



AVOIDING OR MITIGATING EMPLOYMENT LAW RISK

CLASS ACTION AND STATUTE OF LIMITATION WAIVERS

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The cost of litigation is rising. Federal and state regulatory watchdogs continue to exercise more influence over the workplace. In the employment law world, it is no secret that business is booming at the Department of Labor. In particular, lawsuits under the federal Fair Labor Standards Act ("FLSA"), which governs minimum wage and overtime requirements, were up about 10% in 2013, and have seen a

steady increase over the last 20 years. Many of those lawsuits include expensive and time-consuming class or collective action litigation. Discrimination charges filed with the Equal Employment Opportunity Commission ("EEOC") took a slight dip last year, but still exceeded 90,000. In addition, EEOC Commissioners have said that the EEOC's current focus is on pursuing maximum impact

cases. In short, that means more class-action or high-dollar employment lawsuits.

IMPACT ON EMPLOYERS

Employment litigation certainly has an effect on employers. There are obvious costs: attorney fees, litigation expenses, insurance premiums (for those with employment liability insurance), and, of course, the risk of a

large monetary judgment. There are also costs that are not so obvious. For example, a collective action lawsuit could arise under the FLSA because of a problem with company-wide payroll policy or even payroll software that calculates overtime. It is likely that somebody from the company will have to spend precious work hours combing through spreadsheets and payroll records trying to determine who was underpaid, or what went wrong with the calculation. A cost is incurred by having that employee spend time on that task instead of on a more productive activity. Will the CEO, vice president of human resources or other executives be deposed? What is the value of their lost time preparing to give testimony? Is there a cost to having the company's good name dragged through the mud in a public lawsuit?

CLASS-ACTION WAIVER

One way to avoid or mitigate some of the risks involved with a messy, employment-related class-action lawsuit is to have employees sign a class-action waiver set forth in an arbitration agreement. This kind of agreement, if executed correctly, will prevent an employee from dragging the company into class-action litigation, and will require the employee to resolve the dispute "one-on-one" in private arbitration, rather than in a public courtroom. One-on-one litigation is often easier to settle, and requires fewer internal resources. As a practical matter, numerous potential plaintiffs will often elect not to sue at all if they are not part of a class because the time and effort of sustaining a "one-on-one" action is not worth the trouble. In addition, arbitrations usually include expedited discovery, relaxed rules of evidence, and a private experienced arbitrator.

In recent years, federal courts have become increasingly committed to upholding arbitration agreements that do not allow for plaintiff participation on a class-wide basis. In *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, the Supreme Court held that "a party may not be compelled under the [Federal Arbitration Act] to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." In other words, once a party has agreed to arbitrate a dispute, then the dispute is going to be on a one-on-one basis, unless the arbitration agreement allows for class arbitration. In addition, an employee who has agreed to arbitrate is not allowed to bring his or her claim in court, where a class action is permissible, and must instead arbitrate privately. The Supreme Court has also held that arbitration agreements made under the Federal Arbitration Act "pre-empt" or override state laws that do not

allow class-action waivers.

There are downsides to arbitration agreements. For example, a party that loses in arbitration has almost no chance of getting the arbitration ruling overturned. Arbitration agreements are not the best fit for all employers, and each employer should consider the pros and cons with legal counsel. But, given the increasingly favorable legal environment for such agreements, they are worth a look.

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STATUTE OF LIMITATIONS WAIVER

Another way to avoid or mitigate employment law risk is by having employees sign a statute of limitations waiver. Because the statute of limitations is, in short, the deadline by which a legal claim must be filed, an employee may sign a waiver which shortens the deadline, thereby reducing the time frame in which a claim must be filed, and avoiding any claims that are filed outside of the deadline. The time frame for filing a charge with the EEOC is a reasonable 180 days or, in some circumstances, a maximum of 300 days. Individual states, however, may have discrimination or other employment laws that give employees more time. For example, Kentucky's statute of limita-

tions for filing a claim under the Kentucky Civil Rights Act or the Kentucky Wages and Hours statute is a whopping **five years!** An employer can prevent such stale claims by, for example, including a statute of limitations waiver in a prospective employee's application for employment as a term or condition of such employment.

Such waivers may not be allowed in all states, but they are certainly allowed in many. Check with legal counsel to see if this is a viable option for your business.

IMPLEMENTATION

For organizations that are considering implementing such arbitration agreements or statute of limitations waivers for employees, thought should be given to the roll out. Legal counsel should be sought. When considering implementation of these agreements, however, there are numerous documents that most employers already have that could be updated to include the agreements discussed in this article. Employment applications, confidentiality agreements (which most employers should have anyway), non-solicitation or non-compete agreements, new-hire intake documentation, and handbook acknowledgement forms are just a few examples of documents that could include such agreements.

CONCLUSION

Given what seems to be an ever-increasing tide of employment litigation, businesses should consider measures to avoid, or mitigate, employment risks. The agreements discussed in this article are relatively easy to prepare, and certainly less costly than the lawsuits potentially avoided. They represent the proverbial ounce of prevention that can keep companies focused on business as usual, rather than having important resources sidetracked to deal with employment problems.



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