

**Mandatory Employment Arbitration Agreements –  
Employers May Not Achieve an Overall Cost Savings**

**By: Ruth A. Binger**

Employment litigation continues to explode, fueled by the passage of the Civil Rights Act of 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act and increased sensitivity to sexual harassment. The number of employment discrimination claims increased by 2200 percent in the twenty-five years from 1969 to 1994, and now account for twenty to twenty-five percent of the federal court docket. Arbitration became an attractive alternative to litigation when a string of United States Supreme Court Cases were handed down in 1991. By 1997, the United States General Accounting Office found that nineteen percent of employers were using arbitration for employment disputes.

Mandatory employment arbitration agreements are entered prior to a dispute via a written contract. Arbitration clauses are commonly found in employment applications, employment manuals, or stand alone agreements. Such clauses require employees to submit any employment dispute to one or more impartial arbitrators for final and binding arbitration. Employment arbitration differs from other commercial arbitration proceedings; a mandatory employment arbitration clause must not remove remedies that an employee would otherwise have if the employee pursued the matter in civil litigation. Those remedies include the recovery of litigation expenses, including expert witness fees, attorneys' fees, compensatory damages and punitive damages. This unique requirement for employment arbitration clauses is sometime referred to as the "Remedy Rule".

This article explores six critical factors in evaluating the pros and cons of employment arbitration. Mandatory employment arbitration is not a panacea, and many small employers may be better off relying on the civil litigation system.

Factor One. Arbitration is less expensive than civil litigation. Dispute resolution through arbitration proceeds more rapidly than litigation; an arbitration case is generally resolved in six months, whereas an average civil litigation case takes twenty-one months. The relatively rapid resolution achieved in arbitration reduces average attorneys' fees from \$130,000.00 in litigation to \$20,000.00 in arbitration. In addition to providing a more expeditious resolution, arbitration discovery and pre-trial proceedings are more streamlined, further reducing the cost of resolution. Discovery is limited, the legal rules are less formal, and parties to arbitration do not have to wait for a backlog to clear. Although written discovery is allowed, depositions are generally few (which can each cost between \$5,000.00 and \$10,000.00).

However, negatives of arbitration include the costs shouldered by the employer for administering the private dispute resolution system. The Remedy Rule requires the employer to pay the arbitrator's fee (\$1000 to \$1200 per day per arbitrator) and the filing cost (\$300.00 and up, depending upon the amount claimed). Additionally, employees receive more of an advantage in arbitration in that they are allowed to introduce evidence that may not have been allowed in civil litigation. Therefore, although the cost advantages benefit both sides, the more lenient rules in arbitration benefit employees.

Factor Two. Unlike civil proceedings that contain screening mechanisms such as pre-trial motions, arbitration does not allow for filtering and disposal of cases before trial. This useful tool in litigation includes pre-trial motions such as motions to dismiss for failure to state a claim, failure to exhaust administrative remedies, and summary judgment. In 1994, 3500 discrimination cases were filed in federal court; sixty percent of these cases were decided by a pre-trial motion, with the employer succeeding in an overwhelming 98% of these pre-trial determinations.

Factor Three. Arbitration is more predictable than litigation. Arbitration is presided over by an arbitrator with expertise in a given field of law, and the absence of a jury generally predicates consistency in damage awards. This predictability inevitably increases the pressure on both parties to settle for more reasonable amounts, whereas in civil litigation, employers may settle invalid claims for higher amounts due to a fear of a runaway jury. On the other hand, huge verdicts are frequently overturned. Many of the most highly publicized employment verdicts have been reduced or even overturned either as a matter of law or on appeal. Nonetheless, employers would be foolish not to give predictably extra weight if the employer faced a suit in a plaintiff-friendly jurisdiction.

Factor Four. Arbitration programs allow employees more access to the legal system. This increased access adversely affects employers by increasing the total number of active claims and therefore increasing costs. Without an arbitration alternative, many employees abandon meritorious claims because of the high cost associated with litigation. With an arbitration program, the employees are assured of access. Employers, accordingly, will have to invest more in human resource professionals and create internal systems that minimize the number of disputes. Thus, an arbitration policy will increase the overall number of active disputes by facilitating the process by which employees and applicants bring employment related claims.

Factor Five. Arbitration awards are generally final and binding. Arbitration decisions are typically not subject to appeal except in extraordinary situations; judicial review of arbitration awards is therefore limited. This leaves a party with little means to challenge an award that it believes is unjust or not supported by law. An employer who loses an arbitration proceeding generally will not obtain a review of the award, leaving the door open to ghastly awards with which the employer is stuck. In a civil proceeding, there is some evidence that decisions on appeal favor employers. Thus, appeals process afforded by the civil system undeniably gives employers bargaining leverage over prevailing, but financially tapped, plaintiffs.

Factor Six. The limited studies available all indicate employees win more often in arbitration, but are awarded lesser amounts.

Accordingly, the key question for your business is, given the factors set forth above, would a mandatory arbitration program create a cost savings for your business. Mandatory arbitration programs are best suited for large employers who invest heavily in human resource

professionals. For small employers, the increased number of employment disputes will require more investment in human resources and payment for the costs of the private dispute system. These costs may not outweigh the runaway jury consideration factor given the filtering and appeal opportunities available in civil litigation. For smaller employers, the critical inquiry is whether the costs of implementing a preventive strategy like a mandatory arbitration program outweigh the risks of reliance on the unfriendly civil litigation model to shield it from lawsuits?

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*Ruth A. Binger is Principal in the Clayton, Missouri based law firm of Danna McKittrick, P.C.  
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