Six Excuses Employers Should Know:

Employee Challenges to an Arbitration Agreement

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Employers frequently ask employees to sign arbitration agreements covering all disputes arising out of the employment relationship. Recently, the USSC issued rulings enforcing employment arbitration agreements. However, employees would much rather pursue litigation against their employers in court before a jury rather than before an arbitrator. Therefore, when a dispute arises, employees frequently try to get out of the agreement to arbitrate, especially in California where state courts are more likely to void such an agreement.

Thus, every prudent employer should ask its attorney to draft the company's employment arbitration agreements and periodically review and revise them. These agreements should include current provisions and procedures, based on the most recent case law. Then, when a dispute arises, the employer will be better prepared to defend against a number of challenges to the arbitration agreement.

Examples of common arguments asserted by employees seeking to avoid arbitration include:

1. "*But I did not read it before I signed it.*"

The failure to read the agreement carefully is typically no defense, if the employee signed the agreement and he/she has the ability to read. Very limited exceptions apply, e.g. for fraud and coercion.

2. "*But my boss said I had to sign it if I wanted to work for the company.*"

Yes, that is the procedure most of the time, take it or leave it. And that is why the courts require an employment arbitration agreement to meet certain minimum standards so it is not unconscionable.

3. "*But it's not fair.*"

If the agreement provides the minimum standards (neutral arbitrator, discovery process, written award, no additional costs for employee over what court costs would be, and same relief available as in court) it is likely to be enforced. If the agreement is unreasonably one-sided, then it is more difficult (or impossible) to enforce.

4. "*But I don't know the rules.*"

If the agreement details the procedures or specifically identifies a certain set of procedures (e.g. AAA employment dispute resolution rules found at www.), the employee's argument should fail.

5. "*But you cannot make me waive my right to bring a class action.*"

If the agreement contains an express waiver of class claims, that waiver does not invalidate an otherwise perfectly good arbitration agreement, based on current case law. However, there are cases pending before the California Supreme Court that will shed further light on this issue.

6. "*But it cannot apply to claims that arose before I signed it.*"

If the employee signed the agreement during his employment (rather than when he was hired), a valid question arises: Does this agreement cover all disputes that arose before and after the date the agreement was signed? The answer should be yes so long as the agreement clearly sets forth its scope.

These are only a few of the creative arguments employees' lawyers may offer in an attempt to bring an employee's case in court before a jury rather than in

arbitration. A well-drafted arbitration agreement should withstand these attacks and many others, so the employer can avoid a jury trial.

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