Article

Employment Agreements Mitigate Construction Litigation Concerns

03.06.17

Construction Executive

Employers often only require employees serving in a management position to execute employment agreements with provisions largely focused on competition, disclosure and solicitation. However, a more expansive use of employment agreements should be considered, particularly given the increased resort to litigation by all levels of employees utilizing the provisions of the Fair Labor Standards Act (FLSA).

The FLSA essentially requires employers to properly compensate non-exempt employees for their actual hours worked at a regular rate for their first 40 hours worked during each week, as well as at an overtime rate of time and a half for every hour worked beyond the initial 40. With vastly increasing regularity, employees have been initiating litigation against employers in an effort to recover additional compensation for overtime hours. Employers utilizing a job bonus system for compensation, with or without an hourly rate of compensation, are particularly targeted, as are employers that fail to collect or maintain accurate time records.

Such litigation, usually initiated by an employee on behalf of himself and other employees similarly situated, requires significant attention and expense in order to properly present a defense. Notable, too, is the fact that the U.S. Department of Labor may pursue an investigation, as well as litigation, for perceived or alleged violations of the FLSA.

While an employment agreement cannot eliminate this risk, it can dictate the forum within which such disputes are resolved. Additionally, employment agreements may properly allow for a waiver by employees of the right to initiate or join in litigation brought as a collective (or class) action.

ARBITRATION PROVISIONS

Employment agreements may properly include an arbitration provision, which essentially requires all employees to pursue any grievance referencing the FLSA or any other matter in an arbitration proceeding as opposed to a court proceeding. A mutual benefit shared by both the employer and the employee arises as a result of the fact that an arbitrator or panel of arbitrators is vastly more familiar with the FLSA and other employment-related issues than a jury.

Employers also benefit because an arbitration proceeding ordinarily involves substantially fewer expenses, as there are far fewer procedural requirements than ordinarily exist in a judicial proceeding. Additionally, written discovery and deposition obligations are less onerous and more streamlined. Finally, an arbitration proceeding usually results in a more consistent application of the FLSA and other applicable laws, thereby removing concerns over juries comprised of individuals unsympathetic to employers.

The concept of resolving disputes through arbitration as opposed to litigation is addressed both statutorily and by the courts through legal precedent. Since the enactment of the Federal Arbitration Act in 1925, courts have interpreted its provisions as mandating a preference for arbitration over litigation. As a result, any employee who has executed an employment agreement containing an arbitration provision who then initiates litigation shall likely suffer its dismissal in favor of the arbitration proceeding. In the event the litigation includes causes of

action not subject to the arbitration provision, such litigation shall likely be delayed pending the resolution of the causes of action subject to the arbitration provision.

Courts have determined on a rather consistent basis that the arbitration process is so favored that any issues reserved for litigation must be delayed in order to avoid any possibility of the litigation impacting the arbitration.

COLLECTIVE ACTION

Waivers Another extraordinarily important provision to include in an employment agreement concerns the waiver by all employees of the right to initiate or join a collective action. As a result, employees would only be permitted to proceed individually, and the initiation of a collective action would be expressly prohibited, as would be any joinder to an existing collective action. A shared benefit by the employer and the employee is that the singular dispute would be resolved in an isolated manner and without reference to the various and sundry disputes of others.

To a certain extent, such individual disputes might be more quickly resolved by and between the employer and the employee without the involvement of counsel and the need for arbitration or litigation given that many, if not most, lawyers pursuing the representation of employees are vastly more interested in a collective action.

Recently, some controversy has arisen regarding the enforceability of mandatory arbitration agreements with collective or concerted action waivers. Although the 7th Circuit and 9th Circuit have held that mandatory arbitration agreements with collective action waivers violate the National Labor Relations Act, the 5th Circuit has upheld arbitration agreements containing class waivers as enforceable.

In D.R. Horton, Inc. v. NLRB, the 5th Circuit—the court with appellate authority over Texas, Missouri and Louisiana federal courts—reversed the decision of the National Labor Relations Board (NLRB), which held that a class or collective action waiver in an arbitration agreement was unenforceable because it deprived employees of the right to engage in concerted activities. However, the 5th Circuit disagreed with the NLRB and, in holding that the concerted action waiver in the arbitration agreement did not violate the National Labor Relations Act, it relied on the Federal Arbitration Act's requirement that arbitration agreements be enforced according to their terms except in limited circumstances. The 5th Circuit emphasized that the savings clause, which generally allows courts to enforce an arbitration agreement even where certain provisions may be invalid, is not a basis for invalidating the waiver of class procedures in an arbitration agreement.

In contrast, the recent 9th Circuit decision invoked the Federal Arbitration Act's saving clause, which allows the employer to still compel arbitration so long as the employee remains free to join a class arbitration.

The 7th Circuit decision in Lewis v. Epic Systems Corp. is currently pending review by the U.S. Supreme Court to potentially resolve the circuit split as to the legality of class waiver arbitration agreements.

Pending the outcome of the Supreme Court review of this important issue, employers face difficult decisions whether to include collective or class action waivers in their arbitration agreements. If an employer adopts a policy of implementing employment agreements, as is suggested, the manner by which the policy is implemented is essential. Obviously, both the arbitration and waiver provisions must be tailored to the circumstances experienced by each employer.

Once the terms of these provisions and the terms of the arbitration provision are determined, the presentation of the employment agreements to the employees must be accomplished in a non-threatening manner. Several court opinions nullify employment agreements, including appropriate arbitration and waiver provisions, because employers pressurize the presentation of the employment agreements to the employees. Accordingly, the presentation of employment agreements to employees must be accomplished properly.

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