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The Benefits (and Drawbacks) of Employee Arbitration Agreements

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> **"The most obvious benefit of arbitration is that it allows an employer to avoid the cost and uncertainty of a jury trial. There is no jury in arbitration. Instead, a neutral (generally a retired judge or an experienced attorney) is the fact finder. The absence of a jury is so attractive that many employers want their employees to execute arbitration agreements as a condition of employment simply to gain this benefit. In California, it is perfectly legal for employers to make execution of an arbitration agreement a condition of employment."**

Arbitration agreements in the employment context have received a lot of press coverage as of late. News articles often paint arbitration agreements as secretive, one-sided arrangements which ensure complete confidentiality of proceedings and an employer friendly result. The reality is that arbitration agreements offer both benefits and drawbacks for the employer.

Eliminate Risk of a Jury Trial. The most obvious benefit of arbitration is that it allows an employer to avoid the cost and uncertainty of a jury trial. There is no jury in arbitration. Instead, a neutral (generally a retired judge or an experienced attorney) is the fact finder. The absence of a jury is so attractive that many employers want their employees to execute arbitration agreements as a condition of employment simply to gain this benefit. In California, it is perfectly legal for employers to make execution of an arbitration agreement a condition of employment. California courts will uphold arbitration agreements required as a condition of employment absent evidence of oppression or hidden terms.

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Confidentiality. Arbitration allows a greater degree of confidentiality than a court proceeding. While legal pleadings filed in court are generally available to the public, legal papers filed in arbitration are not. Therefore, to the extent that a Plaintiff has made scandalous allegations against his or her employer which the employer would like to keep out of the public eye, arbitration may be preferred. However, while arbitrators are under a general duty to maintain the privacy of the arbitration proceedings, arbitration does not provide an impenetrable shield of confidentiality. Nothing prevents a plaintiff from publicly speaking about his or her allegations in the arbitration proceeding to the press or others. Moreover, once an arbitration award is rendered, it may need to be publicly filed in Court in order to turn the arbitration award into an enforceable court judgment.

Class Action Waivers. Another attractive feature of arbitration is that it may prevent an employee from bringing a class action. In *AT&T Mobility v. Concepcion* (2011), the U.S. Supreme Court held that the Federal Arbitration Act (FAA) preempted California's *Discover Bank* rule that collective-arbitration waivers in consumer contracts were unconscionable. In *Iskanian v. CLS Transp. Los Angeles LLC* (2014), the California Supreme Court held that *Concepcion* abrogated the prior California Supreme Court decision in *Gentry*, which had disallowed class action waivers in employment arbitration agreements. Therefore, under *Iskanian,* arbitration clauses in employment agreements that contain class action waivers are valid. However, *Iskanian* also held that arbitration agreements cannot waive representative claims under the California Labor Code Private Attorneys General Act (PAGA). Accordingly, under current California law, if an employee files a complaint alleging both individual Labor Code violations and PAGA violations, and the employee has signed an arbitration agreement with a class action waiver, the employer will likely be successful in compelling arbitration of the individual Labor Code claims and stopping a class action, but will still have to litigate the PAGA claims in court pending the outcome of the individual arbitration. Federal law is less certain. In October 2017, the U.S. Supreme Court heard oral argument on trio of Circuit Court cases related to whether or not class action waivers in employment agreements are an illegal restriction on "concerted activity" under the National Labor Relations Act (NLRA). The Supreme Court's resolution of those cases remains to be seen.

Limited Discovery. In order to be valid, an arbitration agreement must provide for more than minimal discovery. Yet, the amount of discovery available in arbitration is generally significantly less than what is available in court. Under JAMS' employment arbitration rules, for instance, each side is limited to only one deposition unless additional depositions are granted by the arbitrator. Limited discovery may favor the employer and keep costs down.

Employer Must Pay Arbitrators' Fees. While in theory arbitrations can be less expensive than court proceedings (in part because discovery is limited), the costs of arbitration are borne disproportionately by employers. As a matter of law, arbitration agreements will not be enforced if they require employees to pay unreasonable costs, fees or expenses. In accordance with this principle, JAMS requires that the employer pay all fees and costs associated with the arbitration other than the initial case management fee. AAA requires the employer to bear almost all of the arbitration costs other than a minimal initial fee. Arbitration costs can get very expensive over time. Top arbitrators charge as much as $10,000 per day, and many charge at least $500 per hour.

Limited Availability of Summary Judgment. Another potential drawback of arbitration is that while some arbitrators are open to dispositive motion practice in arbitration, others are decidedly not. Cases which may be appropriate for summary judgment, for instance, might be better off in court than in arbitration if the arbitrator is not willing to hear such motions.

"Splitting the Baby." There is a perception among litigators that arbitrators are more likely than judges to make compromise awards that "split the baby," giving some (but not all) relief to a plaintiff, regardless of the legal merit of the plaintiff's claims. There is also a perception among some litigators that arbitrators may make awards based on broad conceptions of "equity" rather than strictly applying the rules of law or evidence, which may not work in the employer's favor.

Limited Judicial Review. In the event that an arbitrator decides an issue adversely to the employer, there is a much narrower ability to obtain judicial review in arbitration than in Court. In arbitration, an arbitrator's decision is generally not reviewable for errors of fact or law, even if the error is obvious on the face of the award. By contrast, an adverse decision in Superior Court would be immediately appealable.

In sum, while arbitration offers significant benefits to employers, it is not a panacea. As the proverb goes, an ounce of prevention is worth a pound of cure. When it comes to employment law, the best strategy is to comply with California and Federal labor laws and have strong and transparent policies and practices in place to help prevent claims from arising in the first instance.

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Shane Criqui is a trial attorney whose legal practice focuses on employment litigation (employer-side), employment counseling, and business litigation. Mr. Criqui engages in aggressive yet practical legal representation to achieve client's objectives in litigation, as well as providing accurate and thoughtful counseling to clients regarding their legal, business, and employment needs. He has been selected as a 2015, 2016 and 2017 Southern California "Rising Stars" by Super Lawyers magazine. He can be reached at 949.791.5126 or scriqui@stuartkane.com.