

To Arbitrate or Not to Arbitrate? That is the Question...

The prospect of a protracted jury trial, with associated risks and delays as well as substantial fees and costs, is daunting for California employers and employees alike. One method of avoiding the significant burden involved in navigating today's overtaxed judicial system is to enter into an arbitration agreement, where employer and employee each agree that they would rather arbitrate their claims than proceed with a civil lawsuit in court.

Benefits of the arbitration process for all parties include a more rapid resolution to workplace disputes, far less cost (typically less than half the cost of a jury trial), less burden and drain on the persons involved, and access to a more reasoned, knowledgeable decision-maker (often a professional arbitrator or retired judge). Because agreeing to arbitration includes a waiver of the constitutional right to a jury trial, however, the arbitration agreement is only enforceable if it meets strict (and often-changing) legal standards.

First, existing employees cannot be forced to sign an arbitration agreement and cannot be disciplined or terminated for refusing to do so. They can certainly be asked to do so, and employers can even offer incentives (such as a day of paid time off) to employees who agree to sign. On the contrary, applicants can be required to sign an arbitration agreement as a condition of employment, provided that they receive the arbitration agreement with their offer letter and have the opportunity to review it in detail prior to accepting the position.

Second, the arbitration agreement must provide that the employer will pay for the costs of the arbitration, except for an amount equal to any fees the employee would pay to file a lawsuit in court. The arbitration agreement must refer to the rules to be applied to the arbitration, and a copy of those rules must be attached. The agreement must note the waiver of the right to a jury trial, and cannot create statutes of limitation, a mediation obligation or other requirements beyond those already required of the employee by law.

Third, the arbitration agreement must be in writing, and must be signed by the employee to be bound by it. The arbitration agreement should not be buried in an employee handbook or employment agreement, and cannot simply be established as the employer's policy. The arbitration agreement must contain all legally-required provisions, with the appropriate disclosures and required language. If the agreement is not signed by the employee (not by acknowledgement of receipt but by the employee's direct execution of the document), and if it does not contain the legally-required provisions, it is not enforceable. Because the legal requirements are so strict, it is critical to have your arbitration agreement prepared by employment counsel and reviewed on an annual basis to ensure that it remains enforceable over time.

For questions regarding arbitration agreements, or for other employment law questions, contact Karen Gabler at kgabler@lightgablerlaw.com or (805) 248-7207.

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