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Dispute Resolution Process Coming Under Scrutiny

Recent Court Ruling Defines What Not To Include in Plans

EMPLOYMENT LAW

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The conventional wisdom in the business community is that the legal system favors the little guy and that businesses fare better when complex legal disputes are heard by an arbitrator rather than a jury.

This type of thinking has prompted business owners throughout the state to create so-called "Alternative Dispute Resolution" agreements to take their legal disputes from the courtroom to binding arbitration. This trend is especially prevalent in the employment dispute arena.

To be sure, the prospect of keeping an employment case out of the hands of an employee-friendly jury is appealing.

However, many judges simply don't like the idea that an unsophisticated employee may unwittingly sign away the right to a jury trial. These judges look for ways to strike down these agreements based on a wide array of legal technicalities.

There has been a recent spate of employee-friendly decisions involving ADR agreements, including one where the more-than-1000-attorney mega-firm O'Melveny and Myers unsuccessfully tried to use an ADR agreement with its own workforce.

These cases provide a blueprint for what not to do when creating these types of agreements.

The right to a jury trial is a fundamental right enjoyed by all California citizens.

The legal premise behind any ADR agreement is that the people who sign them have elected to sign away this right knowingly and voluntarily. If a court can find something broken in either element of the agreement process, it will be apt to strike down the agreement.

At a minimum, this means that the agreement's language must be capable of being understood by someone with relatively little education and must be in the principal language spoken by the employee. The extra cost in stripping out all unnecessary legalese and translating the document will be well worth it in the end.

Another fundamental right enjoyed by all California citizens is relatively low cost access to the legal system. Today, the price of entry is just $320.00 to file a legal complaint.

Because ADR typically involves the use of a private arbitrator who charges an hourly or daily fee, a court will scrub the ADR agreement for any cost shifting that places the employee at a financial disadvantage when compared to going to court.

Whereas, the parties customarily share the cost of arbitration in a business to business ADR agreement, including such a provision in an employment ADR agreement will invalidate the agreement.

Reviewing courts also look at fundamental fairness.

The phrase, "what's good for the goose is good for the gander," readily comes to mind. Courts require that both the employer and the employee must be giving up their right to a jury trial to the same extent. Thus, the Court will look out for any escape clauses that only apply to one side.

For example, if an employee steals your company secrets and attempts to use them to gain a competitive advantage, you will want your ADR agreement to allow you to go to court and obtain a court-ordered injunction to halt the misappropriation of your trade secrets.

Though this is certainly a legitimate concern, such one-sided carve-outs can be fatal to the enforceability of the agreement.

Once an employer has concluded that an ADR agreement is desirable, serious attention must be paid to how the agreement is introduced to the workforce.

Can you legally threaten an employee with discharge if they don't sign? Surprisingly, courts have approved the take it or leave it approach if the rest of the agreement's terms pass muster.

The O'Melveny case, which came down in late May, is instructive as a blueprint for what can go wrong in these agreements.

In that case, a paralegal assistant sued the firm on a class-action basis for back overtime pay and for meal and rest break penalties. The firm tried to block her suit with their ADR agreement, which diverted all such claims to binding arbitration. Following a bitterly contested court dispute over the enforceability of the ADR program, the U.S. Ninth Circuit Court of Appeal invalidated the O'Melveny agreement and cleared the way for the paralegal's class action against the firm.

The O'Melveny ADR agreement had several fatal flaws.

First, the agreement was presented on a take it or leave it basis. Though the firm gave the employees a full 90 days to consider whether to sign, in effect, they all had to sign it if they wished to keep their job.

Had this been the only flaw, the agreement likely would have passed legal muster.

But, it wasn't.

For example, the firm tried to considerably shorten the period of time in which an employee could sue the firm. Perhaps because they were lawyers and should have known better, the court bristled at this attempt to enforce a shorter statute of limitations.

Another defect was the confidentiality provision.

It provided that employees must keep their dispute confidential and precluded them from discussing their case with anyone. The agreement effectively precluded the employee from enlisting the help of co-workers or former employees.

The court noted that confidentiality provisions must be reasonable and this one went way too far. It also wondered aloud whether the clause ran afoul of a little known state Labor Code provision which makes it illegal for an employer to bar employees from discussing their salary or other employment terms.

Yet another problem in the ADR agreement was the firm's carve-out for injunction actions it wished to pursue against the employee. Since this clause was one sided, the court added it to the list of defects.

Finally, the firm tried to insulate itself from any kind of labor law agency filings by adding a provision precluding employees from filing administrative claims with any federal or state labor law enforcement agency.

The court had little patience for such a clause and noted that the provision was contrary to public policy.

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