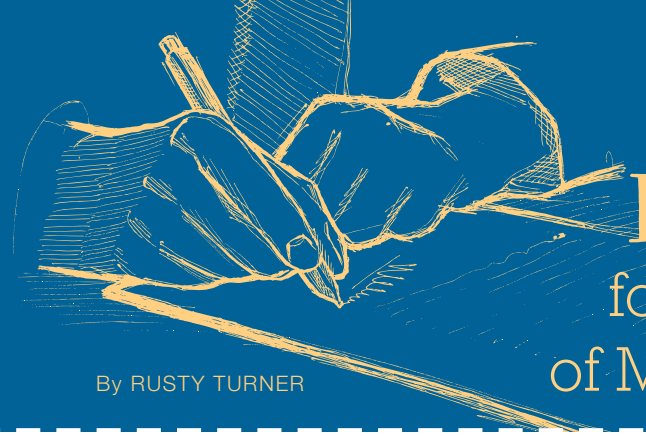

COURTS HAVE PAVED THE WAY

for Mississippi Employers' Use of Mandatory Arbitration Programs

By RUSTY TURNER

The Mississippi Supreme Court was initially reluctant to adopt Congress' longstanding belief that public policy favored the resolution of disputes through arbitration. By 1998, Mississippi finally embraced arbitration as a lawful means of resolving disputes. Since then, arbitration has provided Mississippi employers with an efficient, economic method for resolving employment disputes. Recent U.S. Supreme Court precedent has also provided employers with a basis for requiring employees to waive the right to join in a class/collective action and arbitrate those claims on an individual basis. As such, Mississippi employers now have more incentive than ever for adopting arbitration programs to resolve workplace claims.

LEGAL BASIS FOR ENFORCEMENT

Federal Law

The Federal Arbitration Act ("FAA") provides a broad federal law basis for arbitration programs covering employment disputes. Although the FAA does not provide a basis for the arbitration of claims brought by seamen, railroad workers or those transporting goods across state lines on a regular basis, it provides ample basis for compelling arbitration of all other employees' claims, including those for hiring, promotion/demotion, harassment, discharge, compensation and overtime.

Mississippi Law

Mississippi law does not include a statutory basis for compelling arbitration of employment claims, but Mississippi common/judicial law provides such a right. However, Mississippi employers need not rely on state law to enforce its arbitration program unless they employ seamen, railroad workers or transportation employees who regularly cross state lines to deliver products because, as stated above, the FAA does not provide a federal basis for enforcing arbitration with those workers. Although no published Mississippi decision has addressed whether our common law is sufficient to compel arbitration of disputes for those three groups of workers, judicial decisions from other states indicate that it is. Therefore, Mississippi employers should state in their arbitration programs that both state and federal law provide equal and alternative sources for requiring arbitration of covered claims.

MISSISSIPPI EMPLOYEES' ABILITY TO AVOID ARBITRATION

Fraud and Absence of Consideration

Fraud and absence of consideration are both potential basis for avoiding arbitration. Even though the "fraud" exception exists, there are virtually no reported decisions where Mississippi courts have invalidated an employer's arbitration program based on fraud. Mississippi courts have likewise not required employers to provide employees with separate monetary consideration to compel arbitration, but they have instead adopted the majority rule that either an offer of at will employment or continued at will employment is sufficient consideration to enforce an arbitration agreement.

Unconscionability or Unfairness

Mississippi courts also recognize "unconscionability" or unfairness as a basis to avoid arbitration, but they only do so under limited circumstances. There are two types of unconscionability that employees must rely upon to avoid arbitration: 1) procedural; and 2) substantive. Each type is explained below.

Procedural Unconscionability

"Procedural" unconscionability concerns the fairness of the process leading up to the employee's execution of the arbitration agreement, rather than the substantive terms defining the employee's rights and remedies in arbitration. "Procedural" unconscionability depends on the employee's ability to prove one of two facts: (1) he lacked knowledge of the arbitration provision; or 2) he did not voluntarily agree to arbitrate his claims.

Absence of Knowledge

An employee can show that he did not know about the existence of an arbitration provision through facts like this: 1) the arbitration provision was inconspicuously placed/printed in such a way that he could not have seen or understood it; (2) the language describing the requirement for arbitration was vague, overly complex or a combination thereof, and he was incapable of understanding it; or (3) his employer gave him no time to read the arbitration provision and/or refused to answer his questions about it. Although an employee's absence of knowledge is rarely proven, it still exists for extreme cases when an employee could not have possibly known about the existence of arbitration. Mississippi courts have consistently rejected such arguments when the arbitration clause is plainly written, clearly marked and explained to employees before they accept employment or before the employer adopts such a plan.

Absence of Voluntariness

An employee's reliance on his absence of voluntariness is even more difficult to prove as Mississippi courts have consistently held that disparities in "bargaining power," do not invalidate an arbitration provision. Thus, even though applicants and/or employees may claim they had no choice but to sign the agreement in order to either become or remain employed, that claim should be insufficient to avoid arbitration.

Substantive Unconscionability

Substantive unconscionability depends on the employee's ability to prove that the arbitration clause unlawfully stripped him of a substantive right/remedy available under the applicable law.

Deprivation of Substantive Rights

Mississippi courts have found the provisions listed below to be substantively unconscionable: 1) a limitation of liability provision capping damages at $50,000 for one party but leaving the other party's recovery right unrestricted; 2) limitations on actual/punitive damages; 3) a cost shifting provision where the party opposing arbitration paid the other party's costs for compelling it; 4) a shortened period for filing claims; and 5) a waiver of jury trial right for one party but not the other. The guiding principle here is that Mississippi employers must not include provisions in their arbitration plans that limit an employee's right to recover all the remedies available to the employee under the applicable law or which give the employer some right that the employee does not also have.

Financial Incapacity

When an employee claims substantive unconscionability based on his alleged inability to pay his portion of the filing/administrative fees set out in the agreement, he must offer "individualized evidence" of financial incapacity. The American Arbitration Association ("AAA") is by far the most widely used administrator for claims covered by employment arbitration programs, and AAA administered plans cap the employee's contribution towards AAA's initial $1,100 filing fee at $175. Thus, employees will not be able to argue that this $175 payment renders their employer's plan unconscionable due to financial incapacity.

Absence of Coverage for Employee's Claims

Mississippi courts construe all doubts about whether the employee's claim is one that is covered by the employer's program in favor of arbitration. This presumption of coverage is even more profound when the employer uses "broad" language providing that any employment claims "related to" or "connected with" the employment relationship are "covered claims" as those terms imply that the parties consent to resolve "all disputes" having any connection whatsoever to the employment relationship. It is not surprising that when employers have used "broad" language, Mississippi courts have almost always found the claim covered by the arbitration program.

NEW INCENTIVES FOR ADOPTING ARBITRATION PROGRAMS

As indicated above, Mississippi courts have taken favorable views about mandatory arbitration agreements such that there are now few legal impediments to adopting arbitration programs that eliminate the prospect of litigating employment claims in a hostile venue. The question that many Mississippi employers must still evaluate is whether the benefits of having such a plan outweigh the costs of creating and using it to resolve workplace disputes. Both of those issues are discussed below.

Benefits of Arbitration Program

As indicated by the "Introduction" Section supra, recent U.S. Supreme Court precedent has made it possible for Mississippi employers to require individualized arbitration of employees' class/collective action claims. The Court has done so through decisions holding that if the statute under which the plaintiff sues does not explicitly preclude individual, non-class, arbitration, then courts must enforce such provisions as written. Thus, Mississippi employers may now enforce class/collective action waivers through arbitration programs which means that they can also avoid the potentially crippling impact of having to litigate a class/collective action asserting overtime violations. Not surprisingly, the current NLRB has objected to such class/collective action waivers as being violative of an employee's right to engage in concerted, protected activity under the National Labor Relations Act. Federal courts in Georgia and Texas have already rejected the NLRB's position, and the Fifth Circuit Court of Appeals (which presides over Mississippi) will decide this issue next Spring. Most believe that the Fifth Circuit will reject the NLRB's untenable position based on existing precedent, and the Fifth Circuit's decision will largely remove any remaining uncertainty for Mississippi employers concerning this issue.

In addition to avoiding the potentially crippling impact of wage and hour collective actions, employers having employment practices liability ("EPL") insurance receive a premium decrease after adopting an arbitration program. Employers also save money on defense costs because jury trials are more expensive to litigate. Employers also have the same degree of control over selecting the arbitrator as does the employee, and they can usually select an impartial one with substantial experience in resolving the type of claim brought by the employee. Likewise, the "settlement value" of claims subjected to arbitration are usually lower than those of jury trials because plaintiffs' counsel subjectively perceive that they will recover less in arbitration. Although there is no empirical evidence suggesting that employers prevail more often in arbitration than court, it is highly unlikely that a seasoned arbitrator will be motivated by emotion or prejudice and award an employee a large, unsubstantiated verdict as do some "runaway juries." Finally, arbitration remains a private proceeding and therefore does not generate the publicity that often surrounds a jury trial. For all these reasons, it is not surprising that AAA is presently administering nearly 3,300 employer sponsored arbitration programs nationally, and it has annually presided over at least 2,000 employment cases since 2009.

Costs and Risks of Arbitration Program

The most substantial cost associated with employment arbitration is the employer's duty to pay the arbitrator's fees and expenses. Since AAA only authorizes experienced employment attorneys to preside over such cases, arbitrator fees typically average at least $300 per hour. Thus, if a typical case is fully litigated through the final award stage, an employer may pay $30,000 in arbitrator fees over the life of the case. Arbitrators are also less likely than judges to grant summary judgment motions since arbitrators generally allow claimants to put on their evidence before disposing of such claims through pretrial motions because arbitrators' premature dismissal of claims is one of the few grounds for appealing an arbitrator's decision.

CONCLUSION

Although the Mississippi Legislature evened the playing field for employers through tort reform ten years ago, Mississippi still has certain venues that retain the status of "judicial hellholes" where no employer wants to litigate. That fact, combined with the ability to avoid the exorbitant defense costs required in litigating a class/collective action should encourage every Mississippi employer to seriously consider adopting a comprehensive arbitration program for resolving employees' claims. While the cost/benefit analysis for doing so was gray ten years ago, such is no longer true. Indeed, every prudent Mississippi employer should now evaluate arbitration as a truly viable alternative for resolving employment disputes.

Rusty Turner is Governmental Affairs Director for the SHRM Mississippi State Council. He is also an attorney with Balch & Bingham, LLP in Jackson.