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Forced arbitration: a prelude to the jury trial's obsolescence

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Massachusetts is the American birthplace of the jury system. Each year, residents of the commonwealth serve as jurors and collectively render decisions that directly impact members of their community. In certain instances, their verdicts send powerful messages and drive social change.

From becoming the first state in the country to grant African-American citizens the right to serve on juries to implementing the One Day-One Trial system, Massachusetts has been a leader in ensuring that jury service lives up to the ideal of "government in the hands of the people."

Forced arbitration, also known as mandatory arbitration among management-side lawyers, aims to replace the jury trial in employment cases with a confidential proceeding decided by a single adjudicator.

Because arbitration is a private system, the total cost of participating in this process can rival college tuition. In many cases, employers voluntarily pay the cost of arbitration to avoid facing a jury, creating a dynamic that invites speculation about partiality.

1. Caveat emptor for employees

When employers impose arbitration, employees lose their fundamental Massachusetts and federal constitutional rights to have their case heard by a jury, which, as the late Supreme Court Chief Justice William H. Rehnquist opined, "[t]he founders of our Nation considered … an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."

As a starting point, it is helpful to understand how workers become entangled in forced arbitration in the first place. Such clauses are typically not standalone agreements, but rather buried in a multi-page document laden with legalese discussing a broad range of topics from the "at will" employment relationship to vacation time to post-employment restrictive covenants.

Even where forced arbitration is not camouflaged, neither Massachusetts state nor federal law requires companies to notify prospective employees about the need to sign such clauses as a condition of employment.

As a result, an employee may only learn of this stipulation on the first day of work, leaving him or her in an untenable position: accept the 11th hour term without consulting an attorney or become unemployed.

In some states, employers can impose arbitration long after an employee has joined by simply revising the employee handbook or by sending an email announcing a change in company policy.

Finally, advance notification that forced arbitration will be a condition of employment certainly does not mean that employees will understand and appreciate the repercussions, especially if explained from only one vantage point.

Forced arbitration, for example, may be dressed up and pitched as a quicker and more cost-effective way for employees to air workplace issues.

To say the least, these claims are highly debatable and beg the question: If forced arbitration benefits employers and employees alike, then why must companies insist upon it? Instead, why not provide workers with the choice of whether to accept it without fear of losing their jobs?

Research confirms these concerns. The Employee Rights Advocacy Institute conducted a study revealing that a majority of employees could not recall reading about a forced arbitration provision in a document they executed. Moreover, even when workers knew of such a clause, roughly 75 percent believed that they could still take an employment dispute to court.

In stark contrast, employers possess the resources and sophistication to assess the benefits and drawbacks of arbitration, have ample time to draft such clauses, and dictate the manner and timing in which they are presented.

Simply put, employers wield considerable leverage in forcing arbitration onto employees.

2. "However highly we view the integrity and quality of our judges, the jury — the judges' colleague in the administration of justice — is the true source of the courts' glory and influence."
— Judge William G. Young

Embedded in the concept of a jury trial is an acknowledgment of the human condition that we are all inherently biased in our own ways.

As the late Supreme Court Justice Benjamin Cardozo observed, this condition cannot be cured through academic degrees or professional training: "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. … We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own."

Our constitutional right to a jury trial, and a publicly funded judicial system, aligns with that reality. Unlike a single adjudicator, a jury of six or 12 individuals are more likely to come from different backgrounds and industries; vary in socioeconomic status; and differ by age, race, gender, sexual orientation and religion.

By definition, one person cannot match the potential melting pot of diversity that the jury selection process organically creates. And while each juror may certainly carry his or her own biases, the outcome will not rest on one particular individual's predilections, which also are likely to be exposed and challenged during the deliberation process.

Diversity, or the lack thereof, can have a profound impact on the end result. One study published in the Southern California Law Review, for instance, examined summary judgment decisions in employment cases according to the judge's race. After controlling for confounding variables such as political affiliation, years on the bench, and other characteristics, the data revealed that "white judges" dismissed cases at summary judgment 61 percent of the time. In sharp contrast, "minority judges" (defined to include black, Hispanic and Asian individuals) granted such motions only 38 percent of the time.

Those statistics suggest that perhaps we give

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ourselves too much credit, that a law degree does not create a tabula rasa, and that legal toiling is not a panacea for our blind spots.

Supporters of forced arbitration often demonize the jury trial system as a breeding ground for runaway juries and windfall verdicts. Such concerns, however unrealistic, pay short shrift to the various procedural mechanisms in place to rein in this perceived phenomenon.

Let's be specific. Under Rule 50(a) of the Massachusetts and federal rules of procedure, employers may petition the judge for a directed verdict in their favor at the close of evidence and before a case is given to a jury for deliberations. If denied and when the jury finds against the employer, under Rule 50(b), an employer may ask for judgment in its favor notwithstanding the verdict. If unsuccessful still, under Rule 59(e), an employer may consider a motion to amend or alter the judgment.

In *Trainor v. Hei Hospitality*, for instance, the employer did just that. Disgruntled by the jury's award of $1 million in emotional distress damages, the defendant petitioned the trial court judge for remittitur, which resulted in a 50 percent reduction. Still dissatisfied, the employer appealed to the 1st Circuit, which further reduced the sum by another 40 percent.

After that series of reductions, the final emotional distress award equaled just 30 percent of what the jury originally believed was appropriate. Whether one agrees with the ultimate award is beside the point. The upshot is clear: runaway juries (if they exist) can be apprehended.

Conversely, a court's ability to review an arbitral decision is extremely narrow and exceedingly deferential. Such a limited review requires courts to uphold an award, regardless of its legal or factual correctness, even in the face of a serious error by the arbitrator. Despite the relative finality of such decisions, forced arbitration proponents rarely bemoan runaway arbitrators. Why is that?

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3. Forced arbitration for employees creates a dynamic that fosters implicit bias

Unlike a private arbitrator, judges and jurors have no stake in the outcome of an employee's case. After rendering a verdict, jurors resume their respective careers, which are unaffected by their decision. Similarly, judges receive no direct compensation from either party; for good reason, their salaries are funded through taxpayer dollars.

Arbitration, on the other hand, is not publicly funded and is likely cost prohibitive for employees. From filing fees to administrative charges to compensating the arbitrator at an hourly rate, the costs of arbitration quickly mount and can be substantially more expensive at every juncture compared to court.

To ensure that arbitration provisions are enforced, employers often foot the bill, which can be costlier than defending the same case in court. One case study discussed in InsideCounsel Magazine, for example, found that total costs and outside counsel fees averaged more than $30,000 higher in cases resolved through arbitration instead of litigation. The study also revealed that arbitration took longer.

Questions of financial expediency aside, an employer's payment of thousands of dollars to a single adjudicator to decide a case — in which it potentially faces significant liability — gives rise to misgivings. The expression "don't bite the hand that feeds you" comes to mind.

This is not to suggest that arbitrators in such a scenario deliberately act with a knowing bias. Rather, as numerous social science studies have confirmed, even the most trivial of incentives can create a powerful, implicit predisposition that interferes with sincere attempts at impartial decision-making.

In a study published in the Archives of Internal Medicine, researchers surveyed medical students and discovered that even small promotional gifts such as clipboards and notebooks featuring a drug company's logo create stronger preferences toward that brand, despite years of medical training.

Similarly, a law degree and professional experience may not immunize arbitrators from developing an unconscious bias favoring employers, who write the checks or who are repeat players in the process.

A study published in the Journal of Empirical Legal Studies, for example, found that the employee win rate nearly doubled from approximately 11 percent to 22 percent when the employer had not used the same arbitrator in the past. Researchers also noted a statistically significant difference in the mean award from approximately $3,000, where the employer and arbitrator had been paired in the past, to $25,000, where the arbitrator was a new face to both parties.

None of this is to say that private arbitration does not have its place. Arbitration pursuant to a collective bargaining agreement is one example. In that context, both parties voluntarily and knowingly choose the arbitral forum, possess the resources to share the expense of arbitration, and are both repeat players in the process.

4. Employers can buy into the hysteria or be at the forefront of change

As lawyers, we are trained to think in worst-case scenarios and plan accordingly. Clever legal strategies, however, do not always harmonize with good business judgment. Some of our nation's most successful companies provide paid parental leave, do not require non-competition agreements, and resist the forced arbitration temptation.

As we continue to debate forced arbitration and other important issues, there will be no shortage of alarmist views. Rather than agonize over what could go wrong, however, such employers and their legal advisors focus on the Holy Grail of any successful business: attracting and retaining top talent.

An employer that aggressively maneuvers for every legal advantage risks alienating its employees and creates a culture of distrust, which negatively impacts the bottom line.

Imagine you are a business owner or executive. Yours is a competitive industry, and you are proud of the team that you worked so hard to assemble. Although rivals lurk around every corner, morale and revenue is high.

How would morale be affected if your best performer, who oversees a legion of all-stars, discovered that the company buried a forced arbitration clause into a document signed in haste on the first day of employment?

You may have some explaining to do. MLW

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