OUTSIDE COUNSEL’S PERSPECTIVE ON EMPLOYMENT ARBITRATION

American Bar Association
3rd Annual CLE Conference
Washington, D.C.

November 7, 2009

Robert W. McKinley
Lathrop & Gage LLP
2345 Grand Blvd.
Suite 2200
Kansas City, MO 64108
(816) 460-5636
(816) 292-2001 (fax)
rmckinley@lathropgage.com
Background

As a practitioner who represents employers of all sizes, we discuss several issues surrounding employment arbitration on a regular basis. Our clients understand that reduced to its simplest terms, arbitration is a process where parties to a dispute select a third party to hear and decide issues that exist between them instead of going to court. The decision reached by the third-party arbitrator will be, with very limited exceptions, a final and binding decision.

Until the United States Supreme Court clearly sanctioned the arbitration of statutory discrimination claims of individual employees in 1991 interest in non-labor law related employment arbitration was limited. The Court’s decision placed arbitration of such claims on an equal footing with a Court’s resolution of the same claims. Many point to the 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) as the date after which employment arbitration entered the mainstream as a vehicle to resolve employment-related disputes.

Employment arbitration traces its roots back over at least six decades. The American Arbitration Association, the Federal Mediation & Conciliation Service, several specialty groups of construction and maritime arbitrators, the Filmmakers Arbitration Tribunals, the National Association of Security Dealers all have a long history of arbitration to settle workplace based disputes. All of these organizations have various rules, processes and procedures which they utilize in the arbitration of disputes which fall within their realm.
Since *Gilmer*, hundreds of cases have ruled on various issues involving employment arbitration. Those issues have included barrier-to-access issues, contract formation issues, process issues, as well as issues involving access to full remedies and judicial review.

In 1995, a taskforce of arbitration service providers and attorneys representing employees and employers produced a document which addressed many of the due process issues for the mediation and arbitration of statutory disputes in the employment relationship. See, Due Process Protocol, 9A Lab. Rel. Rep. BNA No. 142, at 534:401 (May 9, 1995). This joint effort set the minimum procedural safeguards for parties who sought to prepare and implement employment arbitration agreements. The Protocol provided for qualifications for employment arbitrators deciding statutory disputes, guaranteed counsel for employees in such proceedings and provided that arbitrators be able to award the full range of damages permitted by applicable laws. Since 1995 the Protocol has been adopted by most major arbitration service providers and many of their members refuse to arbitrate cases under agreements inconsistent with that arbitration service provider’s particular adoption of the Protocol. Many employers utilized the Protocol as a drafting guide for balanced, ethical and enforceable agreements to arbitrate all employment-related disputes. While the Protocol does not answer all of the open questions involving employment arbitration agreements, many commentators agree the Protocol remains a benchmark against which at least initially all employment arbitration agreements are reviewed.

The combination of the court decision, the Protocol and the individual rules and procedures adopted by AAA, FMCS, JAMS and others form the procedural backbone of the employment arbitration process.

The purpose of this paper is to provide an outside counsel’s perspective on several arbitration issues as seen through the eyes of counsel advising employers on when and how to
utilize employment-related arbitration to resolve workplace disputes. This paper excludes any opinions or analysis of issues related to the resolution of workplace issues pursuant to collective bargaining agreements with recognized labor organizations, as well as any alternative dispute resolution processes with voluntary associations representing employees or professionals. Rather, the focus is on five groups of issues employers often analyze when considering employment arbitration for resolving workplace disputes in their particular circumstances.

A. **Quicker, Cheaper and Simpler than Litigation**

As originally envisioned, employment arbitration was to be a quicker, cheaper and simpler method of resolving employment-related issues. Offered as a substitute for traditional employment litigation, arbitration was suggested, encouraged and sold as a quicker and simpler method to resolve workplace disputes than the usual protracted litigation process.

If the process moved quicker, many thought it would also be cheaper as it theoretically would bypass the long and involved discovery issues and the related costs incurred in litigation. For workplace disputes and claims that do not involve allegations of violations of employees’ statutory rights (local, state or federal) the promise of quicker, cheaper and simpler works in a significant number of cases. In disputes involving claims and/or rights to intellectual property, or involving breach of obligations to protect trade secrets, confidential and/or proprietary information, intense discovery issues and the difficulty in securing evidence from third parties usually combine to cause the process to move at about the same pace, if not somewhat slower, than litigation. In cases that involve statutory claims, the procedures of AAA, JAMS, etc. have established procedures based primarily on the Protocol. However, disputes over discovery, resolution of evidentiary admission issues and related subjects tend to become as cumbersome and time-consuming as those faced in litigation.
As originally envisioned, employment arbitration would be performed by practitioners experienced in labor arbitration. The employment arbitration process would thus be grafted onto the traditional arbitration process as practiced by labor law practitioners with its minimalist view and history of voluntary disclosure of relevant documents and deposing a minimum number of witnesses, if any.

Today, in most claims including those involving statutory rights, most of the practitioners called upon to bring or defend such claims within the arbitral forum come to such claims with only a litigation background. The labor arbitration perspective as originally envisioned has faded to black. As predictable as the sun coming up in the east, discovery has become just as, if not more burdensome and now includes the full range of discovery present in state and federal employment discrimination cases. Now, the overwhelming majority of those practicing on both the plaintiff and defendant sides of the bar in employment arbitration have never been involved in a labor arbitration and are blind to its history. The disclosure and discovery process for employment arbitration now follows the federal rules, simply substituting an arbitration forum for the court.

The result is that the arbitration process is neither quick, cheap nor simple in virtually all cases.

B. Is Private at the Same Cost Worth The Price?

Another discussion we have with regularity is whether to impose employment arbitration as a condition of employment (pre-dispute) as part of an effort by the company to keep employment disputes out of the public eye. Generally, large corporations and other business entities view most publicity about disputes with their employees or customers as a significant negative. While there is the occasional employment-related or corporate case where winning loudly in public can have a positive impact with customers and clients and/or a sentinel impact
with employees, most companies seek to avoid the publicity associated with being involved in litigation.

Another key issue is with what class or classes or employees do companies wish to keep disputes private and therefore secure an agreement to arbitrate all employment-related claims? Some business organizations want employment arbitration agreements with all executives and officers so as to prevent the details of the officer’s salary, benefits, perks and work-related disputes from becoming known to other similarly situated employees and also to prevent that same information from becoming known to the public because it could be used by other companies to their competitive advantage.

After these issues involving senior executives and officers are resolved, the next group to be considered are managerial employees below the level of vice-president down to first line supervisors. While some of the same issues also apply here, a larger issue here is disruption of the work force when details of the dispute, the company’s response and the employees’ claims become public and the focus at the virtual water cooler, the internet. Various social and business-based blogs, websites and exchange sites spew information (correct or incorrect, and usually incorrect) across the internet within a matter of minutes and that information can be accessed for years to come by a wide range of individuals, hampering recruitment, making retention more difficult and creating significant disruption within the workplace now and in the future. The impact public information can and will have within an organization currently and in the future is a significant factor to consider.

Realistically, however, can the details of any work place dispute really be contained today? Some would argue the anonymous, open architecture of the internet and the explosion of
social networking sites and blogs will facilitate most private information of this type ultimately becoming public in any event.

A related privacy issue involves disputes where confidential and/or proprietary information might be involved in the defense of a claim. While Courts can provide protective orders and documents can be filed under seal, the employment arbitration process has considerably more privacy. Many employers believe that for the good of their company, the employees involved, better employee retention, as well as the enhanced ability to protect confidential and proprietary information, employment arbitration is the best vehicle to resolve workplace disputes. In their view arbitration has a significant advantage over public, court-based litigation. Even if outside counsel and the company exert the same effort and expend the same time and dollars as litigation, the fact that the process is private tips the scales in favor of employment arbitration for executives, officers and management employees.

A different result is sometimes reached by the same employers when considering non-supervisors and other employees within the business. Disputes involving the remainder of the workforce do not usually involve the same privacy and confidentiality issues as are presented by senior executives, officers and managerial employees. Because the privacy issues are not the same, other factors such as the lack of an effective appeal process to remedy an obvious miscarriage of justice causes some employers to balance the equities in the opposite direction and elect not to utilize employment arbitration for employees below the supervisory level.

The above discussion is based on an analysis and consideration of employment arbitration agreements that provide for full substantive relief, attorneys fees and costs, proper arbitrator selection process, full discovery, no reduction of the applicable limitation periods, proper sharing of the cost and fees involved in the arbitration process. We also assume there are
C. Employment Contract Issues

Employment contract issues include a full range of contract formation, barrier-to-access, process, remedy and appeal issues. Several issues are repeat players when the issues of the exact terms and conditions to be included in an employment arbitration provision are discussed. For employers the legal issues surrounding unilateral modification present serious organizational issues. The enforceability of employment arbitration agreements between a company and “at will employees” which contain a clause granting a company the unilateral right to modify the agreement are generally problematic. Hooters of America, Inc. v. Phillip, 173 F.3d 933, 939 (4th Cir. 1999).

However, in some cases such as Hardin v. First Cash Financial Services, Inc., 465 F.3d, 470 (10th Cir. 2006) courts have held that if the employer provides ten (10) days notice of a modification, could not modify the agreement with respect to any potential claim or dispute of which it had actual notice and could not terminate the arbitration agreement with respect to any claim that arose prior to the date of the termination of the arbitration agreement, the agreement would be enforceable because the restrictions on future modifications do not cause the arbitration agreement to be illusory.

Employers need to be aware that their employment arbitration programs need to be monitored and should provide the flexibility to evolve with the law. An employers’ program for all similarly situated executives, officers and managerial employees may need to be changed periodically in a way that avoids invalidating the underlying employment and/or arbitration agreement. The issues of appropriate notice and full consent to the new terms and conditions of
the employment agreement are part of the analysis of this issue. These concerns are not present in litigation. With careful drafting and perhaps tying changes in the arbitration program to each year’s salary adjustment and/or bonus awards, many of the contractual issues may be resolved. However, in-house counsel and senior HR executives need to proceed with caution on these issues.

Other issues to be considered and discussed are time limitations for claims brought under the employment arbitration agreement, whether class action claims are amenable to arbitration programs and whether the remedy punitive damages can be precluded. It is beyond the scope of these comments to review all of the legal issues surrounding those issues. See Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003); In re Cintas Corp. Overtime Pay Arbitration, 444 F. Supp. 2d 1353 (J.P.M.L 2006); and Johnson v. Circuit City Stores, Inc., 203 F.3d 821 (4th Cir. 1999).

Many employers have selected among these various issues so as to create employment arbitration agreements and programs that best mesh with their human resources and employment contract related concerns.

As courts continue to review and make decisions on each of the contract formation barrier-to-access, process and remedies issues, the breadth and scope of the decisions an employer may make on the above issues and issues involving arbitrator selection, substantive relief, attorney’s fees, forum selection clauses, etc. will continue to narrow. The focus of the question of whether to arbitrate or proceed to court may soon be down to core issues of price, privacy and right to appeal.

D. Pre-Dispute or Post-Dispute Agreements to Arbitrate

All of the discussion above relates to pre-dispute employment arbitration agreements. The issues discussed above as well as the other factors referenced above play a part individually
and collectively in the process of deciding whether pre-dispute agreements to arbitrate are in a company’s best interest.

Another aspect of outside counsel’s discussions with in-house counsel and HR executives is the use of post-dispute agreements to arbitrate employment-related claims. This topic could be the subject of an entire presentation on how to negotiate, draft and conclude post-dispute agreement on an employment-related statutory or non-statutory claim.

Often the parties will agree to utilize a particular arbitration service’s rules on arbitration except as modified by a supplemental agreement to arbitrate which will contain language on the special or individual company-related issues that might be present in the dispute. Examples of those issues could be trade secret, intellectual property, confidential or proprietary information, testimony in future unrelated disputes, specific provisions of a covenant not to compete or not to solicit customers or employees, etc.

The primary problem faced by employers in securing post-dispute arbitration is leverage. Depending upon the facts and circumstances of the underlying case, it is much more difficult to get a post-dispute agreement to arbitrate if plaintiff’s counsel is evaluating a significant opportunity to secure statutorily enhanced, special or punitive damages as part of the claim. A company’s desire to keep a matter private and keep the dispute out of the public’s eye is in direct proportion to the degree to which disclosure of the dispute places the company in a difficult light, creates problems with other employees, creates issues with clients and/or customers or joint venture partners who have had a close working relationship with the employee, executive or officer involved, all matters already part of the well prepared employee’s attorney’s arsenal of weapons. Often the discussions post-dispute arbitration run on a parallel track with settlement discussions.
Some employers have opted for an employment agreement that requires an employee seeking to file a charge or complaint alleging a statutory violation or civil claim to agree as a condition of employment to mediate all employment-related disputes before exercising the right to seek administrative or other statutory remedies. In this ADR context, post-dispute arbitration may be the next logical step following a failed mediation.

E. **No Appeal – We Only Care About That If ……….**

The issue of the company’s right to appeal is one that brings all the pros and cons of arbitration into sharp focus. The legal standard for vacating any arbitration award is extremely difficult, generally requiring fraud, misconduct and other action by the arbitrator or third parties that destroy the impartiality of the process. See *Federal Arbitration Act*, 9 U.S.C. §10-11. Absent conduct of this type, the legal standard for vacating an employment arbitration award is manifest disregard. A party seeking to vacate an arbitration award must prove the arbitrator knew the law and consciously refused to apply it. *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997). There are few examples of courts holding an employer had met that standard of proof.

In addition, when considering your advice to an in-house counsel or human resource executives, outside counsel must be very clear about the limited ability to remedy an obvious miscarriage of justice or to secure a reversal of a case that is wrongly decided. It will be much more likely to obtain reversal in a Federal or state appeals court on appeal from an adverse trial court decision, than in an action to vacate which will require the court’s agreement that an arbitrator acted with manifest disregard of the law. Courts require more than a simple showing the arbitration award contradicted an express term of the contract. The courts have consistently held that a company seeking to overturn an arbitrator’s award must prove the arbitrator
deliberately failed to apply a clear rule of law. In our experience, this level of evidence is rarely found by a court. **B.L. Harbert Int’l v. Hercules Steel Co.,** 441 F.3d 905 (11th Cir. 2006).

The factual findings underlying the arbitrator’s decision often preclude successfully arguing in a motion to vacate that the arbitral award constituted manifest disregard of the law and failed to draw its essence from the underlying agreement. **Remmey v. Paine Webber, Inc.,** 32 F.3d 143 (4th Cir. 1994).

**Conclusion**

Generally, we have found that employment arbitration is neither quicker, cheaper or simpler than litigation. Unless privacy and confidentiality considerations are controlling factors, the legal uncertainty concerning the interpretation of certain contractual terms, the inability to preclude certain undesirable outcomes as part of the agreement and the availability of utilizing post-dispute employment arbitration have and will continue to persuade many employers to not utilize pre-dispute employment arbitration. In a close factual case with substantial possibility of damages, remaining in the federal or state court system will generally preserve the employer’s right to successfully appeal a miscarriage of justice or a wrongly decided case.

*The views expressed above do not constitute legal advice, are only the views of this individual attorney and do not reflect the views or opinions of Lathrop & Gage LLP or any of its partners, attorneys, employees or clients.*