A SMART WAY TO AVOID EMPLOYMENT LITIGATION: INCLUDE MANDATORY ARBITRATION IN YOUR HANDBOOK

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Mandatory arbitration of employment claims has been included in employment related documents ranging from employment contracts to severance agreements for over the past 20 years. Statutory claims under Title VII, FMLA, ADA, ADEA as well as under state statutes have been made subject to mandatory arbitration. By contract parties may explicitly waive their right to file either class action or individual employment related claims and resort to binding arbitration.

Generally employers favor the use of arbitration over litigation in employment disputes for both strategic and economic reasons. When an employer prefers to arbitrate employment claims, the question is how to subject all of its employees--not just those with employment agreements--to mandatory arbitration. Notice to employees that employment disputes will be subject to mandatory arbitration and evidence that the employees have specifically agreed to give up their rights to file in court are critical to successful implementation of a company policy to arbitrate. In order to ensure that the mandatory arbitration provision applies to all employees, employers should include the employment dispute resolution procedures, including mandatory arbitration, in their employee handbooks.

This recommendation is consistent with the Ninth Circuit decision in *Ashbey v. Archstone Property Management, Inc.*, No 12-55912, 2015 U.S. App. LEXIS 7819 (9th Cir. May 12, 2015). In this case the court ruled the arbitration provision contained in an employee handbook was enforceable. The court provided guidance on how an employer should draft a proper notice and employee agreement to render an arbitration provision in an employee handbook enforceable.

In *Ashbey,* the employee asserted violations of Title VII and state law and had signed an acknowledgment prior to his termination that stated he:

- received directions as to how [to] access the Archstone Company Policy Manual, including the Dispute Resolution Policy.
- bore responsibility to understand the Archstone Company Policy Manual, including the Dispute Resolution Policy and
- agreed to abide by the Company Policy Manual's provisions.

The Company Policy Manual's Dispute Resolution Policy contained a mandatory arbitration provision that covered all disputes arising out of the employment relationship, expressly including claims under the Civil Rights Act of 1964 (Title VII) and its state law equivalents, and also provided that the Federal Arbitration Act expressly governed it.

Recommendation. An employer interested in adopting an arbitration provision for resolution of employment disputes for all employees should include such a provision in its employee handbook. To render it enforceable, however, the employer must ensure that the arbitration provision and the written employee acknowledgment are drafted to address the following items:

- The arbitration provision should explicitly cover statutory rights under federal and state law, and specifically enumerate the various statutes covered under the provision;
- The written acknowledgment must reference the company's handbook dispute resolution policy which contains the arbitration provision and clearly state that the Federal Arbitration Act applies to the resolution of all employment disputes;
- The employee's written acknowledgment must specify that the employee waives his right to litigation;
- The employee must sign an acknowledgement of his receipt of the employee handbook which clearly states his/her agreement to abide by the handbook's policies, including its dispute resolution provision.

Of course, an employer must be mindful of court decisions in its locale that have ruled upon the enforceability of arbitration provisions. Several courts have found an arbitration provision in an employee handbook to be unenforceable. Upon a closer look at these cases, however, the rationale

generally used to support this ruling simply points to poor draftsmanship. In other words, if the handbook language is carefully crafted, the arbitration provision included in it would have likely been ruled valid and enforceable.

Some examples cited by these courts for finding the arbitration provision in an employee handbook to be unenforceable are:

- The statement that the handbook does not constitute a contract of employment. This is a common provision. The handbook should make clear that the arbitration provision itself cannot be modified unilaterally or retroactively, and is mutually binding upon the parties.
- A reservation of unilateral or retroactive right to amend the handbook provisions, including the arbitration clause. This can be addressed by stating that any modification to the handbook will apply in a prospective manner only, that is, it will not apply to any claim that is pending when the handbook modification is made.
- The arbitration provision is not mutually binding on both employer and employee. The arbitration provision should provide that both employer and employee are subject to binding arbitration for any employment-related disputes that may arise between them.
- The handbook can be modified without notice to the employee. Always make certain that the employee receives prompt notice of any handbook changes and have the employee sign an acknowledgement of his receipt of the updated version of the handbook. If the arbitration provision itself was modified in the revised handbook, the acknowledgement should clearly disclose that fact immediately above the signature line in the acknowledgement form.

By adopting the approach discussed above an employer will minimize the threat of employee initiated employment litigation. The potential for employment litigation, however, cannot be completely eliminated because the EEOC has an independent statutory authority to bring a discrimination lawsuit of its own under federal law.