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Silence Can Be Deadly: Review Your Arbitration Clause To Assure It Doesn't Let The Arbitrator Decide If Classwide Arbitration Is Allowed

Many employers include arbitration clauses in employment contracts, largely to deter or avoid class action wage-and-hour, employment discrimination or other suits. As the law on arbitration is evolving rapidly, employers should review those arbitration clauses periodically to assure they are up-to-date, taking advantage of the latest developments and avoiding the pitfalls revealed in the latest decisions.

Case in point: Sandquist v. Lebo Automotive, Inc. (July 28, 2016) 180 Cal.Rptr.3d 1. In Sandquist, the California Supreme Court held that it is the arbitrator, not a court, that determines whether classwide arbitration is allowed when the arbitration clause is silent on the question.

The decision is important because classwide arbitration is the worst of all possible worlds for the employer. Classwide arbitration has all the disadvantages of class actions in court: delay, expense, high exposure. Plus: unlike a class action judgment, a classwide arbitration award cannot be set aside for legal or factual error.

Does it matter who decides if classwide arbitration is allowed? You bet. An arbitrator is paid by the hour. Classwide arbitration takes longer than individual arbitration. Lots longer. Could that influence the arbitrator's decision? Just possibly.

So employers should check their arbitration clauses to assure that they expressly and clearly state that (1) there will be only individual, not classwide, arbitration and (2) if there is a dispute about the issue, the court, not the arbitrator, will decide whether classwide arbitration is allowed.

For more information on any of these new laws, handbook compliance, or any employment compliance issues, contact Rhonda L. Nelson at 415-677-5502, rln@severson.com; or Matthew A. Garfinkle at 949-225-3752, mag@severson.com.

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