

Should You Have An Arbitration Agreement With Your Employees?

By Karen Sutherland

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Legal Background

In March, the U.S. Supreme Court held that employers could enter into arbitration agreements with their employees for matters such as tort claims and violations of state law regarding fair employment practices. This ruling was important because the Ninth Circuit (which includes Washington, Oregon, California, and several other western states) had previously held that the Federal Arbitration Act, which allows binding arbitration agreements in contracts in interstate commerce, did not apply to contracts of employment. The U.S. Supreme Court's ruling, which is called *Circuit City Stores, Inc. v. Adams*, overruled the Ninth Circuit and held that employers can enter into binding arbitration agreements with their employees.

As an employer, you may wish to consider whether it would be a good idea to require binding arbitration for employment disputes. An arbitration agreement would need to be signed by the employee to be binding. It could either be a stand-alone agreement or included as part of a noncompete or nondisclosure or non-solicitation or other agreement. It could be applied to existing employees, either through re-negotiation of an existing contract if the employees are employed under a contract, or if the employees are at-will, by requiring signing as a condition of continued employment (at least under the current law of Washington; this rule may be different in other states, and I anticipate that it may change in Washington in the future).

Practical Guidelines

The pros and cons of arbitrating employee disputes are set forth below. There also may be others that are not included here that are specific to your workplace.

Advantages:

- Cost savings because of the reduced likelihood of an irrational award (arbitrators tend to be more conservative than juries)
- Cost savings in terms of time away from work and attorney's fees because of a less formal discovery process and a less formal fact-finding process (you do have to pay the arbitrator, though)

- Less publicity because arbitration filings are not public records (except for a judgment on the award and enforcement proceedings)
- Less publicity because the arbitration is not open to the public or the press

Disadvantages:

- Inability to obtain quick, temporary relief restraining an employee from stealing trade secrets or working for a competitor in violation of a noncompete agreement
- No right of appeal if a decision appears to be wrong
- The streamlined process inherent in arbitration may encourage employees to bring claims that they would not have brought in court (it may be possible to address this problem by requiring the employee to pay part of the arbitration costs)
- Arbitrators may have a tendency to "split the baby" rather than to give the employee nothing or to dismiss a case
- Flexible evidence rules could hurt or help the employer, depending on the facts
- An arbitration clause will not prevent an agency from investigating or suing an employer based on an employee's complaint (the Supreme Court may rule on this issue later this year)
- The courts still have not fully resolved exactly what types of cases can be determined through binding arbitration, which means the employee may seek to challenge the arbitration clause or the arbitration results in court

Arbitration clauses can be used for all of your employees or just for employees in certain positions. If you decide that a binding arbitration agreement would be the best option for your workplace, there are a variety of formats and different types of rules governing the arbitration process and a variety of legal clauses that can be used to implement the format that is best for you. For assistance with drafting a stand-alone arbitration agreement or other document that contains an arbitration agreement, contact an attorney with experience in this area.

These materials are not intended and should not be used as legal advice or other recommendation. If you need a legal opinion on a specific issue or factual situation, please contact an attorney. Anyone using these materials should not rely on them as a substitute for legal advice.