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PERSPECTIVE

Consider the true implications of waiving arbitration

By Anthony J. Oncidi

It is not surprising that many high-profile employers have rushed to respond to developments on the #MeToo front over the past year. The very understandable desire not to be seen doing nothing ("Don't just stand there, do something!") has motivated a number of household-name companies to react, but in ways that may turn out to be even more problematic than the status quo they seek to correct.

For example, some employers have recently issued splashy press releases stating that they will no longer require employees to arbitrate sexual harassment claims that they may have against the company. Henceforth, employees at those companies will be free to file such claims in state or federal court and have a jury (not a retired judge or lawyer) decide their case.

While these companies may be making a welcome gesture in support of the larger movement to put an end to sexual harassment in the workplace, employers should carefully consider the true implications of opting out of arbitration — especially for some (but not all) forms of illegal harassment.

First of all, it's a dangerous form of unilateral disarmament — especially in California. With alarming frequency, state and federal juries in the Golden State are handing out tens of millions of dollars in emotional distress and punitive damage awards to individual plaintiffs who have alleged various forms of discrimination and harassment.

Just within the past year, local juries have awarded $18.6 million to an insurance salesman; $6 million to a pharmacist; $8 million to a fast food company employee; $13 million to a university oncologist; and $17.4 million to an employee of the bureau of sanitation.

The website of one prominent California plaintiff's lawyer boasts that he has recovered "over $300 million in verdicts and settlements," including recent single-plaintiff verdicts that range from $9 to $31 million.

Unquestionably, the blockbuster judgment of all time (or at least since the fall of the Roman Empire) is the whopping $185 million verdict that a mid-level manager received from a San Diego federal court jury in a gender discrimination case against AutoZone in 2014. And in 2012, a former cardiac surgery physician assistant who alleged she was a whistleblower and victim of sexual harassment was awarded $168 million by a jury in Sacramento.

Multimillion dollar judgments like these have long since ceased being black swan events in California, and companies that voluntarily subject themselves to such catastrophes, which could easily be avoided with the use of arbitration agreements, presumably will have a lot of explaining to do to their boards and shareholders should they have the misfortune of finding themselves in front of such a runaway jury.

Further, it's logically inconsistent (and arguably hypocritical) to waive the arbitration requirement for sexual harassment claims but not for other forms of equally illegal discrimination and harassment (e.g., based upon race, religion, disability, age, sexual orientation, medical condition, etc.) Allowing employees who allege sexual harassment to go before a jury, but not employees who may have suffered from other forms of illegal harassment suggests that not all forms of illegal harassment are equal — or equally reprehensible.

Why should an African-American employee who claims she was harassed on the basis of her race be consigned to arbitration while another or even the same employee could plead her case to a jury if she happened to have been sexually harassed? And what happens if the not uncommon situation arises that the same employee is the victim of more than one form of illegal harassment? Does the sexual harassment claim go to a jury, while the other (less important?) harassment claims are shipped off to a retired judge for disposition?

Clearly, employers should not be taking some sort of stand against one form of harassment if they're not prepared to take the same stand against all forms of illegal harassment. Neither the law nor good sense suggests that one particular form of illegal harassment should be treated differently from the others.

Perhaps the biggest problem with waiving arbitration in certain cases is that it is an implicit concession that arbitration is in some way inferior to a jury trial. By allowing certain employees (i.e., those claiming sexual harassment) to take their claims to court, an employer is essentially conceding that a jury trial is a better option for an employee than arbitration. Of course, this is the very argument that the plaintiff's bar makes all of the time — and that the defense bar and their clients go to great lengths to refute.

Once an employer starts down the slippery slope of conceding that there's something "wrong" with arbitration, then it's only a matter of time before that company will have to abandon arbitration for other types of discrimination and harassment claims as well. That day is surely coming for those employers who jump on the anti-arbitration bandwagon without thinking it through.

Certainly, it is true that there are many pros and cons to arbitration. Perhaps what Churchill said about democracy fits best: "It's the worst system in the world — except for all the others." However, the thing the plaintiffs' lawyers hate the most about arbitration is that it will rarely result in humongous awards like the ones mentioned above. Rather, arbitrators tend to do a pretty good job assessing liability and damages and handing out reasonable awards that are often considerably less than the amounts plaintiffs' lawyers like to profile on their websites.

The angst that some companies are feeling about enforcing arbitration agreements comes at a peculiar time in that the courts (including the U.S. Supreme Court and the California Supreme Court) are in full accord that such agreements are generally enforceable in the employment context. S*ee, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014).

Notwithstanding these judicial developments, the California Legislature doggedly insists on passing legislation year after year that would outlaw arbitration in the employment context, including most recently Assembly Bill 3080. Outgoing Gov. Jerry Brown has repeatedly vetoed such measures on the rather unremarkable ground that they indisputably conflict with and therefore are preempted by federal law. *See* Gov. Brown's Message Returning AB 3080 without his Signature (Sept. 30, 2018) ("Since this bill plainly violates federal law, I cannot sign this measure"). Of course, it's anyone's guess if soon-to-be-Gov. Gavin Newsom will be as punctilious in his review of such legislation the next time the Legislature passes it — which is likely only a matter of months away.

While the desire to do something rather than nothing is admirable, employers must tread very carefully when it comes to rights that cannot be easily won back once they've been surrendered. At least for the time being, enhanced training and stepped-up policy review may be a better course.

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