

Employment Arbitration Agreements: Effective Design and Implementation

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I. INTRODUCTION¹

Employment arbitration is a system of dispute resolution between non-union employees and their employers. The methodology of the process can vary greatly, but a final binding decision by a neutral arbitrator and the avoidance of litigation through the court system are two common features. Employment arbitration can be offered to employees in a variety of ways, including mandatory arbitration agreements which must be agreed upon prior to an actual dispute with the employer arising. These agreements have been found to be enforceable through the courts, particularly in the United States Supreme Court decisions of *Gilmer v. Interstate/Johnson Lane*² and *Circuit City Stores, Inc. v. Adams*.³

In *Gilmer*, the Supreme Court held for the first time that mandatory arbitration agreements are the type of agreements covered by Federal Arbitration Act (“FAA”)⁴ and are enforceable for both employment and statutory claims.⁵ Following *Gilmer*, there was

¹ The author gratefully acknowledges the substantial contribution of Sean O’Connor, a student of Northeastern University School of Law, to the preparation of this article.

² 500 U.S. 20 (1991).

³ 532 U.S. 105 (2001).

⁴ 9 U.S.C. §1, et seq. Congress enacted the FAA in 1925 to make clear that courts must apply arbitration agreements to any transaction “involving commerce” and that arbitration agreements should be treated the same as other contracts.

⁵ 500 U.S. 20 (1991).

some lingering confusion as to the scope of employment relationships covered under the decision. The Supreme Court clarified the issue in *Circuit City Stores, Inc.* by holding that the only type of employee agreements that are not covered by the FAA are those involving seamen, railroad workers, and other transportation workers.⁶ These court decisions opened the door for many employers to utilize arbitration agreements and there has been a significant increase in the use of arbitration agreements by employers as a result. In response, the arbitration community, *e.g.*, the American Arbitration Association, developed rules and guidelines designed to ensure fundamental fairness and basic due process to employees.

In deciding whether employment arbitration is the right choice for a particular employer, an organization must analyze the pros and cons of the process. The advantages and disadvantages of the system are susceptible to change through the actions of the courts and Congress, making it necessary to be aware of the latest legal trends on the subject. If an employer decides that it wants to institute an arbitration program for its employees, then it is critical the employer know how to design a program that courts will enforce. This article will examine and discuss each of these issues, and provide suggestions for employers considering employment arbitration.

II. LATEST TRENDS IN THE COURTS AND CONGRESS

A. *Court Treatment of Class Action Waivers*

⁶ 532 U.S. 105 (2001).

Over the past decade, there has been an increasing trend throughout the courts across the country of striking down pre-dispute class arbitration waivers⁷ in consumer cases.⁸ This trend is part of a public policy debate that is taking place about whether class action waivers act as exculpatory clauses for corporations, immunizing them from liability for violations of laws that provide for low dollar amounts on an individual basis.⁹ More recently, this trend has spread into the realm of class arbitration waivers in employment arbitration agreements, particularly with regard to the validity of class arbitration waivers in the context of wage and hour class action claims. This is a particularly concerning issue to employers relying on class arbitration waivers as a way to insure themselves against wage and hour class actions. Since most, if not all, Employment Practices Liability Policies (“EPLI”) exclude coverage for wage and hour violations, class arbitration waivers have been used by employers as a way of limiting their potential liability in connection with uninsurable wage and hour class action violations.

The validity of a class arbitration waiver in the context of a wage and hour class action was at the center of a 2007 California case, *Gentry v. The Superior Court of Los Angeles County*.¹⁰ In *Gentry*, an employee filed a proposed class action suit against his employer, Circuit City, for, *inter alia*, violations of the California wage and hour laws

⁷ Through such waivers, individuals agree that they will submit all disputes to binding arbitration and that arbitration of class claims is prohibited.

⁸ See e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006); *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (Cal. 2005); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Leonard v. Terminix Int’l. Co.*, 854 So. 2d 529 (Ala. 2002); *Bellsouth Mobility LLC v. Christopher*, 819 So. 2d 171 (Fla. Ct. App. 2002); *Dix v. ICT Group, Inc.*, 125 Wash. App. 929 (Ct. App. 2005).

⁹ See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33 (1997).

¹⁰ 42 Cal. 4th 443 (Cal. 2007).

with respect to the payment of overtime wages. In turn, Circuit City filed a motion to compel arbitration. The trial court granted the motion and the Court of Appeals refused to alter the decision. The Supreme Court of California agreed to review the case.

When the plaintiff was first hired by Circuit City, he was presented with a packet with information regarding Circuit City's dispute resolution rules and procedures. These rules included a mandatory arbitration agreement along with a class arbitration waiver. The employee was given 30 days to opt out of the arbitration agreement, but he did not do so. In addition to providing for the waiver of class arbitration, the agreement also provided for: a shorter statute of limitations period for statutory claims than is provided under the statutes themselves; a limitation on the employee's ability to recover back pay for a period of time longer than one year even though there is no such statutory limitation; a ceiling (\$5,000.00) on punitive damages even though there is no such statutory limitation; and, a provision granting the arbitrator discretion to award the employee his or her attorney's fees even though attorney's fees are provided to prevailing parties under most statutory schemes.

In reviewing Circuit City's arbitration agreement, the court found the class arbitration waiver to be unconscionable under California law and therefore unenforceable. The decision did not hold that all class arbitration waivers in employment cases are categorically unenforceable. Instead, the court set forth a list of factors that a trial court should consider in determining the validity of a class arbitration waiver clause. The factors identified by the *Gentry* court were as follows: "the modest size of the potential individual recovery, the potential for retaliation against members of the class,

the fact that absent members of the class may be ill informed of their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration.”¹¹

In reviewing these factors in the context of the case, the *Gentry* court expressed particular concern over two main factors. First, the court noted that the wage and hour violations at issue involve non-waiveable rights. Second, the court noted that individual awards in wage and hour cases tend to be modest and must be balanced against the costs of pursuing such claims. The court contrasted the potential recovery in such cases with those under the Age Discrimination in Employment Act (“ADEA”) in which the median award is \$269,000.00.¹² While it did not reach the argument advanced by the plaintiff in *Gentry* that the arbitration agreement itself was substantively unconscionable, thereby rendering invalid the agreement as a whole, the *Gentry* court remanded the case to the Court of Appeals for a finding in that regard and took note of the fact that there were several provisions in Circuit City’s arbitration agreement that created significant disadvantages to arbitration versus litigation.¹³

In another 2007 decision, the First Circuit Court of Appeals in *Skirchak v. Dynamics Research Corporation*,¹⁴ also found a mandatory class arbitration waiver to be unconscionable as applied to wage and hour class claims brought under the Fair Labor Standards Act of 1938 (“FLSA”) and Massachusetts state law. In striking down the class arbitration waiver, the First Circuit left open whether class arbitration waivers violate the

¹¹ *Gentry*, 42 Cal. 4th at 463.

¹² *Gentry*, 42 Cal. 4th at 459.

¹³ *Gentry*, 42 Cal. 4th at 470-71.

¹⁴ 508 F.3d 49 (1st Cir. 2007).

FLSA or policy. However, the court found the class arbitration waiver unenforceable under state law based on the combination of a series of events which rendered the waiver unconscionable.

Specifically, the employer in *Skirchak* had adopted its arbitration program by sending out, on the Tuesday before Thanksgiving, a short email to all employees asking them to read three attached documents describing the program. The email and attachments were silent on the issue of the class arbitration waiver except for the waiver clauses themselves which were buried in a 15 page document with appendices. No response to the email was required. An employee was deemed to have accepted the program, including the class arbitration waiver, by appearing for work on the Monday after the Thanksgiving holiday. The First Circuit found that “the content, the obscurity, and the timing of the email and the failure to require a response raise[d] unconscionability concerns.”¹⁵

The recent decisions in *Gentry* and *Skirchak* provide insight into a troubling area for employers seeking to enforce arbitration agreements, particularly with regard to wage and hour claims, and could be a foreshadowing of things to come in the future. If class arbitration waivers continue to be found to be invalid and/or unconscionable, then employers will be forced to decide whether to revise their arbitration programs to try to meet the concerns of the courts, or revise their agreements to carve out wage and hour, as well as perhaps other, class claims based on statutory violations. As of now, most jurisdictions still have not weighed in on this matter. Therefore, this is an issue which

¹⁵ 508 F.3d at 60.

should be watched closely because of the important effects that such decisions could have on employers and their arbitration programs in the future.

B. *Congressional Legislation*

The courts are not the only arena in which there has been hostility towards employment arbitration agreements. On July 12, 2007, the Arbitration Fairness Act of 2007, sponsored by Sen. Russell Feingold (D-WI) and Rep. Henry Johnson (D-GA), was introduced in both the United States Senate and the House of Representatives.¹⁶ The bill proposes to amend the FAA to prohibit all predispute arbitration agreements requiring arbitration of (1) an employment, consumer or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights, or to regulate contracts or transactions between parties of unequal bargaining power.¹⁷

Thus, if this bill is enacted, mandatory arbitration agreements will become illegal and unenforceable in the courts. As of the date of this article, the bill was still in the first step of the legislative process and had been referred to the Senate Judiciary Committee, House Judiciary Committee and the House Judiciary Subcommittee on Commercial and Administrative Law.

C. *Equal Employment Opportunity Commission Opposition*

While it does not have law-making authority like the courts or Congress, the U.S. Equal Employment Opportunity Commission (“EEOC”), the main federal agency aimed at ending employment discrimination, has long voiced strong opposition to mandatory

¹⁶ Arbitration Fairness Act of 2007, S. 1782, H.R. 3010, 110th Cong. (2007).

¹⁷ *Id.*

arbitration agreements.¹⁸ The EEOC's influence can be seen through the United States Supreme Court decision in *EEOC v. Waffle House, Inc.*¹⁹ In *Waffle House*, an employee filed an age discrimination claim with the EEOC against his employer, with whom he had signed a mandatory arbitration clause. The EEOC filed suit against the employer, seeking injunctive relief as well as specific relief for the employee including backpay, reinstatement and damages. The Supreme Court ruled in the EEOC's favor, holding that the EEOC was not a party to the arbitration agreement with the employer, and therefore was able to seek victim-specific relief for the employee. *Waffle House* has been construed as holding that an employment arbitration agreement cannot preclude a public enforcement agency like the EEOC, the United States Department of Labor, or a state agency enforcing the state's fair employment practices laws, from bringing an enforcement action or employee-specific relief.

Following the *Waffle House* decision, the EEOC does not seem to have made the vindication of the rights of employees subject to arbitration an enforcement priority. However, in an April 2006 press release, the EEOC announced its new enforcement priority of pursuing cases of systemic discrimination, *i.e.*, class action cases, and it has started pursuing cases using its "national law firm model" since that time. Depending on the outcome of the pending Congressional legislation and the race for the United States presidency, we could see the EEOC turn its sights to vindicating the rights of employees subject to arbitration in the future.

¹⁸ U.S. EEOC, Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997).

¹⁹ 534 U.S. 279 (2002).

III. PROS AND CONS OF EMPLOYMENT ARBITRATION

Employers considering arbitration programs are well served by weighing the advantages and disadvantages of the arbitral forum over the court forum. Recent studies have suggested that employment arbitration may not be the panacea to rising litigation costs that it has been thought to be. Set forth below are some of the major considerations that should be weighed.

A. *Success Rates*

While it is often assumed that arbitration favors employers, several empirical studies have shown that employees prevail in the majority of arbitration cases and at a higher rate than they typically prevail in court cases. However, there is a wide discrepancy in the results of the various studies, due mainly to the confidential nature of arbitration, which prevents a public analysis of decisions. Two of the most cited studies, Bingham (1997) and Maltby (1999), show employee success rate in arbitrations at 63% and 66% respectively.²⁰ On the other hand, studies by Hill (2003) and Kleiner (2003) have found employee win rates at 43% and 46% respectively.²¹

As with the empirical data on arbitration decisions, there is also a wide range of statistics portraying the success rate of employment claims brought in court. Some

²⁰ See Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Employment Pol'y J. 189, 213 (1997); Lewis Maltby, *Employment Arbitration: Is it Really Second Class Justice?*, Disp. Resol. Mag., Vol. 6, No. 1, Fall 1999, at 23.

²¹ Theodore Eisenberg & Elizabeth Hill, *Employment and Litigation: An Empirical Comparison*, 2003 Pub. L. & Legal Theory Res. Paper Series 1, 14; Michael Delikat & Morris Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, Disp. Resol. Mag., Nov. 2003-Jan. 2004, at 56.

studies report employees winning just 15% of the claims they file in court,²² while others show that they win as much as 34%.²³ Though there is again variation in the reported statistics, these studies are still helpful. They demonstrate that on average, employees seem to have a higher success rate in arbitration than they do when their claims are fully decided in court.

One factor these statistics do not take into consideration is the propensity of cases to be settled or disposed of prior to being fully adjudicated. Of cases filed in court, approximately 90% of discrimination claims are resolved by summary judgment in favor of employers, and between 79% and 84% of all cases are settled prior to final adjudication.²⁴ In comparison, arbitrators will rarely dispose of cases on motion prior to hearing them on the merits, and settlements are reached in just 31% to 44% of arbitration cases.²⁵ Thus, the research indicates that employees are likely to prevail more often in arbitration than in court, and that employers are also significantly less likely to have claims against them disposed of in arbitration, on motion or at hearing, than they are in court.

B. *Avoidance of Juries and High Damage Awards*

One of the prime factors that have motivated employers to implement employment arbitration programs is the fear of facing large adverse judgments in court. In the court system, the thinking goes, an employer could be subject to plaintiff-friendly

²² Michael Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration from Discrimination Claims*, 31 Rutgers L.J. 399 (2000).

²³ Michael Delikat, *supra*, at 56.

²⁴ Hoyt Wheeler, Brian Klass, Douglas Mahony, *Workplace Justice Without Unions*, 39, 51 (W.E. Upjohn Institute for Employment Research 2004).

²⁵ *Id.* at 51.

juries and unpredictable awards for excessive emotional distress and/or punitive damages. In contrast, arbitrators are generally viewed as more predictable and reasonable in their awards of damages. Again, the research reveals some interesting results on this issue.

A survey revealed a median award of \$34,733.00 from AAA arbitration cases decided in 1999 and 2000²⁶ and a mean of \$49,030.00 for cases decided in 1993 to 1995.²⁷ In comparison, a study of federal court awards in employment cases revealed that in 2000, the median award was \$218,000.00 and the mean was \$712,636.00²⁸ The same study also analyzed settlements of employment cases filed in court, finding that from 1994 to 2000, the median settlement was \$62,000.00 and the mean was \$1,863,406.00.²⁹ These statistics clearly provide a basis for employers' fear of high damage awards through litigation in the courts.

However, these statistics do not reflect the amount of money that is actually received by the successful employees. Because employers often appeal adverse court judgments against them, and such appeals are expensive and time consuming, many employees who prevail at trial settle their cases to avoid an appeal. These statistics also do not reflect any reductions in the court awards based on appellate review. Unlike with arbitration awards, employers can appeal excessive jury awards and many awards are reduced on appeal.

²⁶ Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements*, 16(3) *Ohio St. J. on Disp. Resol.* 559-570 (2001).

²⁷ Bingham, *supra* note 12; see Wheeler, *supra* note 16 at 56.

²⁸ Jury Verdict Research, 4(6) *Employment Practice Liability Verdicts and Settlements* 1, 2 (2000); see also Wheeler, *supra* note 16 at 57.

²⁹ *Id.* at 58.

C. Cost

Another of the most commonly cited advantages of arbitration is the lower costs associated with arbitration in comparison to litigation through the court systems. Arbitration is assumed to be a cheaper alternative to litigation mainly due to its shorter time frames, informal nature and lack of an appellate process. One study has reported an average cost of \$20,000.00 in defending employment cases through arbitration as opposed to the \$200,000.00 average cost of defending the same cases in court through trial.³⁰ The major disparity between these figures is a reflection, in large part, of the significant difference in attorney's fees for the two arenas. Generally, a trial setting in a court requires a larger amount of preparation and resources on the part of attorneys, and therefore their fees usually accrue to a higher total than in arbitration.

Though the lower cost of arbitration is often considered a positive motivator for employers to institute such a system rather than utilizing the court system, there are some negative aspects of the reduced costs as well. For example, employers normally hold a significant economic resources advantage over employees. Through the court system, employers have the ability to use their economic power to cause employees to invest in their case and can, at times, help an employer gain an advantage in settlement agreements. With arbitration, both sides incur less in costs and the benefit of the employer's economic power is essentially lost.

Another concern with arbitration is that because the process is cheaper and easier for employees to utilize, it may cause an increase of claims being brought against

³⁰ Estreicher, *supra*.

employers that employees might not otherwise bring in court. The informal nature of arbitration means that employees are often able to pursue their claims without the assistance of a lawyer, something they are unable to do easily in the court system. However, there have not been any empirical studies as of yet which validate this fear of increased claims.

D. *Discovery*

In the court system, the scope of discovery is far wider than that of arbitration, particularly with the advent of the new rules on electronic discovery. As a result, the cost to employers of participating in the court discovery process can be expensive. Employees in court cases often propound wide and far-reaching discovery requests upon employers, resulting in high costs. Whereas, employers do not generally serve employees with requests of similar scope or volume.

In contrast, discovery in the arbitral forum is usually much more limited and, in the absence of specific provisions in the employment arbitration agreement, arbitrators possess the discretion to allow or disallow discovery. In addition to adding to the overall cost savings of arbitration, the cost savings of limited discovery in the arbitral forum allows for employers to make more settlement decisions based upon the merits of a claim as opposed to the costs of mounting a defense.

Employees frequently bring claims in court without the evidence needed to properly make out their claim, relying on the discovery process to uncover such materials. With the limited discovery in arbitration, employees are less likely to be able to “go fishing” through an employer’s materials in order to support an otherwise

unfounded claim. Therefore, the limited discovery of arbitration can act as a deterrent for employees in bringing frivolous claims. It is also one of the reasons why arbitrations are able to be concluded in a shorter period of time than court proceedings.

However, it is important to remember that the seminal case of *Cole v. Burns International Security Services*,³¹ which set out the factors to be considered in determining whether an employment arbitration agreement is enforceable, identified as important to the enforcement of an arbitration agreement whether the agreement provides more than minimal discovery.³² As employers draft their arbitration agreements to provide more and more discovery, in the hopes of creating a program that will not unfairly restrict employees' ability to pursue their claims in arbitration, the cost savings of arbitration over court could diminish.

E. *Speed*

The speed with which arbitrations are able to be resolved is one of the great advantages of the arbitral forum. It is well known that court cases can take several years before they reach a conclusion, and that appeals can be are lengthy. Conversely, arbitration is designed for a resolution to be reached within a shorter time frame. This is beneficial to employers in terms of cost savings, not only because of the lower attorney fees, but also because of a reduced liability for any potential back pay that may be owed if the employee wins his or her claim.

F. *Finality*

³¹ 105 F.3d 1465 (D.C. Cir. 1997).

³² *Id.* at 1482.

In court, the appeals process can be very time-consuming, allowing a claim to drag on for an extended period of time after the final decision of the trial court is rendered. The finality of arbitration, on the other hand, relieves both parties of the stress of an ongoing process and allows them to move on with their other business.

However, there is very little opportunity for judicial review of an adverse arbitration decision. The grounds for review of arbitration decisions are extremely limited, and are made more difficult if there is no written arbitration award, which is often the case. Whereas, an employer that is unsuccessful in a court trial can seek appellate review of the basis for the jury award, the size of the award, the amount of attorney's fees awarded, etc.

G. *Informality*

Though both the court system and arbitration are adversarial by design, the informal nature of arbitration is often deemed more conducive to preserving ongoing relationships between the parties involved. In many employment cases, the employee is still working for the employer, making it all the more important to preserve their relationship as much as possible. Arbitration is a less formal forum, allowing for flexibility to accommodate each party's needs and schedules. In addition, arbitrators frequently take into consideration the relationship of the parties and will do their best to try and keep things amicable between all sides. Overall, the system is considered to be less divisive than that of the courts and best suited to protect ongoing relationships. The privacy of the arbitration can help in this matter as well by helping to prevent the situation from turning into a large negative publicity event.

H. *Privacy*

For employers, a major benefit of arbitration is the fact that it is usually private. Employers often worry about negative publicity related to employment situations and the privacy of arbitration helps alleviate some of that concern. Court proceedings are normally public and the records are made available as well. Consequently, the media is able to fully follow and report on court cases, exactly what many employers want to avoid. The records and hearings in arbitration are kept private and are not allowed to be given to the media to report upon. This does not prevent all public exposure of the employment claim, but rather serves as a major obstacle in the media's way. As is the case with each of these pros and cons, the privacy of arbitration is not set in stone and changes in the legal landscape of arbitration could affect it in the future.

IV. TIPS FOR DESIGNING AN ENFORCEABLE PROGRAM

In designing an arbitration program, employers can take many steps to avoid a court holding that the agreement is unconscionable and unenforceable. Following *Gilmer*, a series of cases have helped develop the minimum applicable standards for enforceability. Arbitration programs can be designed in various ways. This provides an employer with flexibility to structure a process that is unique to its own needs. Set forth below are some tips for drafting enforceable arbitration agreements.

In the seminal case of *Cole v. Burns International Security Services*,³³ the court set forth six required characteristics of a valid mandatory arbitration agreement: (1) it cannot require an employee to waive her substantive rights; (2) it cannot require an employee to waive access to a neutral forum in which to enforce her rights; (3) it provides for all forms of relief otherwise available in court; (4) it provides for more than mere minimal discovery; (5) it requires a written award; and (6) it cannot require an employee “to pay either unreasonable costs or any arbitrators’ fees or expenses as a condition of access to the arbitration forum.”³⁴ Two later cases, *Prudential Insurance Company of America v. Lai*,³⁵ and *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,³⁶ established another requirement -- that prior to contracting to a mandatory arbitration agreement, an employee must be aware that she is doing so and that her statutory claims will be subject to arbitration if the agreement so provides. In addition,

³³ 105 F.3d 1465 (D.C. Cir. 1997).

³⁴ *Id.* at 1482.

³⁵ 42 F.3d 1299 (9th Cir. 1994).

³⁶ 170 F.3d 1 (1st Cir. 1999).

an employer has an underlying obligation to establish rules and procedures of arbitration which are fair to the employee.³⁷

A. Notice

Regardless of what type of arbitration program is put in place, the employer must make sure that its employees are aware that they are agreeing to a mandatory arbitration agreement and what that means. If an employer does not assure that an employee knows which claims are subject to arbitration, a court may find that the waiver of rights was not knowing and the agreement is therefore unenforceable. In creating an arbitration agreement, an employer should indicate clearly and conspicuously the claims which are subject to arbitration, specifically pointing out whether or not statutory claims are covered.

The recent First Circuit Court of Appeals decision in *Campbell v. General Dynamics Government Systems Corp.*,³⁸ dealt specifically with the issue of notice, finding that an arbitration agreement that had been e-mailed to employees was unenforceable. The court stated the test of notice is “whether, under the totality of the circumstances, the employer’s communication would have provided a reasonably prudent employee notice of the waiver [of their right to bring claims in court].”³⁹ The non-exhaustive list of factors which the court looked at for this analysis included the method of communication, the workplace context, and the content of the communication. Also

³⁷ *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999); see also See Steven Warshawsky, *Gilmer, the Contractual Exhaustion Doctrine, and Federal Statutory Employment Discrimination Claims*, 19 *The Labor Lawyer* 285 (2004).

³⁸ 407 F.3d 546 (1st Cir. 2005).

³⁹ *Id.* at 555.

important to the court was the fact that the employer required no acknowledgment by the employees of their receipt and awareness of the policy and its meaning. As noted above, the First Circuit reached a similar result in the case of *Skirchak* where the program materials had been e-mailed to employees over a holiday weekend and where the language regarding the waiver of claims was buried in a 15 page document with appendices.

As these decisions demonstrate, the issue of notice is very important. The best way to ensure that proper notice is given is to provide employees with a copy of the arbitration agreement and with a substantial amount of time to consider the agreement. Language describing the waiver of claims should be written in plain language and should be conspicuous.

B. *No Limitation of Substantive Rights or Remedies*

It is imperative that an arbitration program not be designed in a way to limit the substantive or procedural rights that an employee would otherwise have in court. Part of the rationale for the enforcement of mandatory arbitration agreements is that arbitration acts simply as a separate forum in which an employee is able to bring their claims, not a place in which different claims are brought and where different remedies can be achieved. This means that arbitration agreements must not place limits on the amount of damages or remedies otherwise available in court for each of the claims subject to arbitration.⁴⁰ A sample provision for remedies is:

⁴⁰ See *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054 (11th Cir. 1998)(holding an arbitration agreement unconscionable which only granted arbitrator authority to award damages for breach of contract claims and not for statutory claims).

“the arbitrator(s) will have no authority to award punitive or other damages not measured by the prevailing party’s actual damages, except as may be required by statute.”⁴¹

They also should not impose more stringent statutes of limitations on an employee than the applicable statutes of limitations would be if the cases were brought in court.⁴²

C. Selection of Arbitrator and Written Decisions

When determining how an arbitrator should be selected, it is essential that the process results in the choice of an impartial and qualified neutral. It is important that the employee is able to participate in the selection of the arbitrator. In *Hooters of America*, the court found a mechanism for selecting an arbitrator to be unconscionable as it allowed the employer unrestricted control over the process.⁴³ Ways in which this can be avoided include coming to a mutual agreement with the employee on the panel of arbitrators, or using one of the dispute resolution organizations such as the American Arbitration Association. A sample provision for arbitrator selection is:

“Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within ten days of their appointment. [The party selected arbitrators will serve in a non-neutral capacity.] If the arbitrators are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.”⁴⁴

When implementing such a clause, employers may also want to have a provision requiring certain qualifications of the arbitrator(s) to be selected.

⁴¹ See American Arbitration Association, *Drafting Dispute Resolution Clauses - A Practical Guide*, 36 (2007).

⁴² See *Davis v. O’Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007).

⁴³ 173 F.3d at 938-39.

⁴⁴ See American Arbitration Association, *Drafting Dispute Resolution Clauses - A Practical Guide*, *supra* at 24.

Arbitration agreements should additionally require the arbitrator to set forth his or her opinion in writing, explaining his or her decision. Though the level of detail in the explanation required by law is relatively low,⁴⁵ written opinions help build confidence between the parties in the process. They also provide a basis for review in the off chance there is a basis for judicial review. A sample provision for written decisions is:

“The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.”⁴⁶

D. *Discovery*

While *Cole* established that more than mere minimal discovery is required in order to avoid being unconscionable, courts have not set a particular standard of how much discovery is actually required. Traditionally, arbitration has a more limited scope of discovery than court, and court decisions have not suggested that discovery in the two forums be equivalent. Rather, the goal is to ensure fairness. Employers should provide for as much discovery in their arbitration agreements as they can and vest the arbitrators with the discretion to grant any additional discovery as may be necessary in order for an employee to have proper access to present their claims. This discretion should be applied particularly broadly when statutory claims are at issue.

E. *Fees*

One area of contention for many employers involves the payment of arbitration fees. Traditionally in arbitration, the parties split the costs of the process. Under the

⁴⁵ See *Armendariz v. Foundation Health Psychcare Serv., Inc.*, 24 Cal. 4th 83 (Cal. 2000).

⁴⁶ American Arbitration Association, *Drafting Dispute Resolution Clauses - A Practical Guide*, *supra*, at 36.

Cole doctrine however, employers are not able to force employees to pay substantial costs because the court system is free and they are left without a choice to use that forum. Therefore, in order to remove one of the grounds on which an arbitration agreement can be found unenforceable, employers should consider paying for all of the costs of arbitration beyond the initial filing fees.

F. Fairness

By following all of the above recommendations, an employer will have designed an arbitration system which meets all the minimum requirements set forth by *Cole* to be enforceable. Still, the remaining characteristics of the system must be designed in a way that promotes overall fairness to the employee in order to be considered conscionable. One of the most important factors in this is mutuality of the contract provisions. This means that when there are provisions in the arbitration agreement granting one party the right to do something, or placing upon them a burden to do something, the same provisions should be equally applied to the other side. Overall, an employer must look at each individual aspect of an arbitration agreement, as well as the agreement taken as a whole, in determining its fairness.

G. Miscellaneous

There are several other provisions which an employer may want to consider including in an arbitration agreement even though they may not be required for it to be enforceable. One common provision is a choice-of-law clause which is used to clarify the governing law which is to be applied in the arbitrations. An example of such a clause is:

“This agreement shall be governed by and interpreted in accordance with the laws of the State of [specify]. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement.”⁴⁷

Employers who choose to utilize a choice of law clause should ensure that there is some logical connection between the law chosen and the parties and claims potentially at issue.

Another clause that is commonly utilized by employers is a confidentiality clause. Without such a clause, there is no legal requirement to preserve the privacy of the arbitration proceedings. Therefore, many employers choose to implement a confidentiality clause such as this:

“Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.”⁴⁸

A final clause that employers may want to consider including in their arbitration program is a clause allowing for the filing of dispositive motions. While arbitrators are historically not favorably inclined to ruling on dispositive motions, if such motions are specifically provided for in the plan document, they must consider them.

V. CONCLUSION

The popularity of employment arbitration has been on the rise following the Supreme Court’s decisions in *Gilmer* and *Circuit City Stores, Inc.* However, this does not mean that the system is right for all employers. Each employer should examine the advantages and disadvantages of employment arbitration in determining whether it is

⁴⁷ *Id.* at 27.

⁴⁸ *Id.* at 36.

right for them. It is especially helpful to be aware of current developments so that employers can be aware of how such agreements may be interpreted in the future. Once the determination has been made implement an arbitration program, employers must ensure that they take into account the proper considerations in designing the agreements so that they will be enforceable by the courts. If each of these steps is undertaken properly, employment arbitration can be a very useful tool for employers in handling all forms of employment disputes.

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