer needs to consider whether it is the best way for it to resolve employment disputes. Below are some pros and cons employers may want to consider in deciding whether requiring employees to arbitrate employment related disputes is the right choice.

1. **Cost:** Arbitration is generally a less costly option due to its less formal and speedier process, but there are both pros and cons to this factor.

a. Pros – Utilizing arbitration can help employers limit their spending on employee-related legal disputes. This can reduce the leverage of opposing parties to extract a larger settlement based merely on "cost of defense." The Supreme Court's recent decision in Epic Systems Corp. v. Lewis increased the potential cost savings of arbitration clauses by allowing employers to prevent employees from bringing a class action. This can further increase cost savings for employers because a single employee's claim may be small enough that the employee deems it not worth pursuing individually.

b. Cons – Arbitration is generally less expensive, but this is not always the case. The ultimate cost is highly dependent on the specific arbitration and the rules, including how much discovery is allowed, the actions of opposing counsel, and the complexity of the case. Additionally, one of the costs of arbitration is the arbitrator's hourly fee. Because parties are rarely able to control the amount of time an arbitrator spends on a case, it is more difficult to contain that cost. To the extent the parties wish to attempt a resolution, enlisting the arbitrator's assistance is an extra cost, whereas judges in courts will host settlement sessions and try cases without charge. Because arbitration is generally less costly, this can encourage employees to file claims that they otherwise would not file in court due to the potential cost.

2. **Time / Speed:** According to a recent study by the American Arbitration Association, U.S. district court cases take 12 months longer, on average, to get to trial than arbitration. Time, however, may not always be on your side.

a. **Pros** – Arbitration disputes may resolve more quickly than litigation. Smaller claims can be resolved under some arbitration organization's rules in 45 days. Faster resolutions may allow employers to focus on other matters. It may also free up employees to be more productive by spending less time doing things like pulling documents for a hearing, being deposed, or attending hearings. Less time can also mean lower legal fees.

b. **Cons** – There is a risk that arbitration may end up taking longer than a lawsuit. Many arbitrators are less likely to grant a motion that could end a claim before a hearing, as compared to judges, most of whom are more likely to grant such a motion before trial. This means that arbitration can ultimately consume more of an employer's time.

3. **Confidentiality and Privacy:** Documents filed in court are public record. In arbitration, parties usually agree to keep everything private. Privacy, however, may have unintended consequences.

a. **Pros** – Private arbitration can minimize the leverage an employee has to threaten going to the media. Moreover, the media does not have access to arbitration hearings.

b. **Cons** – Requiring non-disclosure of arbitration settlements may result in adverse tax consequences for employers. The Tax Cut and Jobs Act provides that no deduction will be allowed for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement." Although it is not yet clear, an arbitration clause or arbitration rules requiring privacy of settlements might be such a nondisclosure agreement.

4. **Type of Relief:** Arbitrators can award injunctive relief, but they cannot enforce it. Only a court can enforce temporary restraining orders ("TRO") and preliminary or permanent injunctions. This can work against an employer if it is the one calling foul.

a. **Pros** – If an employee seeks a TRO or a preliminary injunction, he/she might have to ask a court to enforce it. This would slow the enforcement down and allow the employer a chance to challenge enforcement in court.

b. **Cons** – The same applies to the employer. As discussed below, to have an enforceable arbitration clause, employers should also bind themselves to arbitrate employment disputes against employees. This means that, if an employee breaches his/her restrictive covenant (e.g., non-compete), the employer would first have to seek a TRO or preliminary injunction in arbitration. Then, the employer would have to ask a court to enforce the award. The employer's ability to enforce the non-compete is likewise relaxed. There is a way, however, to draft an arbitration clause to avoid such a slowdown and yet maintain the enforceability of the arbitration clause. The prevailing party in an arbitration must go to court to collect money or enforce any injunction awarded in arbitration. This would require the prevailing party to file a lawsuit. Such a process normally takes about 90 days.

5. **Discovery:** Arbitration can have significantly less discovery (such as depositions) than litigation.

a. **Pros** – Less discovery adds to some of the previously mentioned benefits of arbitration, such as faster resolution and fewer costs.

b. **Cons** – Less discovery may leave a party and legal counsel with less opportunity to build the party's case or analyze the opponent's case. In arbitration, third party affidavits might more easily be submitted without cross-examination. Depending on the experience of the

arbitrator, employees also may be able to more easily "prove" damages in arbitration using speculation and conjecture.

6. **Splitting the Proverbial Baby:** Some experts argue that arbitrators tend to resolve a dispute by making their decision somewhere in the middle of the parties' positions. The American Arbitration Association, however, has disputed this in recent years. Assuming that arbitrators do tend to come down closer to the middle than they should, the party with the "winning" case will likely be less satisfied with the result.

a. **Pros** – The loss is lower for an employer who might otherwise have lost the case. An arbitrator's "split-the-baby" decision might be preferred over risking an adverse decision or a large award in front of a jury. Juries are typically plaintiff-friendly because they tend to identify with and favor the emotional or sympathetic arguments that employees typically make. After all, as most jurors have been employees most of their careers, a jury is usually more a jury of an employee's peers than a jury of an employer's peers.

b. **Cons** - Analytics suggest that employers tend to win employment disputes, at least in federal court.

7. **Errors and Appeals:** An arbitrator is usually less bound by the law or the rules of evidence than a judge. Moreover, arbitration decisions are not normally appealable.

a. **Pros** – There is nothing favorable about errors. Errors, however, rarely happen. The parties typically select an arbitrator because of his/her expertise in an area of law, such as employment law. A typical arbitrator has fewer cases than a typical judge has and thus normally has more time to understand the facts of the case and to make a decision.

b. **Cons** - Good rarely comes from an error and the lack of an appeal compounds any error an arbitrator makes. Although it is rare, parties can be stuck with an irrational decision because arbitration awards are not typically appealable on their merits. Employers typically win employment disputes, so this is something employers must seriously weigh before deciding to require arbitration.

These are just some of the factors an employer may want to consider in deciding whether to adopt an arbitration clause in its employment agreements. The answer may also depend on each employer's industry and the size of its workforce, among other considerations. There are some industries where arbitration clauses are widely used, so applicants for employment will expect them. For example, in the securities industry, persons licensed as registered representatives are

generally required to arbitrate employment disputes before the Financial Industry Regulatory Authority, Inc., unless there is a claim of employment discrimination.

The Enforceability of Arbitration Clauses

The expected benefits an employer believes it will reap from utilizing arbitration are for naught if the arbitration clause is determined to be unenforceable. In such a case, the employee will be able to file his or her dispute in court, negating the expected advantages of arbitration. Therefore, employers should take steps to ensure the arbitration clause is enforceable. While each state's law (or other industry and regulatory requirements) may differ on the specific requirements, below are a few general points that can increase the likelihood that an arbitration clause is enforceable in the courts. Employers, of course, should consult legal counsel about the specific requirements affecting their employment agreements. Generally, employers should:

- **Include the arbitration clause in an employment agreement.** Employers should include the arbitration clause in their written employment agreements, rather than using a separate document dealing with arbitration. This will limit the risk of needing to give the employee additional consideration for the "separate" arbitration agreement. Taking this step can also reduce the risk of an employee successfully arguing that the "separate" arbitration agreement was "slipped in" or otherwise wrongly obtained.

- **Make the arbitration clause conspicuous.** The arbitration clause should be in its own paragraph or section and in a conspicuous place in the agreement so that an employee will be able to see it easily. Employers may also want to consider bolding the clause and putting it in all capital letters, making it less likely that an employee will successfully argue that he or she was unaware of the arbitration clause when reviewing and signing the agreement.

- **Allow the employee ample time to read the arbitration clause.** As with any agreement in the employment context, (whether at hiring or termination), employers should allow an employee ample time to read the agreement and avoid rushing or pressuring the employee into signing. This minimizes the risk of an employee's claim of duress, mistake, or failure to understand the agreement, including, of course, the arbitration clause. Employers should include language in the employment agreement confirming that the employee had ample time to review the document and consult with legal counsel.

Additionally, the content of the actual arbitration clause is important to ensure not only that the clause is enforceable, but also enforceable as envisioned by the employer. Concepts employers should consider include the following:

- **The arbitration clause should clearly define the disputes to be arbitrated.** Employers should use appropriate language to clearly define what type of disputes are covered by an arbitration clause. The language should be broad enough to cover the disputes an employer intends to force into arbitration. Otherwise, an employee may drag an employer into court because the employee's dispute does not fall within the clause.

- **Do not make the language too broad.** Notwithstanding the suggestion above, employers should be careful not to make the scope of the arbitration clause too broad. If the clause as written covers every possible dispute between the employee and the employer (e.g. personal injury due to use of a purchased company product), it may be held unenforceable as overly broad and unfair.

- **Identify the logistics of the arbitration.** The arbitration clause should identify whether the arbitration will be conducted by an outside dispute resolution service, by a pre-selected arbitrator, or before an arbitrator who is mutually selected by the parties. It should also specify who will pay for the cost of the arbitration. The cost should either be borne equally by the employer and the employee or borne solely by the employer, not placing the burden solely on the employee.

- **Identify the rules that will govern the arbitration.** For example, employers can specify the rules from one of the several arbitration organizations such as the American Arbitration Association or JAMS. These organizations sometimes have their own rules for employment disputes. Employers may also want to specify how much, if any, and what kind of "discovery" an arbitration clause will allow before an arbitration hearing (if the selected rules do not cover this point).

- **Provide the employee with those rules.** The employer should provide the employee with the current rules, or at least a link to the rules, that will govern the arbitration.

- **The arbitration clause should be mutual.** The arbitration clause should not be one-sided. Rather, if an employer is requiring arbitration of the employee's claims, the employer should be willing to have its claims arbitrated as well. Some courts have found one-sided clauses unenforceable. Having said the foregoing, an employer may want to carve out from the arbitration clause the right of the employer to go to court to enforce restrictive covenants and obtain injunctive relief for breach or alleged breach of those covenants.

- **Require enforceability of the arbitration clause be determined in arbitration.** Employees may try to challenge the enforceability of arbitration clauses for any of the reasons

above. An employer can mitigate this challenge by requiring the employee to arbitrate any challenges to the enforceability of the arbitration clause.

Although there are some downsides to including mandatory arbitration clauses in the employment context, they can provide employers with several advantages. Enforceable agreements, however, need to be prepared with care. Employers should consult with legal counsel to discuss their specific situations, applicable state law, and, if they proceed with arbitration clauses, the preparation of enforceable agreements.

Whether arbitration clauses in the employment context are as beneficial as their wide use would suggest is still an open question. For employers that are rarely embroiled in litigation with their employees, it may not behoove them to create ill will with their employees by requiring arbitration. The point is, "if it ain't broke, don't fix it." Arbitration clauses are no substitute for sound human resources policies and practices, nor do they insulate employers from all employment-related litigation. Federal and state agencies (such as the EEOC) can still pursue employers who violate the rights of employees. Employers may be playing with fire if they view arbitration as a way to constrain the rights of employees to raise concerns or to seek compensation when things go askew. Rather, employers should regard arbitration simply as an alternative method for resolving disputes that does not include the courts.

This article is merely informational and does not constitute legal advice. You should contact an attorney about your specific situation or legal questions. **Paul King** is an associate with Chicago corporate and litigation law firm Funkhouser Vegosen Liebman & Dunn Ltd. You may contact Paul at **(312) 701-6842 or pking@fvldlaw.com.**