Now Is The Time For Employee Dispute Resolution Programs

Law360, New York (July 17, 2013, 1:14 PM ET) -- Employers in California and throughout the country face challenges in navigating federal, state and local employment laws. The regulatory complexity makes it difficult to be fully compliant, and employment suits are a long-standing favorite of the plaintiffs’ bar, yet many businesses still lack a coordinated approach for addressing employee concerns. In line with evolving case law, a well-designed employee dispute resolution program will help companies better manage their risk and reduce exposure to high-stakes litigation.

Companies implementing an employee dispute resolution program should consider two features:

- As an initial step, a predispute process can provide a protocol for employees to raise concerns and attempt resolution before pursuing formal claims.

- For concerns that are not resolved informally, new developments in the law enhance the enforceability of programs mandating individual arbitration of claims arising out the employment relationship.

Initial Predispute Process

Courts have long favored use of internal resolution processes prior to commencing litigation. In 1976, the California Supreme Court ruled in Westlake Community Hospital v. Superior Court that a doctor alleging wrongful denial of hospital privileges was required to exhaust the hospital’s internal remedies before suing in court.

The court ruled: “Such internal remedies are designed not only to promote the settlement of grievances but also to promote more harmonious relationships, and the courts look with favor on them.”

A California appellate court recently reaffirmed these principles in Serpa v. California Surety Investigations, issued March 21, 2013 (as modified April 19, 2013). In Serpa, the company had a mandatory employment arbitration agreement that required employees to initially attempt to resolve disputes internally. An employee sought to circumvent the policy, alleging it was unconscionable because it gave the company a “free peek” at her case.

The court rejected her argument and compelled arbitration, ruling that “a requirement that internal grievance procedures be exhausted before proceeding to arbitration is both reasonable and laudable in an agreement containing a mutual obligation to arbitrate.”
Internal resolution processes come in a variety of shapes and sizes. In Westlake, the hospital’s bylaws provided for a hearing before a judicial review committee. By contrast, the policy in Serpa merely required the parties to attempt informal resolution before arbitrating.

While having a predispute process does not guarantee that a court will dismiss an action if an employee fails to utilize it first, at a minimum, it can reduce exposure by increasing the likelihood that the company will have an opportunity to address a concern before it escalates.

**Mandatory Individual Arbitration**

The Federal Arbitration Act creates a strong public policy favoring arbitration of disputes and requires federal and state courts to enforce valid arbitration agreements according to their terms. Although arbitration has its limitations, recent developments in the law create new opportunities to design efficient and cost-effective arbitration programs — including avoidance of class claims. For companies that do not require arbitration of employment claims, this is a good time to revisit the issue.

Arbitration has its limitations to be sure. An enforceable arbitration agreement generally has to be mutual and bind the company as well as the employee to arbitrate employment-related claims. Moreover, if arbitration of claims is required as a condition of employment, the company generally must pay for the arbitration.

An arbitrator also may be less inclined than a court to dismiss an action on a pleadings motion or summary judgment, and there is little, if any, recourse for challenging an erroneous decision.

That being said, there is a growing consensus that these limitations are outweighed by arbitration’s significant upsides. In lieu of a jury trial, in which some lay jurors may be more prone to be influenced by passions rather than the rule of law, arbitrators typically are professionals in the field who have subject matter expertise. An arbitration agreement may even mandate arbitration before a retired judge.

Arbitrations often are resolved more expeditiously and within a shorter time frame than court actions and forego the exorbitant added time and expense of jury trials. Further, and although the U.S. Supreme Court still has to weigh in on certain issues, the trend of emerging case law is to make it permissible to require claimants to arbitrate claims individually and preclude class action suits.

**Landmark Ruling: AT&T Mobility v. Concepcion**

In 2011, the U.S. Supreme Court issued a landmark opinion in AT&T Mobility v. Concepcion, upholding an arbitration agreement that required claims to be brought in an individual capacity and not as a class action. The court touted the benefits of arbitration, stating that “parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower cost, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”

The court ruled it is permissible to require claims to be arbitrated individually so that the benefits of arbitration can be realized. Although recognizing that errors are more likely to go uncorrected in arbitration due to the absence of appellate review, the court pointed out that defendants would be willing to accept that because “their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts.”
Agreements Silent on Class Claims: Oxford Health Plans v. Sutter

The ramifications of Concepcion are still winding their way through the courts. One key issue is whether a claimant can pursue class action arbitration when the parties’ agreement is silent on arbitration of class claims.

In 2010, the U.S. Supreme Court ruled in Stolt-Nielsen v. AnimalFeeds International that class action arbitration is impermissible unless the parties’ agreement shows they intended to arbitrate class claims. The court recently revisited this issue in Oxford Health Plans v. Sutter and issued an opinion on June 10, 2013, upholding an arbitrator’s interpretation of an agreement to submit all disputes to arbitration as permitting arbitration of a class action.

The company argued in Oxford that the agreement did not specifically address arbitration of class claims, so the arbitrator’s interpretation was wrong and ran afoul of Stolt-Nielsen. The court rejected that argument, noting that in Stolt-Nielsen, the parties stipulated that they had not reached any agreement on class arbitration.

In Oxford, by contrast, the parties’ intent was in dispute, they agreed to submit the issue to the arbitrator, and the arbitrator interpreted the contract as permitting class arbitration. Notably, the court refused to address whether the arbitrator’s interpretation was correct. The Court merely held that in that circumstance, the issue was properly before the arbitrator to decide, and the arbitrator’s interpretation was not subject to court review even if erroneous.

In light of Oxford, it is important for an arbitration agreement to clearly state the parties’ intent regarding arbitrability of claims. Further, some opinions have held that arbitrability of class claims is a gateway matter for courts to decide, so it may be possible to have this issue decided by the court rather than the arbitrator.

Effective Vindication: American Express v. Italian Colors Restaurant

Appellate courts also are reviewing several other issues in connection with individual arbitration agreements. Another key issue that the nation’s highest court recently resolved is whether an individual arbitration agreement can be invalidated on the basis that it does not allow for effective vindication of a claimant’s statutory rights.

In American Express v. Italian Colors Restaurant, the parties had an agreement that mandated arbitration but barred arbitration of claims on a class action basis. The plaintiff sought to circumvent it on grounds that the cost of expert analysis necessary to prove the claims would far exceed any individual damages recovery, so the statutory rights at issue could only be effectively vindicated via a class action.

On June 20, 2013, the U.S. Supreme Court issued an opinion rejecting that argument and upholding the individual arbitration agreement, ruling that parties are not guaranteed an affordable procedural path to the vindication of every claim. The court noted that the premise of effective vindication is that parties should not be prevented from exercising their right to pursue statutory claims.

The court observed that that might occur if an agreement forbade the assertion of certain statutory rights or perhaps if it required filing and administrative fees that were so high as to make access to the
forum impractical. The court ruled, in contrast, that “the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”

The American Express ruling will likely have significant impact in California, where state courts have extensively addressed the issue of effective vindication. In 2007, the California Supreme Court ruled in Gentry v. Superior Court that a class action waiver in an employment arbitration agreement is unenforceable in wage and hour cases if the trial court finds a class action is more effective in vindicating the employees’ statutory rights.

California appellate opinions have since been divided on whether Concepcion overrules Gentry, and the California Supreme Court is currently reviewing that issue in Iskanian v. CLS Transportation Los Angeles.

**Representative Actions under California’s PAGA**

California appellate opinions also are divided on whether an individual arbitration agreement can bar employees from bringing representative actions seeking civil penalties for Labor Code violations under the state’s Private Attorneys General Act.

On June 4, 2013, a California appellate court ruled in Brown v. Superior Court that employees are entitled to bring representative PAGA actions in court notwithstanding an agreement to individually arbitrate claims. However, another California appellate court previously ruled oppositely in the Iskanian case. That issue also is currently under California Supreme Court review in Iskanian.

**NLRB Rulings on Employees’ Right to Engage in Concerted Activity**

In 2012, the National Labor Relations Board issued decisions against D.R. Horton and 24 Hour Fitness, ruling that mandatory individual arbitration of employee claims violates the employees’ right to engage in concerted activity under the National Labor Relations Act. The D.R. Horton ruling is being challenged before the Fifth Circuit Court of Appeals, and the vast majority of court rulings to date have rejected the NLRB’s position.

On Jan. 7, 2013, the Eighth Circuit issued an opinion in Owen v. Bristol Care, rejecting the NLRB’s interpretation in D.R. Horton. Instead, the court ruled oppositely that arbitration agreements containing class action waivers are enforceable in wage actions brought under the Fair Labor Standards Act. California appellate courts have similarly issued multiple opinions rejecting D.R. Horton, including a published opinion last year in Truly Nolen of America v. Superior Court.

**Unenforceability of Unconscionable Agreements**

Although certain issues are not fully settled, most post-Concepcion decisions reject arguments that companies are precluded by law from requiring individual arbitration of employment disputes and instead determine enforceability based on how a particular agreement is designed.

A court may invalidate an agreement if its terms are skewed toward the company so as to render it unconscionable. Examples of terms that have been found to be unconscionable include requiring employees to arbitrate claims but allowing the company to pursue its own claims in court, mandating arbitration as a condition of employment and then requiring employees to pay for or split the cost of the arbitration and limiting the remedies that would be available to employees in a court action.
Takeaway: Benefits of a Well-Designed Dispute Resolution Program

A well-designed employee dispute resolution program increases the prospects that concerns will be resolved before they ripen into actual claims and that claims requiring adjudication will be resolved cost-effectively. In light of the emerging case law favoring alternatives to court litigation, now is a good time to consider options for designing an employee dispute resolution program and the potential business advantages.

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