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The Arbitration Dilemma

Over the course of our thirty years practicing employment law, there have been occasional trends which have caused our clients to periodically reassess how they approach employment disputes. In the 1990s, an uptick in big retaliation verdicts gave pause over the jury system. More recently, a decade long swell of wage and hour collective actions looked like it would never subside. And one of the regular considerations when these trends arise is mandatory arbitration.

Arbitration has its advantages, but it's not a one size fits all fix for all employers. The original selling points for arbitration were that it was faster and less expensive than going to the courthouse. This hasn't proven to be universally true. Most arbitration programs allow similar discovery (document exchanges, depositions, etc.) as the judicial process so the time and legal expense can be similar. To be enforceable, invoking the arbitration process can't be more expensive for the employee than filing a lawsuit (usually a \$400-500 fee). This means that the employer has to pick up the tab for the rest of the process (administrative fees, arbitrator fees) which frequently total tens of thousands of dollars and sometimes more.

The cost can grow exponentially if your arbitration agreement includes a waiver preventing employees from bringing claims on behalf of a group of employees. These waivers were intended to discourage class and collective actions, but savvy plaintiff's attorneys started bringing these as multiple individual actions. Instead of paying a single filing fee and hiring a single arbitrator, an employer may have to pay these fees for hundreds of individual cases.

Obviously, a primary advantage of arbitration is having a professional neutral decide your case, as opposed to a judge (who may be elected) and jury (who generally identify with the employee). Keep in mind, however, that an arbitrator's decision is final; there is rarely an opportunity for appellate review, so you're stuck with their decision, good or bad. A key consideration for those weighing mandatory arbitration is jurisdictions in which you operate. Are the judges generally fair? Do juries handout disproportionate verdicts?

If you decide to require arbitration, make sure your agreements are current. The law on arbitration is evolving and ensuring that your agreements are enforceable requires regular review and updates.

If you have questions about arbitration or reviewing an arbitration agreement, you can contact [Al Vreeland](mailto:AVreeland@lehrmiddlebrooks.com) at 205-323-9266 or avreeland@lehrmiddlebrooks.com.