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| **ARBITRATION AND MEDIATION IN EMPLOYMENT MATTERS****Using Arbitration Clauses and Mediation Will Keep Most Employment DisputesOut of Court and Reduce Risk, Cost, Time and Trauma** |
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| Attachments:One-page Employment AgreementQuestions Commonly Asked by Employers | rea**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_****by James J. Damis**Harvard College (1958); Columbia Law School (1961);Member of the Oregon State Bar since 1962;Sole Practitioner, Portland;Administrator, Arbitration Service of Portland(www.arbserve.com) |

**Summary.** Being an employer in today's litigious society without taking advantage of an arbitration clause is like driving a car without a seat belt: it is a dangerous and unnecessary risk. Why would employers ever want to subject themselves to the whims, inexperience, uncertainties, and the anti-employer prejudices of a jury—not to mention the horrendous costs, unrecoverable attorney fees, and time-consumption of courthouse litigation? The use of an arbitration clause by an employer (with respect to its non-union employees) acts as an effective shield to discourage frivolous suits against the employer (by removing the tantalizing attraction to an employee of a potentially sympathetic jury) and to dramatically increase the likelihood of a successful and less expensive defense by having the matter decided by a truly impartial person who possesses expertise in the subject area of the dispute. If properly implemented, mandatory and binding arbitration is a time-tested technique that has proven effective when used by other industries and businesses that faced similar dilemmas now confronting employers.**Private Arbitration.** Private arbitration is the referral of a dispute to an impartial third person chosen by the parties who agree in advance to be bound by the arbitrator's decision after a hearing in which both parties have an opportunity to be heard. Private arbitration is expressly authorized by Oregon's private arbitration statute (ORS 36.600-36.740) and the Federal Arbitration Act (9 USC Sections 1-14). An arbitration award may be submitted to the court clerk for confirmation as a judgment of the court (ORS 36.715; 9 USC Sections 9, 13). Private arbitration requires an agreement to resolve the dispute through arbitration. If the agreement to arbitrate is made before any dispute has arisen, it is called a predispute arbitration agreement.**The Advantages of Private Arbitration.** Compared with litigation, arbitration has the following significant advantages:Speed: An arbitration hearing usually occurs within 90 days, many months sooner than a court trial.Economy: Arbitration's informality and streamlined procedures are designed to quickly get at the crux of a dispute, and eliminate the time-consuming and paper shuffling burdens of formalized litigation, which reduces attorney's fees and costs.Fairness: An able arbitrator with experience in the subject matter of the dispute is far better equipped to deal with complicated issues than is a jury or an inexperienced trial judge struggling in an unfamiliar area.Convenience: Arbitration hearings are scheduled promptly according to the convenience and availability of the parties, rather than the vicissitudes and postponements of a congested court docket.Privacy: Employers can avoid unfavorable publicity, and both sides prefer the privacy, sensitivity and informal setting that arbitration provides.Finality: Binding arbitration eliminates the delays and costs of appeals that can occur in litigation.Because employment disputes often involve complex factual and legal issues, arbitration's defining attribute also offers perhaps the most important benefit of all: the opportunity to select as the trier of fact and law a person who possesses high expertise in the subject area of the dispute and who is also intellectually able, conscientious, and impartial.**How Private Arbitration Differs from Union Arbitrations.** There are significant differences between "private arbitration" and "union contract arbitration." The type of arbitration found in union contracts has many features that most employers dislike, including: references to standards and practices dictated by the collective bargaining agreement, an arbitration process that is internalized and often non-binding because of a many-layered appeal process, and decisions by arbitrators whose sole income is being a labor arbitrator and who thus feel compelled to maintain a 50-50 voting record. Those union arbitration problems do not exist in private arbitration.**Types of Claims Covered.** A properly drafted arbitration clause covers all contract, tort, and statutory claims that an employee would be entitled to sue upon, including claims for wrongful discharge, sexual harassment, age, race and disabilities discrimination, wage claims, and claims that arise under state and federal statutes (such as the Civil Rights Act, the ADEA, and the ADA). An arbitration clause will not cover workers compensation claims or compensable job injuries (covered by insurance or by self-insurance), and it will not cover a union member's claim based upon violations of a collective bargaining agreement. It is possible that Congress in the future might declare that some types of claims must be resolved by a jury trial, but so far this has not occurred. The Supreme Court made clear in Gilmer (infra) that an employee must show that Congress intended to preclude a waiver of the judicial forum for rights created by statute. Moreover, there is specific language by Congress in recent Acts that expressly encourages dispute resolution by arbitration and other alternative dispute resolution procedures (Americans with Disabilities Act, Section 5.3; Civil Rights Act of 1991, Section 118).**Damages.** An arbitrator may award the same types of damages as a judge or jury, including punitive damages. Experience has shown that arbitrators do not often award punitive damages and, when they do, punitive damages are temperate in amount. Arbitration is equally helpful when the employer concedes that the employee is entitled to recover. When both sides know that (absent settlement) the matter will be decided by a reasonable, truly impartial, and experienced arbitrator (as opposed to a jury), it is a far simpler task to negotiate a fair settlement. Because an arbitration clause eliminates the potential of an angry, runaway jury, an employer can ignore unreasonable settlement demands.**"But there's no appeal!"** This is a concern often expressed by litigators, who are quick to point out that a court will not review an arbitrator's fact-finding or legal decisions. True enough. But litigators forget that finality itself is of great practical benefit. They also forget that: fact-finding errors by a judge or jury rarely rise to the level of reversible unreasonableness; judicial errors are not reversed unless prejudicial; appeals are expensive; most appeals do not succeed; and, successful appeals in employment cases usually result not in victory but rather the hollow reward of having to repeat the same expensive process in front of another employee-friendly jury. Litigators who would sacrifice the obvious benefits of arbitration upon the holy grail of appellate review fail to acknowledge a more pragmatic explanation of an adverse award: if they were unable to persuade an astute arbitrator (or, in large cases, a panel of three able people), perhaps they did not deserve to win. The right to appeal is over-rated. An informed employer would not knowingly choose a jury trial (thereby increasing risk and expense) solely to preserve the right to appeal.**Will Claims Increase?** Employers are sometimes told that arbitration might increase the number of claims because the arbitration process is easier to initiate. Not so, according to a survey conducted by a large New York-California law firm, which concluded that no proliferation of employment claims occurs when arbitration clauses are used by employers. A 36-page article by the DePaul, Hastings, Jenofsky, and Walker law firm thoroughly discusses (and supports) the use of arbitration clauses by employers. The conclusion that arbitration clauses do not increase claims is supported by the experience of the Bank of America in California after it began to use arbitration clauses in its loan agreements: Over two and one-half years passed before the first arbitration claim was filed in agreements that contained an arbitration clause. The B of A's attorneys concluded (and common sense suggests) that claims decrease because plaintiff's attorneys are reluctant to commit to marginal cases when they are denied the (unfair) advantage of a sympathetic jury.**Current Cases Validate Arbitration.** The following cases illustrate the current judicial trend validating arbitration clauses in the employment context and hold that arbitration clauses also govern claims that are based on state and federal statutes:* ***Gilmer v. Interstate/Johnson Lane Corp.****, 111 S. Ct. 1647 (May 13, 1991): an employee's age discrimination claim (based on the federal Age Discrimination in Employment Act) was subject to compulsory arbitration because of a predispute arbitration clause and because of the requirements of the Federal Arbitration Act, which "manifest a liberal federal policy favoring arbitration agreements" (111 S. Ct. at 1651).*
* ***Saari v. Smith Barney, Harris Upham & Co.,****968 F.2d 877 (9th Cir 1992): claims arising under the Employee Polygraph Protection Act must be arbitrated if required by the contract.*
* ***Perry v. Thomas,****107 S. Ct. 2520 (1987): conversion, breach of fiduciary duty. (In spite of a California statute that precluded arbitration of wage claims, the Supreme Court declared that the preemptive effect of Federal Arbitration Act has created a body of federal substantive law of arbitrability that is enforceable in state and federal courts, and the predispute arbitration clause between the employer and employee must be honored.)*
* ***Swenson v. CDI Corp.,****670 F. Supp 1438 (DC Minn 1987): an employee's claim for negligence, conversion, invasion of privacy, and sexual and racial discrimination claims under Title VII and other applicable state and federal statutes must be arbitrated because of a predispute arbitration clause.*

**An Indelicate Indictment.** The benefits to an employer are so overwhelming and the counter arguments are so negligible that the current under-utilization of arbitration clauses is puzzling. Partners from two "national" law firms (one on each coast) separately told this author that a principal reason for the non-use of predispute arbitration clauses by employers is a fear by law firms that arbitration will reduce the attorney's fees earned in court litigation. (Gasp! Say it isn't so.) Aside from the ethical impropriety, most lawyers recognize that such short term pocketbook considerations would work to the attorney's long range financial detriment. More importantly, the good lawyer wants what is best for the client. The use of arbitration clauses is growing, but too many lawyers still are too unfamiliar with arbitration clauses and the arbitration process. (This ignorance is partly caused by lawyer specialization: lawyers who draft and review instruments lack sufficient dispute resolution experience to understand the arbitration process.)**Resistance by Management.** Sometimes management confuses private arbitration with the company's internal mechanisms and grievance procedures. Managers thereby (incorrectly) view private arbitration as a loss of internal control. This objection evaporates when management understands that the sole purpose of an arbitration clause is to substitute arbitration for courthouse litigation as the last resort. The employer may adopt (or continue to use) whatever internal negotiation, grievance, or mediation procedures that it selects. But, if those procedures do not resolve the matter, arbitration (and not the courthouse) then becomes the employee's final remedy.**The Procedural Rules of Arbitration/Arbitration Organizations.** Remember that private arbitration is a substitute for formal litigation's vast array of procedural rules. To be effective, the arbitration clause must ensure an efficient procedural processing and provide for the selection of an appropriate arbitrator. Therefore, the arbitration clause must either designate a specific arbitration organization (and thereby incorporate the rules and arbitrator selection process of that organization) or it must set forth in the arbitration clause itself detailed rules on how the arbitration is to be initiated, the selection, qualifications, and compensation of the arbitrator, discovery, determining the date and site of the hearing, etc. If the arbitration clause merely requires dispute resolution by arbitration (and nothing more), or even if it goes on to state how the arbitrator is to be selected, but provides no procedural rules, downstream problems often occur because parties who are then at war must thereafter agree on the rules of the game. Arbitration clauses that do not ensure an efficient beginning to end processing will prove impractical if the other side later refuses to cooperate. Disputes governed by incomplete clauses will present continuing procedural problems and the difficulties encountered will be in direct proportion to the contentiousness of opposing counsel: the bigger the jerk, the greater the problem. Requiring arbitration "in accordance with the rules of" a designated arbitration organization is the most expedient way to avoid such problems.Arbitration Service of Portland. For Oregon employers, Arbitration Service of Portland (ASP) offers many advantages. A review of ASP's attorney's file (free for the asking) reveals the following features:* High quality arbitrators, each with a minimum of ten years in practice, pre-screened for expertise in the subject area. (A sample list is included in ASP's attorney's file.)
* Arbitrators are pre-screened for expertise in the subject area of the dispute.
* Reasonable fees and costs. (In a typical two-party one-arbitrator dispute less than $250,000, the filing fee is $700. The arbitrator receives his/her regular hourly, but not to exceed $495/hr.)
* Sophisticated procedural rules include:
	+ full discovery (pursuant to ORCP)
	+ 14-day pre-hearing statement of proof (to avoid "trial by ambush")
	+ presumed admissibility of certain documents and affidavits
	+ provisional process is preserved (to allow interim injunctive relief and other provisional remedies from a court pending final resolution through arbitration), to enforce (for example) a non-competition agreement
	+ consolidated hearings of related disputes
	+ default procedures against non-responding party

ASP has created arbitrator panels throughout Oregon, including Portland, Salem, Eugene, Bend, Pendleton, Grants Pass, and Medford.**The American Arbitration Association: Mitigating its Defects.** Business litigators are familiar with the arbitration procedures of the AAA as well as its many shortcomings: AAA's administrative fees for commercial arbitrations are high (for example, it charges $975 plus a $300 hearing fee for claims between $10,000 and $75,000), the AAA's response time inexplicably slow, its procedural rules are frustratingly silent on discovery and surprisingly unsophisticated, and it administers Oregon arbitrations in its Fresno office. Nevertheless, in spite of AAA's expense and its procedural and administrative defects, an arbitration clause naming AAA is infinitely better than no clause at all. Moreover, for employers with multi-state locations, AAA offers the advantage of national coverage. If an AAA designation is used, some of AAA's procedural deficiencies can be mitigated by adding additional provisions to the arbitration clause, such as:* Requiring an arbitrator to be an attorney with not less than ten years in practice and who has expertise in the pertinent area of the law.
* Specifying that the arbitration shall be decided by a sole arbitrator if the amount in controversy does not exceed a specific dollar amount, and a three-person panel for disputes exceeding that sum.
* Establishing a fair arbitrator compensation (to increase the likelihood of arbitrator acceptance).
* Designating the city in which the hearing shall be held.
* Permitting a party to apply to a court for provisional process (without waiving any arbitration rights) pending the initiation or completion of the arbitration.
* Establishing discovery procedures (for example, in accordance with ORCP).
* Requiring an exchange of the documents and a list of witnesses (including experts) 14 (or more) days prior to the hearing.

**Providing for the Selection of the Arbitrator.** In addition to providing for an efficient procedural processing, the arbitration clause also should ensure the selection of an experienced and able person to serve as arbitrator (requiring, for example, that the arbitrator be a business attorney with at least ten years in private practice). *Quality is paramount.* If the predispute arbitration clause requires arbitration pursuant to the rules of a designated arbitration service, a list of proposed arbitrators will be submitted to the disputants by that arbitration organization after an arbitration has been initiated. Although the parties then will have an opportunity to participate in the arbitration or selection process, the quality of the arbitrators being proposed is crucial. Therefore, in addition to reviewing the procedural rules of the arbitration service being proposed, the attorney should ask for a sample list of arbitrators. *You pick one; I pick one.* Arbitration clauses that do not designate an arbitration service sometimes require that each side select its own (non-neutral) arbitrator, with those two non-neutrals then selecting a third arbitrator. There are defects in this procedure. Selecting the third arbitrator can be time-consuming, and a stalemate will require a request to a court and the like-it-or-lump-it designation of the chief arbitrator. Using three arbitrators, only one of whom is neutral, is unnecessarily expensive and often a distasteful arrangement to the two non-neutrals. Moreover, such clauses rarely establish even minimum qualifications for the arbitrators and lack procedures to monitor any conflicts of interest or to conduct an appropriate challenge should a conflict arise. *Three person panels.* The employer must also decide at what monetary level the dispute should be decided by a panel of three arbitrators rather than a sole arbitrator. Whether the figure should be $50,000 or $100,000 (for example) represents an assessment by the employer (or its attorney) of when the additional expense and scheduling complications of a three-person panel is justified.**Employers Control the Use of Arbitration.** Whether an arbitration clause is used in the employment context for non-union employees is solely the employer's decision, because the employer can require its inclusion as a condition of employment. Although an arbitration clause has significant risk reduction benefits for the employer, it also serves the employee's interest because it ensures that the employee's claim will be resolved with reasonable promptness and fairness. (The fact that the plaintiff's bar may lament the absence of a pro-employee jury merely illustrates the penchant by all lawyers to have a playing field that is tilted in their favor.)**How to Implement an Arbitration Clause.** Arbitration requires a written agreement to arbitrate. Therefore, the employer and the employee must sign an agreement to arbitrate. An arbitration clause can be included in the employment contract. Employers who do not use written employment agreements can easily adopt a simple one-page employment agreement that establishes the beginning (or current) rate of pay, confirms that the employment is at will, and that requires arbitration of all disputes. (An example of an arbitration clause in a one-page employment agreement is attached.)**Arbitration Clauses in Employee Handbooks.** An arbitration clause in an employee handbook may not be enforceable unless it is clear in the handbook that the arbitration clause is a contract that binds both the employer and employee. Merely having an employee sign a statement that acknowledges receipt of the handbook is not enough, because employer and employee must agree to be bound by the arbitration process. Many employers do not want their employee handbooks to be construed as contracts. Moreover, employers will find it burdensome to maintain in their files separately signed handbooks for each of their employees as evidence of the arbitration agreement. Therefore, a much easier and safer procedure is a separate employment agreement signed by both sides (with a reference in the employee handbook to the arbitration procedure).**Binding New Employees and Existing Employees.** An employer can condition new employment of a non-union employee upon the employee's execution of an agreement to arbitrate all disputes. The execution of the agreement is most easily accomplished as a part of the normal in-take process. An employer probably can also require its existing at-will, non-union employees to sign an arbitration agreement (as a condition of continued employment). The most logical time to obtain execution of an arbitration agreement of an existing employee is during a regularly scheduled review meeting. As long as an employer's policy (requiring new or existing employees to execute an employment agreement) is applied uniformly (without regard to race, creed, sex, age, etc.), requiring the execution of an arbitration agreement as a condition of employment can be justified.**Mediation: Settlement Negotiation Assisted by Mediator.** In mediation, the parties attempt to settle their dispute with the assistance of a neutral third person (the "mediator") who is skilled at facilitating the resolution of disputes. Any party can terminate the mediation proceeding at any time, and the dispute is resolved only if the parties reach a settlement agreement. The mediator acts as a settlement facilitator, does not take sides, and does not render a decision. The mediator helps each party (in joint sessions and in private caucuses) to share emotions and different viewpoints in a constructive fashion, to focus on the real interests of the parties, to develop and refine settlement options, and to use objective criteria. When direct settlement negotiations break down the most logical alternative to first consider is mediation, especially in the emotionally charged types of issues that arise in employment disputes.**Mediation: Its Relationship to Arbitration.** Unfortunately, in spite of the efforts of skilled mediators, too often one of the parties refuses to participate in a mediation and even with full participation some mediations (between 15% and 30%) will fail. The failure to utilize predispute arbitration clauses (or to submit to arbitration after the fact) condemns all refused or failed mediations to the very evils that alternative dispute resolution is intended to avoid: excessive delays, increased expenses, emotional turmoil, uncertainties, unreasonable juries, and other such litigational horrors. For those failed mediations, arbitration is unquestionably preferable to litigation. It is not an "either-or" question. Rather, it is the recognition that mediation should be attempted prior to the use of arbitration and that arbitration is a necessary final safeguard. An arbitration clause also has an important fringe benefit for mediation: it increases the potential use of mediation because the comparative swiftness of the arbitration process creates an urgency that makes it more likely that the parties not only will attempt mediation but will mediate in good faith. (The reluctant party is not as apt to refuse a request to mediate if (absent settlement) the dispute will very soon be heard by an able arbitrator.)**Conclusion.** As noted in a recent article from the New York Times, "more and more companies are requiring their employees to submit claims of discrimination, including sexual harassment, to binding arbitration." As employers learn that selecting arbitration is an everything-to-win-and-nothing-to-lose choice, using arbitration clauses quickly will become the norm. And not just in the employment context. Business and industry is increasing its use of arbitration and other alternative dispute resolution techniques in many different settings and for all the right reasons. Consider these observations by Warren Burger, former Supreme Court Chief Justice:*"For many claims, trial by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for truly civilized people."**"The notion that most people want black-robed judges, well-dressed lawyers and fine paneled courtrooms as the setting to resolve their dispute is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible."*Not surprisingly, those sentiments are shared by consumers and employees, as well as industry and business. Arbitration is efficient and fair to all sides. The overall benefits of an arbitration clause are so overwhelming that employers who do not arm themselves with arbitration clauses have only themselves to blame.Form of simple employment contractcontaining arbitration clause**EMPLOYMENT AGREEMENT**1. Employment and Parties. VERY WISE EMPLOYER, INC. (Employer) hereby agrees to employ the Employee identified below under the terms and conditions set forth herein, and Employee hereby agrees to accept those terms and conditions.
2. Employment start date (new employees only):
3. Compensation. During the period of time that Employee performs his/her current job, Employer shall compensate Employee at the rate of: \_\_\_\_\_
4. Termination at Will. The employment may be terminated at any time with or without cause either by the Employer or by the Employee.
5. Mediation; Arbitration of Disputes Required (in lieu of litigation). MEDIATION: The parties acknowledge that mediation usually helps parties settle their dispute. Therefore, before or after initiating the arbitration process, any party may propose mediation through any mediation process or mediator as the parties may agree upon. ARBITRATION: Any dispute or claim that arises out of or that relates to this employment agreement, or that relates to the breach of this agreement, or that arises out of or that is based upon the employment relationship (including any wage claim, any claim for wrongful termination, or any claim based upon any statute, regulation, or law, including those dealing with employment discrimination, sexual harassment, or civil rights, age, or disabilities), including tort claims (except a tort that is a "compensable injury" under Workers' Compensation Law), or a dispute between the parties that arose/arises before, during, or after employment, shall be resolved by arbitration in accordance with the then effective arbitration rules of, and by filing a claim with, Arbitration Service of Portland, Inc., and judgment upon the award rendered pursuant to such arbitration may be entered in any court having jurisdiction thereof.

Dated this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_.

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| VERY WISE, INC. (Employer)By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(signature) | EMPLOYEE:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_                     (print name)\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(signature) |

**QUESTIONS COMMONLY ASKED BY EMPLOYERS ABOUT ARBITRATION:****(and Answers from Arbitration Service of Portland)***Q:    Why is arbitration much safer for the employer?*A:    Because the arbitrator (who is usually a business attorney) is almost always more reasonable and objective than a jury (which too often is composed mostly of employees with strong anti-employer bias). Moreover, if arbitration is required, fewer claims are filed against employers because questionable claims become even less attractive to a plaintiff's attorney who is denied access to a jury that usually is prejudiced against employers. And arbitration is private (no unfair publicity!).*Q:    Is arbitration binding?*A:    Yes.*Q:    Is arbitration legal?*A:    Absolutely. The laws of every state and the federal government not only permit arbitration, but actually encourage its use. Recent court decisions show a strong judicial trend favoring arbitration (which, as a byproduct, helps relieve congested court dockets).*Q:    How does arbitration fit in with an employer's grievance procedures?*A:    The sole purpose of an arbitration clause in an employment agreement is to substitute arbitration for courthouse litigation as the last resort. You may adopt (or continue to use) whatever internal negotiation, grievance, or mediation procedures that you desire. But, if those procedures do not resolve the matter, arbitration (and not the courthouse) is the employee's final remedy.*Q:    What kind of employee claims are included?*A:    All contract, tort and statutory claims that an employee would be entitled to sue upon, including claims for wrongful discharge, sexual harassment, age, race and disabilities discrimination, wage claims, and claims based on state and federal statutes (such as the Civil Rights Act, the ADEA, and the A.D.A.). It is possible that Congress might remove some types of claims from arbitration clauses imposed by employers, but so far this has not occurred. Excluded are workers' compensation claims for compensable job injuries (covered by insurance or by self-insurance). Also excluded are a union member's claims based upon violations of a collective bargaining agreement.*Q:    Why is arbitration less expensive and more efficient for the employer?*A:    The attorney's fees in defending an employer in an arbitration are dramatically lower than in defending a case in formalized litigation. Moreover, because the arbitration process moves much more quickly, the time spent by an employer's supervisory personnel is significantly reduced.*Q:    Are there any up front costs that the employer pays to Arbitration Service of Portland or the American Arbitration Association when it adopts an arbitration clause?*A:    No. Nor is it necessary or customary to inform either organization when you designate them in your arbitration clause. The employee pays a filing fee to the organization selected if and when the employee files a claim. The arbitrator is not paid until later in the process.*Q:    Why haven't our lawyers told us about this?*A:    Lawyers often are too busy dealing with pending lawsuits to practice preventive law. Even though defending against employee claims earns large fees, a conscientious and ethical lawyer always wants what is best for the client and will recommend the use of arbitration clauses whenever appropriate. Arbitration Service of Portland's administrator is a lawyer and will be happy to discuss the matter with your attorney.*Q:    How does an employer implement the utilization of an arbitration clause?*A:    Arbitration requires a written agreement to arbitrate. Therefore, the employer and the employee must sign an agreement to arbitrate, which can be included in the employment contract.*Q:    But what if an employer doesn't have an employment contract?*A:    Every employer-employee relationship constitutes an employment agreement (even though it is not in writing). An employer can adopt a simple one-page employment agreement that establishes the beginning (or current) rate of pay, confirms that the employment is at will, and that requires arbitration of all disputes.*Q:    If the employee handbook contains an arbitration clause, is it binding?*A:    No, unless the employee handbook is itself a contract that binds both parties. Merely having an employee sign a statement acknowledging receipt of the handbook is not enough, because employer and employee must both agree to be bound by the arbitration process. Many employers do not want their employee handbooks to be construed as contracts. Moreover, it may be burdensome to maintain a signed handbook for each employee as evidence of the arbitration agreement. Therefore, a separate employment agreement signed by both sides is an easier and safer procedure.*Q:    Can I require binding arbitration as a condition to hiring a new employee?*A:    Yes. You may condition new employment upon the prospective employee's execution of an agreement to arbitrate all disputes.*Q:    Can an employer require its existing at-will, non-union employees to sign an arbitration agreement?*A:    Probably. As long as the employer's termination policy for refusals to sign are applied uniformly (and without regard to race, creed, sex, age, etc.), requiring arbitration agreements as a condition of continued employment should be an acceptable policy. A logical time to obtain signed arbitration agreements with existing employees is during review meetings. |
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