Why Every Employer Needs Arbitration Agreements with its Workers

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Consider these scenarios: At the office holiday party, the head of the company held a woman down and kissed her although she said she didn't want to be kissed. She reported the incident to HR, which investigated half-heartedly. Subsequently, a companywide policy of arbitration agreements was instituted for all employees. She signed the arbitration agreement to keep her job. Then they fired her.

At least that's the allegation.

As a plaintiff against the individual and the company, the woman wants the testimony about these events to occur in a courtroom open to the public. The company wants to enforce the arbitration agreement to keep the testimony confidential.

In another matter, drivers who use a ridesharing app claim the technology company does not treat them properly: they receive no benefits or overtime, they incur expenses, they do not collect unemployment if they get fired, and the like. When the driver relationship starts, the driver signs an agreement that requires arbitration of disputes between the driver and the company to be conducted driver by driver, rather than between the company and the drivers collectively.

In another matter, workers say their large employer systematically pushed out older workers to allow the company to hire younger workers who formed a cheaper

pool for health insurance premiums, who connected more easily with customers and who were savvier with newer technology.

Such situations occur in many workplaces. Companies accused in these settings say they benefit from agreements that require dispute resolution through one-on-one arbitration and ones that aggressively address treatment of confidential information. The behind-closed-doors nature of arbitration proceedings and awards ranks high on the list of important considerations, along with the general propositions that arbitration may be, as a rule, faster, cheaper and less intimidating than litigation.

The United States Supreme Court has found "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." As a result, federal courts have adopted policies and practices that promote arbitration conducted privately between contracting parties on the unspoken assumption that courts must treat companies and workers as having similar bargaining power.

Furthermore, the Supreme Court stated, "The Courts of Appeals have …consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability."

That is why federal courts everywhere have enforced agreements providing for arbitration of disputes by minimizing or overlooking inconvenient factors.

Those who buy services, whether from independent contractors or employees, are therefore well advised to capitalize on this governmental policy.

This governmental preference also fits with the good practice of protecting trade secrets by means of confidentiality agreements, also known as non-disclosure agreements or "NDAs." Today, the facts on which profits depend often constitute an organization's most valuable asset. Well-run companies enforce policies that employees and independent contractors must sign agreements whereby a worker promises to keep secret things secret, that new ideas a worker develops belong to the company and that, if a dispute arises, the worker and the organization must settle it out of court. Such agreements often contain promises that the worker will not act collectively with similarly situated individuals.

A recent California federal appellate court decision illustrates the kinds of choices courts make to effectuate this governmental policy.

In that matter, Mr. Capriole drove a car for Uber in Massachusetts. The agreement with Uber that he signed when he became an Uber driver classified him as an independent contractor and included a provision requiring arbitration of disputes. Mr. Capriole's purported class consisting of Massachusetts Uber drivers asserted that, under Massachusetts law, he and his fellow drivers should be treated as employees rather than as gig workers.

Uber got the case moved to California from Massachusetts thanks to the agreement's forum-selection clause. The California federal district court ordered arbitration to enforce the agreement, and the Ninth Circuit panel affirmed.

Judges from across the political spectrum have supported these policy choices. In fact, in Mr. Capriole's case, the appellate panel consisted of judges appointed by Democratic presidents, including Presidents Clinton and Obama.

The opening of the panel's written decision showed the outcome as a foregone conclusion. Judge Kim McLane Wardlaw, the opinion's author, cast the matter as a clash between the internet's "technological revolution" and "laws designed for the analog age." The decision suggests that "technological advances" inevitably make workers like Uber drivers independent contractors.

The FAA requires courts to hold arbitration contracts to the same standards as other contracts, meaning that courts must enforce Uber's contract with its independent contractors as written unless the FAA exception for seamen, railroad employees, or any other class of workers "engaged" in foreign or interstate commerce encompasses drivers. Therefore, the panel's fundamental question was whether the court should treat Massachusetts Uber drivers as members of a "class engaged" in foreign or interstate commerce. If treated as members of such a class, they would not be required to go to arbitration.

The decision says that the court joins a "growing majority of courts holding that Uber drivers as a class" do not fall within the class of workers engaged in foreign or interstate commerce. First, the Supreme Court has said courts are supposed to give the FAA's "residual" class a "narrow" construction. A narrow construction means that "[t]he plain meaning of the words 'engaged in commerce'" … "is narrower than the more open-ended formulations 'affecting commerce' and 'involving commerce.'"

The court's "analysis focuses on the inherent nature of the work performed and whether the nature of the work primarily implicates inter- or intrastate commerce," the decision said. Uber had argued elsewhere, among other things, that Uber drivers carried passengers, and that seamen and railroad workers carried freight. The Third Circuit and the Ninth Circuit have now rejected that argument in other cases.

Although plaintiff Capriole's class action purportedly included only Massachusetts drivers, the court explicitly chose to treat Uber drivers everywhere as a single class. Previously, courts had dealt with nationwide classes, and the court saw "no reason for our analysis to change, where, as here, we face only a putative statewide class." The statutory language does not geographically define seamen and railroad workers, therefore, for purposes of plaintiff Capriole's case, the "category of workers must similarly be assessed at a nationwide level, rather than any narrow, geographic region."

The court said that it would undermine "certainty and predictability which arbitration agreements are meant to foster" if the court were to treat Uber drivers in some states or locales differently from other Uber drivers. Such a result would produce "absurd" results, the court said.

Apparently, nationwide, Uber drivers begin or end about 10 percent of their trips at airports. That level of activity was insufficient to make likely interstate or foreign commerce central enough to Uber drivers' work in Massachusetts to make them "engaged" in interstate commerce under a narrow reading of the statutory exception.

Mr. Capriole's case illustrates that federal courts make choices when deciding cases that tend to favor outcomes that lead to arbitration and away from court. By requiring incoming employees to agree to arbitration for any disputes that may arise in the employment setting, employers can take advantage of this pattern in the law to reap the benefits of arbitration, such as confidentiality, speed, expense and avoidance of class actions.

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