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Be Careful What You Ask for In **Employment Arbitration**

The case for offers of judgment

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As recent Supreme Court decisions have surveyed and expanded the landscape of arbitration and arbitration agreements, employers have placed greater focus on whether arbitration is actually the right fit for their company. Arbitration offers many benefits including privacy, confidentiality and avoidance of emotional jury awards to mention a few. Among the most cited drawbacks of arbitration are the cost of arbitration fees, the lack of summary disposition and the impossibly narrow scope of appeal. It is not uncommon for an employer to receive a statement from an arbitration provider that is in excess of $35,000 for the cost to administer and try an employment arbitration. See "Employment Arbitration: A Practical Assessment of Advantages and Disadvantages," New York Law Journal (Nov. 27, 2017).

In addition, a growing number of employers now say that the absence of a mechanism in arbitration to incentivize reasonable settlement offers also gives them pause. If you practice in certain states, the state's offer-of-judgment rules (akin to FRCP 68) explicitly apply to the arbitration setting. The rest of us are left to fashion a similar settlement apparatus through the arbitration agreement.

Employers should see this as an opportunity. If properly tailored,

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the adaptation of offer-of-judgment rules to arbitration can bring it closer to its promise of an equitable dispute-resolution forum that saves both parties time and money.

Barriers to Settlement In Arbitration

As much as arbitration is designed to bring about the speedy resolution of claims, there are aspects inherent to the process that discourage claimants from making reasonable, early offers of settlement.

Specifically, because employers must, by virtue of case law or adoption of provider rules, accept the rather substantial costs of arbitrator and arbitration fees, claimants often include an approximation of these costs into any pre-hearing settlement offers. In other words, a claimant will often determine the reasonable value of a case, add to that its estimate of the arbitrator and arbitration fees at hearing, and present the sum as his or her settlement offer. There is little disincentive for a claimant to take these fees and costs off the table, but this "premium" often means the difference between settling the matter and going to hearing.

In essence, arbitration creates an imbalance between the parties regarding the cost of trying a case that does not exist in normal litigation. Inserting a viable offer-of-judgment mechanism into arbitration can level the playing field in this regard, and incentivize reasonable settlements.

Adopting the Offer Of Judgment to The Arbitration Setting

Judges enjoy the luxury (or burden) of knowing that they will always have a steady stream of customers seeking to resolve their disputes. Many arbitrators, of course, do not. So there is widespread belief, justified or not, that arbitrators may be tempted to refrain from doing anything that will diminish their likelihood of being chosen by either side at future arbitrations, leading to the proverbial "splitting the baby." Likewise, because one of the specified grounds for vacating an award is an arbitrator's "refusing to hear evidence pertinent and material to the controversy" (9 U.S.C. §10(a)(3)), some arbitrators will refrain from granting dispositive motions except in the clearest of cases in favor of sorting everything out once the parties have spoken their piece at the arbitration hearing.

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These aspects of arbitration practice suggest the desirability of a workable offer-of-judgment system in arbitration. Offer-of-judgment rules operate by inducing careful consideration of settlement offers made to claimants. Under Federal Rule of Civil Procedure 68, for example, if a plaintiff ultimately prevails at trial for an amount less than the defendant's offer of judgment, then the plaintiff is precluded from recovering his or her right to attorney fees and costs after the date of the offer. In the context of employment law, where costs are statutorily defined to include attorney fees, the magnitude of the potential waiver can be substantial.

However, in jurisdictions where offer of judgment rules have not been legislatively extended to arbitration proceedings, employers desiring to rebalance the playing field through the offer of judgment device should consider including the right of either party to make the offer in the arbitration agreement itself. For example, the arbitration agreement can include an express provision allowing for offers of judgment in a manner consistent with, and within the time limitations, consequences, and effects provided in Rule 68 of the Federal Rules of Civil Procedure. Thus, the arbitration agreement would allow a party to serve the other side with a sealed offer of settlement that is visible to the offeree, but not to the arbitrator until after he or she has issued the final award of liability.

This protocol ensures that the offeree has some skin in the game heading into the hearing and that the arbitrator (like a judge under Rule 68) is not influenced by the offer.

Another approach suited to the arbitration setting is the "Last Best Offer" rule, also known as the "Baseball" rule. This system requires the arbitrator to issue only one of two possible awards: the claimant's offer or the respondent's offer. This rule prevents the arbitrator from dulling the efficacy of the offer process, while encouraging each side to put forth only reasonable offers. The International Centre for Dispute Resolution and the American Arbitration Association have published a series of "Final Offer" rules, which can be incorporated by reference into an arbitration agreement. The cost shifting discussed above would apply in this scenario as well.

Crafting a Conscionable Settlement Incentive

While a waiver of the recovery of attorney fees and costs (and potentially paying the respondent's attorney fees and costs up to the amount of the award) can mean giving up a substantial amount of money in a court setting, there often is less predictability in this regard in the arbitral setting, unless the parties' agreement provides clear rules of the road. One should proceed with caution on this front.

Because arbitration lacks the oversight of a judge, arbitration agreements are often subject to challenges that they are unconscionable or otherwise in violation of public policy. Offer-of-judgment mechanisms set forth within these agreements are no-less susceptible, particularly if they impose downsides on a claimant's rejection of an offer that go beyond what might be expected in court under Rule 68. For example, it is virtually a settled matter that for an arbitration agreement to pass muster, at least where there are statutory or other public policy claims, the employer alone must pay the arbitrator's and arbitration fees.

Similarly, an arrangement that requires a claimant to pick up the employer's attorney fees in the event that the award is less than the previous offer could also be vulnerable to challenge. One need only think of the ostensibly prevailing minimum-wage worker saddled with many thousands in legal fees to see the obvious perils of such an approach.

Nevertheless, a more equitable approach should be considered with the use of offers of judgment in arbitration. For example, some agreements shift the cost of electronic discovery or expert witness fees to claimants where the award is less than the offer. This approach would encourage greater a measure of pause for the offeree than if a mere waiver was involved. However, any such incentive mechanism should be designed with an eye towards its overall conscionability. An agreement tracking Rule 68 will be more likely to pass judicial muster.

Conclusion

Employers' views of arbitration have evolved considerably since courts began blessing the use of arbitration agreements in the employment context. In many cases, arbitration does not always live up to its potential as a cost-effective means of resolving disputes. However, adapting the offer-of-judgment model to arbitration, and tailoring it to the unique incentives present in that setting, would help bring arbitration closer to that promise.