

Avoiding Litigation Risks Arising Out of Employment¹

Employment Roundtable

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Employment related litigation remains a significant concern for employers as the number of employment-related cases filed each year continues to soar. In 2005 alone, the Equal Employment Opportunity Commission (EEOC) obtained compensation and benefits for employees in excess of \$107.7 million through litigation, and an additional \$271.6 million through informal resolution of EEOC charges.² These statistics do not include any of the settlements, judgments, and litigation expenses for employment claims that are not within EEOC jurisdiction, such as wrongful discharge, family medical leave, wage and hour, violation of state discrimination laws, and contract actions.

The best way to avoid employment related litigation is to implement and follow good employment practices. Adequate screening can help insure that employees hired are qualified and a good cultural fit. Written job descriptions and performance evaluations allow employees to know what is expected of them and how they are doing. Ongoing communication can help to uncover and address performance and behavior problems early. Consistent corrective and disciplinary actions reinforce company policy and insure fairness in their application. Open door and grievance procedures provide a forum for airing complaints. Exit interviews provide a last opportunity to find out what the employer is doing right and wrong from the employee's perspective.

Unfortunately, these days, even a company that implements and follows best practices is likely to be involved in litigation at some point. The purpose of this memorandum is to provide some suggestions to avoid or minimize that risk.

I. ESTABLISH AN INTERNAL GRIEVANCE PROCEDURE

Litigation of some employment disputes could be avoided by simply providing employees with a mechanism for airing and resolving issues of concern to them. Employee grievance procedures can run the gamut from a simple open door policy (*e.g.*, providing employees with the

¹ This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings and legal publications, and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

² See <http://www.eeoc.gov/stats/enforcement.html> (*see* "Litigation Statistics" and "All Statutes").

opportunity to orally address issues with a designated supervisor or manager) to a formal, multi-step process that provides an opportunity for the employee to present evidence and witnesses. In some cases, the failure to pursue an available grievance procedure may bar an employee from pursuing a civil action in court. In addition, an employee who pursues a quasi-judicial remedy to resolution may be entitled to only a limited review.³

For example, in *Palmer v. Regents of the University of California*,⁴ the California Court of Appeals held that California employees who fail to exhaust available internal grievance procedures are barred from pursuing any claims against their employers. The plaintiff, Patricia Palmer, had been laid off as part of a restructuring after working at UCLA laboratory for 21 years. Palmer was permitted to apply for a job in the newly-restructured department, but she did not receive a permanent position. She claimed that UCLA terminated her employment in retaliation for her repeated reports of the laboratory's violation of state regulations and her refusal to sign off on falsified data.

The University maintained both a general grievance procedure for complaint resolution and a specific grievance process for whistleblowers that alleged retaliation. Palmer filed a complaint under the general University system for complaint resolution, but abandoned the process before her claims were resolved. She never initiated a specific grievance for retaliation based on her alleged whistle blowing activities. When she sued for wrongful discharge in state court, the Regents argued that Palmer's claim was barred because she failed to exhaust the internal grievance procedures offered by the University. The California court agreed.

When a private association or public entity establishes an internal grievance mechanism, . . . failure to exhaust those internal remedies precludes any subsequent private civil action.⁵

The court reasoned that requiring exhaustion of internal remedies may eliminate or mitigate the plaintiff's damages by correcting errors without resort to litigation.⁶ In addition, an employer's quasi-judicial tribunal may have greater expertise than the courts in deciding the merits of a plaintiff's claim.⁷

³ See, e.g., *Westlake Community Hospital v. Superior Court*, 17 Cal 3d 465, 131 Cal Rptr 90 (1976) (doctor whose staff privileges are denied are withdrawn in hospital's quasi-judicial proceeding is required to first succeed in setting aside decision in a mandamus action before instituting tort action for damages).

⁴ 107 Cal App 4th 899, 132 Cal Rptr 2d 567, review denied, 2003 Cal LEXIS 4559 (July 9,2003).

⁵ 107 Cal App 4th at 904, 132 Cal Rptr 2d at 572-573. Subsequent California courts of appeal have narrowed that holding in certain circumstances. See, e.g., *Schifando v. City of Los Angeles*, 31 Cal App 4th 1074, 6 Cal Rptr 3d 457 (2003) (city employee claiming discrimination was not required to exhaust both internal administrative remedy under City Charter and administrative remedy under FEHA before filing a court action); *Williams v. Housing Authority of the City of Los Angeles*, 121 Cal App 4th 708, 17 Cal Rptr 3d (2004) (*Schifando* exception for FEHA claims extends to FEHA-related non-statutory claims when resolution of those claims through administrative process would have preclusive effect on FEHA claims); *Payne v. Anaheim Mem. Medical Cntr., Inc.*, 130 Cal App 4th, 30 Cal Rptr 3d 230 (2005) (exhaustion not required when internal administrative procedures are inadequate).

⁶ 107 Cal App 4th at 905, 132 Cal Rptr 2d at 572.

⁷ *Id.*

Employers outside of California may be reluctant to invest the time and expense necessary to institute a grievance procedure, as it is not clear whether other states will follow *Palmer* or extend it to statutory causes of action. Although Oregon courts have yet to consider exhaustion of internal remedies as a defense,⁸ Oregon employers should nevertheless consider adoption of a grievance procedure to minimize litigation risk.⁹

For internal and administrative remedies to serve as alternatives to court actions, they must include a fair right to be heard and have a decision rendered through a fair and sufficient process.¹⁰ A fair procedure requires adequate notice of the action proposed or taken against the individual, and a meaningful opportunity for the individual to be heard in his or her defense.¹¹ “A procedure which merely provides for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of facts is manifestly inadequate to handle disputes of [a] crucial and complex nature”¹²

To maximize the likelihood that a reviewing court will require exhaustion of an internal remedy, a grievance procedure should include a meaningful investigation and hearing at which the employee is permitted to submit evidence and/or witnesses. While such a procedure may sound onerous, in reality, few non-union employees take advantage of the right to grieve adverse employment decisions, and the establishment of quasi-judicial proceedings is far less onerous than prolonged litigation.

II. CONSIDER OTHER FORMS OF MANDATORY ALTERNATIVE DISPUTE RESOLUTION

A. Mediation

Mediation provides disputing parties with an opportunity to negotiate a resolution that ends their differences with the aid of an independent, neutral third party. Unlike a judge or an arbitrator, a mediator is not concerned with the merits of the dispute. The mediator’s focus is on getting the parties to reach an agreement that ends the dispute. Mediation can occur at any time, although early mediation may enable the parties to avoid the expense of litigation.¹³

Mediation can be an attractive and viable option for employers and employees. As one author notes:

⁸ *But see Embry v. Pac. Stationery and Printing Co.*, 62 Or. App. 113, 115, 659 P2d 436 (1983) (employee covered by a collective bargaining agreement that includes a grievance procedure cannot sue in tort until contract remedy is exhausted).

⁹ Until the Oregon Supreme Court rules the defense is not viable in Oregon, employers may assert exhaustion of internal remedies as a defense and assert dismissal of the defense as a basis for appeal.

¹⁰ *See, e.g., Payne v. Anaheim Mem. Medical Cntr., Inc.*, 130 Cal App 4th 729, 739-740, 30 Cal Rptr 3d 230, 237-238 (2005).

¹¹ *Id.*, 130 Cal App 4th at 740-741, 30 Cal Rptr 3d at 238-239.

¹² *Id.*, 130 Cal App 4th at 741, 30 Cal Rptr 3d at 239 (citations omitted).

¹³ *See generally*, Michele M. Fox, *Mediating Employment Disputes*, *New Jersey Law Journal* (March 29, 2004).

Familiar surveys have shown consistently that a very high percentage of civil lawsuits settle before judgment, typically more than 90%. And countless disputes settle before they ever mature into lawsuits. Therefore, it is highly likely that any particular dispute will settle at some point; the question usually is, when? Mediation presents the opportunity to ascertain whether such disputes can be settled earlier in the process than may otherwise be the case.¹⁴

Mediation provides both benefits and drawbacks. If the parties are not committed to the process, it can be a waste of time. However, it does provide a confidential¹⁵ mechanism for resolutions that may be more desirable than court-ordered remedies, which are usually limited to money and injunctive relief. Mediation allows the parties an opportunity to voice concerns and create personally meaningful solutions. Mediation is particularly useful in situations involving current employees and when there is a desire to main a working relationship. Even if mediation is ultimately not successful, mediation can help to narrow or clarify issues and provide useful information that could otherwise be obtained only through formal discovery.

B. ARBITRATION

The Federal Arbitration Act was enacted in 1925 to reverse historic judicial hostility toward arbitration, and “embodies a ‘liberal federal policy favoring arbitration agreements.’”¹⁶ Arbitration is now favored by most courts as an alternative forum for resolving disputes.¹⁷ The Federal Arbitration Act provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁸

Employees may challenge the validity of an arbitration agreement by raising contract defenses under state law, such as unconscionability, lack of mutual assent, lack of consideration, fraud, duress, and breach of contract.¹⁹ Moreover, arbitration agreements that are not “knowingly” made, fail to insure minimal standards of due process, or limit employees’ substantive rights

¹⁴ Excerpt from Chapter 16. Representing the Executive by Wayne R. Outten, appearing in Executive Compensation (BNA 2003).

¹⁵ ORS 36.220.

¹⁶ *Hill v. Rent-A-Center, Inc.*, 398 F3d 1286, 1288 (11th Cir 2005) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 US 1, 24 (1983)).

¹⁷ Indeed, the purpose of the Federal Arbitration Act, 9 USC §1, *et seq.*, was “to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation.” *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GMBH*, 141 F3d 1434, 1440 (11th Cir 1998).

¹⁸ 9 USC § 2.

¹⁹ 9 USC § 2; *Perry v. Thomas*, 492 US 483, 492 n.9 (1987) (“[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”). For example, in *Doctor’s Associates, Inc. v. Casarotto*, 517 US 681, 687 (1996), the Supreme Court held that fraud and duress were defenses that could invalidate an arbitration agreement. In *Hooters of America, Inc. v. Phillips*, 173 F3d 933, 940 (4th Cir 1999), the Fourth Circuit upheld challenges to an arbitration agreement and the employer’s duty of good faith under it when the employer’s arbitration procedure was so one-sided that it was “egregiously unfair.”

contrary to the underlying intent of certain statutory schemes, such as Title VII, will not be enforced.²⁰

Employers may adopt Alternate Dispute Resolution (ADR) programs that require as a condition of employment that employees submit their disputes to arbitration rather than filing such claims in court.²¹ Although there is much debate on the issue, arbitration is often perceived to be quicker, less expensive, and a favorable alternative to trials before juries, which are highly unpredictable. In addition, employers may impose time limitations, class action waivers, discovery limitations, and confidentiality clauses within the context of an ADR program, all of which can provide significant benefits. However, there are advantages and disadvantages to arbitration, and many considerations when determining whether arbitration is right for a particular employer.

The Equal Employment Opportunity Commission (EEOC) has historically looked unfavorably at mandatory arbitration programs, viewing them as biased against employees.²² A 1995 study suggested that jury verdicts in employment discrimination cases were at least three times higher than comparable arbitration awards.²³ However, at least one study has shown that plaintiffs

²⁰ See *Prudential Insurance Co. of America v. Lai*, 42 F3d 1299, 1304 (9th Cir 1994) (holding there must be “at least a knowing agreement to arbitrate employment disputes”); *Cole v. Burns Int’l Security Services*, 105 F3d 1465, 1482 (DC Cir 1996) (holding that based on Title VII arbitration agreement must provide employees with a minimum standard of procedural due process as well as all substantive rights).

²¹ *Equal Employment Opportunity Commission v. Luce, Forward, Hamilton & Scripps*, 345 F3d 742 (9th Cir 2003) (*en banc*) (employers may require employees to arbitrate employment claims, including those arising under Title VII, as a condition of employment). Some courts have upheld arbitration agreements based on continuation of at-will employment. See, e.g., *Lang v. Burlington Northern RR Co.*, 835 F Supp 1104, 1106 (D Minn 1993) (long-term employee bound under mandatory arbitration agreement contained in revised handbook); *Caley v. Gulfstream Aerospace Corp.*, 428 F3d 1359, 1378-1379 (11th Cir 2005) (continued employment supported arbitration agreement under Georgia law); *Fontaine v. Rent-A-Center West, Inc.*, Slip Copy, 2006 WL 141606 (D Or 2006) (upholding arbitration agreement based on continued employment under Oregon law); but see, e.g., *Standard Coffee Service Co. v. Babin*, 472 So 2d 124 (La Ct App 1985) (where employee's agreement was obtained under threat of discharge, contract modification mandating arbitration was void for duress).

²² See generally, *EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (1997), <http://www.eeoc.gov/policy/docs/mandarb.html>. It should be noted that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages in ADA enforcement actions. *Equal Employment Opportunity Commission v. Waffle House*, 534 US 279 (2002). However, the EEOC pursues only a very small number of enforcement actions, - and its ability to seek employee-specific remedies may be limited by ongoing arbitration or a release of claims from the employee.

²³ William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 J. Disp. Resol. 40 (1995).

receive more, on average, with arbitration, although arbitration results in faster dispute resolution and lower attorney fees.²⁴

Like the EEOC, the Ninth Circuit has demonstrated a long-standing reluctance to enforce arbitration agreements in the employment context.²⁵ As a result, employers in the Ninth Circuit (which includes Oregon) who wish to rely on arbitration agreements should have their agreements reviewed periodically to insure that the latest developments in this area of the law are taken into consideration.

Elements Required to Enforce Arbitration Agreements

➤ Agreement Must Be Supported By Consideration

To be binding, a contract requires an exchange of promises or “consideration.”²⁶ An arbitration agreement will be supported by consideration if the employer agrees to do something in exchange for the employee’s agreement to arbitrate. An employer’s agreement to be bound by the arbitration process is sufficient consideration to support an arbitration agreement,²⁷ at least at the inception of the employment relationship.

The modification of an existing contract requires additional consideration.²⁸ In some states, continued at-will employment may constitute sufficient consideration for an employer to impose unilateral changes in the terms and conditions of employment, including a requirement that the employee arbitrate disputes.²⁹

²⁴ Michael Delikat and Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, American Bar Association Conflict Management, Vol. VI, Issue 3 (Winter 2003) (finding that plaintiffs who resolve legal disputes through arbitration fared better in terms of monetary awards than individuals who went to federal court).

²⁵ See, e.g., *Craft v. Campbell Soup Co.*, 177 F3d 1083, 1094 (9th Cir 1999) (holding that arbitration agreements signed as a condition of employment are unenforceable), abrogated by *Circuit City Stores, Inc. v. Adams*, 532 US 105 (2001). The Ninth Circuit subsequently modified its position on this issue. *Equal Employment Opportunity Commission v. Luce, Forward, Hamilton & Scripps*, 345 F3d 742 (9th Cir 2003) (*en banc*).

²⁶ Consideration is "the accrual to one party of some right, interest, profit or benefit or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." *Shelley v. Portland Tug & Barge Co.*, 158 Or 377, 387, 76 P2d 477 (1938); *McPhail v. Milwaukie Lumber Co.*, 165 Or App 596, 999 P2d 1144 (2000).

²⁷ *Circuit City Stores, Inc. v. Najd*, 294 F3d 1104, 1108 (9th Cir 2002).

²⁸ *McPhail*, 165 Or App at 601 (citing *Jole v. Bredbenner*, 95 Or App 193, 196, 768 P2d 433 (1989)).

²⁹ See, e.g., *Fontaine v. Rent-A-Center West, Inc.*, Slip Copy, 2006 WL 141606 (D Or 2006). Not all courts maintain this view. The imposition of an arbitration agreement upon threat of discharge may render the agreement subject to challenge on grounds of duress or unconscionability, see n.21, supra, or expose the employer to claim of retaliatory discharge in the event the employee is fired for refusing to sign the agreement. See *Equal Employment Opportunity Commission v. Luce, Forward, Hamilton & Scripps*, 345 F3d 742, 754 (9th Cir 2003) (*en banc*) (remanding for further consideration EEOC’s claim that adverse action against applicant for opposition to compulsory arbitration agreement was retaliatory in violation of Civil Rights Act).

➤ **Agreement Must Be Entered Into “Knowingly”**

In *Prudential Insurance Co. of America v. Lai*, the Ninth Circuit held that employment arbitration agreements are enforceable only if employees “knowingly agre[e] to submit such disputes to arbitration.”³⁰ In other words, employees must be put on notice that they are agreeing to arbitrate employment-related claims.³¹

In *Lai*, the plaintiffs signed a form U-4 that contained a mandatory arbitration clause in connection with their registration as securities dealers. The form did not mention employment disputes and the plaintiffs were not given a copy of a separate manual that described the arbitration process. As a result, they were not on notice that they were agreeing to arbitrate employment disputes.³² The court reasoned that the employees “could not have understood that in signing [the U-4], they were agreeing to arbitrate sexual discrimination suits” because the form “did not refer to employment disputes” and “did not purport to describe the types of disputes that were to be subject to arbitration.”³³

In *Nelson v. Cyprus Bagdad Copper Corp.*,³⁴ an employee was given a handbook that contained an arbitration clause and asked to sign an acknowledgement form. The court found that the employee’s acknowledgement that he had read and understood the handbook did not constitute a knowing agreement to arbitrate.³⁵ To qualify as a “knowing agreement,” the Ninth Circuit held that the agreement “must at the least be express: the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question.”³⁶

➤ **Procedures Afforded In Arbitration Must Be Fair**

Some courts have held that arbitration agreements must include specific procedural safeguards for arbitration to be consistent with federal civil rights statutes. In *Gilmer v. Interstate/Johnson Lane Corp.*,³⁷ the U.S. Supreme Court considered a plaintiff’s arguments that his arbitration

³⁰ 42 F3d at 1305. “[C]ongressional concern that Title VII disputes be arbitrated only ‘where appropriate,’ and only when such a procedure was knowingly accepted, reflects our public policy of protecting victims of sexual discrimination and harassment through the provisions of Title VII and analogous state statutes.” *Lai*, 42 F3d at 1305.

³¹ See, e.g., *Campbell v. General Dynamics Government Systems Corp.*, 407 F3d 546 (1st Cir 2005) (abbreviated e-mail notice of arbitration agreement did not provide minimally sufficient notice of the policy and waiver of an employee’s right to access a judicial forum).

³² *Id.* at 1303.

³³ *Id.* at 1305.

³⁴ 119 F3d 756, 762 (9th Cir 1997). In contrast, the court in *Patterson v. Tenet Healthcare, Inc.*, 113 F3d 832 (8th Cir 1997), upheld an arbitration agreement contained in handbook acknowledgment where the employee expressly acknowledged that submission of employment disputes to arbitration was a condition of employment.

³⁵ *Nelson*, 119 F3d at 761.

³⁶ *Id.*; but see, *Circuit City Stores, Inc. v. Najd*, 294 F3d 1104 (9th Cir 2002) (consent to arbitrate may be inferred when employee signs acknowledgement that expressly provides for arbitration of employment-related disputes, the form describes in detail the mechanism by which employee could opt-out of arbitration, and employee fails to opt-out in a timely manner).

³⁷ 500 US 20, 31-32 (1991).

agreement was not enforceable because (1) it did not ensure a neutral arbitrator, (2) it did not allow for more than minimal discovery, (3) it did not guarantee a written award, (4) it did not allow the plaintiff to recover all remedies that would have been available in court, and (5) there was a requirement that the employee pay unreasonable costs. While the Court ultimately upheld the arbitration agreement,³⁸ some courts have interpreted *Gilmer* as requiring minimum due process standards in connection with arbitration of employment-related claims.³⁹ It is not clear that employers must explicitly provide for all of the protections outlined in *Gilmer*, but it is wise not to expressly remove such protections in the arbitration agreement.

Unconscionability is the single most frequent defense raised by employees to avoid arbitration agreements. Unconscionability has two components: procedural unconscionability and substantive unconscionability.⁴⁰ States may require that one or both requirements be met before an agreement is declared unconscionable.

Under a procedural unconscionability analysis, courts consider whether the circumstances under which the agreement was obtained involved elements of unfair surprise, trickery, or abuse of grossly unequal bargaining power. The Ninth Circuit, applying California law, has found agreements procedurally unconscionable when they were contracts of adhesion or afforded the employee no means of “opting-out” without losing his or her job.⁴¹

Under the substantive unconscionability analysis, courts examine the fairness of the terms in the agreement to see whether the terms are so one-sided they “shock the conscience.” The Ninth Circuit has considered a variety of factors when evaluating arbitration agreements for substantive unconscionability, such as whether only one party was bound to arbitrate, whether employees are required to pay unreasonable arbitration fees, whether there is one-sided or inadequate discovery, whether there is a neutral arbitrator, and whether only one party may make modifications or cancel the agreement. With few exceptions, courts have held that a variety of these factors must be present before an agreement is substantively unconscionable.⁴² However, the Ninth Circuit

³⁸ *Id.* at 32.

³⁹ See, e.g., *Cole v. Burns Int’l Security Services*, 105 F3d 1465, 1482 (DC Cir 1996) (holding, based on *Gilmer*, that arbitration agreement must provide employees with access to a neutral forum as well as all substantive statutory rights). The Ninth Circuit has held that an arbitration agreement is unenforceable when it deprives an employee of types of relief that would otherwise be available in court or requires an employee to bear additional costs that would not be required in a court proceeding. *Circuit City v. Adams*, 279 F3d 889, 895 (9th Cir 2002) (applying California law).

⁴⁰ See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal 4th 83, 6 P3d 669 (Cal 2000).

⁴¹ See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F3d 889, 893 (9th Cir 2002); see also *Circuit City Stores, Inc. v. Ahmed*, 283 F3d 1198, 1199-1200 (9th Cir 2002) (employees must be given a “meaningful choice” about whether to arbitrate their claims, and continued employment must not be conditioned on their assent); *Ferguson v. Countrywide Credit Ind., Inc.*, 298 F3d 778 (9th Cir 2002); *Circuit City Stores, Inc. v. Najd*, 294 F3d 1104, 1106 (9th Cir 2002). Contracts of adhesion are not unenforceable in Oregon. *Fontaine v. Rent-A-Center West, Inc.*, Slip Copy, 2006 WL 141606 (D Or 2006).

⁴² See, e.g., *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F3d 778 (9th Cir 2002) (applying California law, court denied enforcement of arbitration agreement that excluded claims for workers compensation, unemployment, and enforcement of intellectual property protections, required employee to pay part of the filing fee and an equal share of the arbitration fees beyond the first day unless the arbitrator made a different allocation, and limited discovery not relating to experts to three depositions

has held that a fee allocation that requires the employee to incur fees he or she would not have to pay in a judicial forum (such as arbitrator's fees) is *per se* substantively unconscionable.⁴³

➤ **Agreement Cannot Deprive Employee Of Statutory Remedies**

“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”⁴⁴ Consequently, agreements that purport to limit the statutory remedies otherwise available (e.g., compensatory damages, punitive damages, or attorney's fees) are unenforceable.⁴⁵ Arbitration agreements in the employment context must afford employees an opportunity to bring the same substantive claims and obtain the same remedies available in a judicial forum.⁴⁶

Limitations Enforceable in Arbitration

Provided the arbitration agreement otherwise satisfies requirements for enforceability of contracts under state law, arbitration agreements may impose limitations that may not be possible in litigation.

In the absence of other provisions making the agreement unconscionable, some limitations on discovery are permissible.⁴⁷ Indeed, it is not uncommon for arbitration rules to grant the arbitrator the discretion to determine the scope of discovery.⁴⁸ Arbitration agreements may

and 30 discovery requests, subject to the arbitrator's ability to allow additional discovery for good cause); compare *Fontaine v. Rent-A-Center West, Inc.*, Slip Copy, 2006 WL 141606 (D Or 2006) (applying Oregon law, court upheld enforcement of arbitration agreement that required parties to equally share filing fees and the arbitrator's fee, except if the law of the jurisdiction in which the arbitration was held required a different allocation, excluded claims for workers compensation, unemployment, and enforcement of intellectual property protections, and allowed either party: (1) to be represented by an attorney; (2) to depose one individual plus any experts designated by the other party; (3) to serve requests for production of documents; (4) to ask the arbitrator for additional discovery; (5) to subpoena witnesses and documents; and (6) to arrange for a court reporter).

⁴³ *Circuit City Stores, Inc. v. Adams*, 279 F3d 889, 894 (9th Cir 2002) (applying California law).

However, the US District Court for the District of Oregon refused to find an arbitration unconscionable based on similar provisions. See *Fontaine*, note 42, *supra*.

⁴⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 US 614, 628 (1985).

⁴⁵ *Circuit City Stores, Inc. v. Adams*, 279 F3d 889, 895 (9th Cir 2002).

⁴⁶ See *Adams*, 279 F3d at 894, 895 (invalidating agreement limiting back pay, front pay, compensatory damages, and punitive damages); *Ramirez III v. Circuit City Stores, Inc.*, 76 Cal App 4th 1229, 1236, 90 Cal Rptr 2d 916 (Cal App 1999) (invalidating limitation on punitive damages, costs and attorney fees); *Kinney v. United Healthcare Svcs., Inc.*, 70 Cal App 4th 1322, 83 Cal Rptr 2d 348 (Cal App 1999) (invalidating limitation on contract damages and compensatory and punitive damages for employment discrimination). It is not clear whether the Ninth Circuit would invalidate all limitations on remedies in non-statutory employment claims.

⁴⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 31 (1991) (holding that limitations in discovery under NYSE arbitration would not deprive employee of fair opportunity to prove age discrimination claim).

⁴⁸ See, e.g., *Caley v. Gulfstream Aerospace Corp.*, 428 F3d 1359, 1378 (11th Cir 2005) (upholding arbitration agreement that allowed depositions only if authorized by arbitrator).

require that the parties maintain confidentiality of both the arbitration proceeding and award.⁴⁹ In addition, an arbitration agreement may be used to limit the period of time in which an employee may file a claim against the employer.⁵⁰

A class action waiver was upheld in *Gentry v. Superior Court*,⁵¹ a case involving the alleged misclassification of employees as exempt from overtime pay. The arbitration rules at issue prohibited the arbitrator from consolidating claims of different employees into one proceeding or hearing the arbitration as a class action.⁵² The court upheld the validity of this provision and required the employee to arbitrate his claims on an individual basis. The Eleventh Circuit reached a similar result in a wage and hour case involving 300 employees.⁵³

Unless a statute provides for attorney fees solely to a prevailing employee, an arbitration agreement that provides for recovery of attorney fees by the prevailing party is enforceable to the same extent as any contract. Such a provision is useful primarily as a deterrent, as many employees will not have the resources to pay any attorney fees that may be awarded. Employers should also be aware that including a prevailing party attorney fee provision enables a prevailing employee to recover fees on claims for which attorney fees would not otherwise be recoverable (*e.g.*, wrongful discharge).

III. LIMIT PERIOD IN WHICH EMPLOYMENT CLAIMS MAY BE FILED

The law limits by statute the period in which an individual may file suit on any given claim. For example, Oregon allows six years for filing contract claims.⁵⁴ An employer may significantly reduce this period by contract. Such a limitation may either be tied to an arbitration agreement, an employment agreement, or stand on its own.

In *Fink v. Guardsmark, LLC*,⁵⁵ the U.S. District Court for the District of Oregon enforced a six-month limitation period contained in an at-will employment agreement. The agreement provided that any action arising from employment had to be brought within six months of the date the cause of action arose or it would be time-barred. The limit did not apply to claims filed with or arising under any statutes enforced by the EEOC.⁵⁶ The court granted summary judgment dismissing plaintiff's wrongful constructive discharge and FMLA/OFLA claims based on plaintiff's failure to file suit within the contractual limitations period.⁵⁷

⁴⁹ See *Id.* at 1378-79 (requiring confidentiality of transcripts of arbitration and award).

⁵⁰ Both Oregon and Washington have upheld contracts imposing a six-month limit on the filing of an employment claim. See part III, *infra*. It is unclear whether a California court would uphold such a limit in the arbitration context, at least where other indicia of unconscionability are found.

⁵¹ 35 Cal App 4th 944, 37 Cal Rptr 3d 790 (2006).

⁵² *Id.*, 37 Cal Rptr 3d at 792.

⁵³ *Caley v. Gulfstream Aerospace Corp.*, 428 F3d 1359 (11th Cir 2005).

⁵⁴ ORS 12.080.

⁵⁵ 2004 WL 1857114 (D Or 2004).

⁵⁶ Presumably, this exception was to avoid a conflict with administrative exhaustion requirements that cannot be waived. Oregon discrimination statutes contain no similar exhaustion requirements.

⁵⁷ *Id.* at 4. Although there is no state case law on this subject, the court predicted that "the Oregon Supreme Court would reach a similar conclusion***." A six-month contractual limitation has also been

Similarly, in *Badgett v. Federal Express Corp.*,⁵⁸ a North Carolina court enforced a six-month contractual limitation period against a plaintiff asserting § 1981, emotional distress, and FMLA claims (like FLSA claims, FMLA is subject to a two-year statute of limitations that is extended to three years if the violation is “willful”). The court rejected plaintiff’s contention that the limitation interfered with employees’ rights under FMLA or was unenforceable under a regulation prohibiting employees from waiving their FMLA rights.⁵⁹

In both *Fink* and *Badgett*, the contractual limitation was signed by the employee upon initial employment. In some states, continuation of at-will employment would provide sufficient consideration to support such a limitation on current employees.⁶⁰ Alternatively, such a limitation could be included in a severance agreement.

IV. CONDUCT EXIT INTERVIEWS

An exit interview may be conducted at the time an employee terminates employment. Such an interview provides an opportunity to gain a candid opinion from the employee about employment conditions and any outstanding issues that the employee may have with the company. An exit interview provides many benefits:

By conducting exit interviews you are taking a pro-active approach to managing your company’s human resources. Also, isn’t it in your company’s best interest to learn of an employee’s disparate treatment on the job before you get a visit from his or her lawyer or the EEOC? Maybe, you are able to “save” the employee or at least address whatever issues you uncover.⁶¹

An exit interview also provides an opportunity to remind departing employees of any ongoing obligations they have to the company, such as protecting the company’s confidential information or refraining from solicitation of the company’s customers. Such a reminder may enable the parties to avoid misunderstandings and resolve concerns about the scope and enforceability of the employee’s obligations.

V. OFFER CONSIDERATION IN EXCHANGE FOR A RELEASE OF CLAIMS

When an employment dispute with a current employee seems likely, employers may want to consider offering something of value to the employee in exchange for a release of claims against the company. Such agreements should be reviewed from time to time to insure that they comply with all applicable laws and do not trigger any unforeseen tax consequences. Employees should be given a reasonable period of time to consider the agreement and have it reviewed by counsel.

upheld in California. *Soltani v. Western & Southern Life Ins. Co.*, 258 F3d 1038 (9th Cir 2001) (upholding six-month limitation on filing claim but invalidating requirement that employee provide ten days’ notice setting forth particulars of claim prior to filing suit).

⁵⁸ 378 F Supp 2d 613 (MD NC 2005).

⁵⁹ *Id.* at 624. Note that a plaintiff could still recover damages for a two or three-year period so long as the claim is filed within the six-month limitations period.

⁶⁰ See notes 21 and 29, *supra*.

⁶¹ Nina Drake and Ian Robb, Exit Interviews (SHRM White Paper 1995, rev. 2001).

VI. CONDUCT PERIODIC AUDITS AND INVESTIGATIONS

Audits and investigations can be extremely important and beneficial tools to minimize litigation risks. Audits to insure the efficacy of internal controls is *required* of publicly traded companies under federal law.⁶²

Periodic audits are likely to reveal wage and hour, payroll, and other administration errors that are most likely to result in class action lawsuits. Common subjects of class action suits include final paycheck violations, misclassification of workers as independent contractors or exempt from overtime pay, improper calculation of overtime pay, improper payroll deductions, failure to provide meal and rest breaks, working off-the-clock, improper calculation and payment of vacation and sick time, and failure to pay commissions and bonuses. In the event violations are discovered, employers should act promptly to minimize their exposure by fixing any problems and resolving potential claims with existing and former employees who could assert legitimate claims.

Once an employee lodges an internal complaint, it is important to conduct a prompt and meaningful investigation and, if a violation is found, take corrective action sufficient to remedy the problem. Prompt investigation and remedial action in response to an internal complaint may provide a complete defense to a discrimination action.⁶³

Employers should keep in mind that audits and investigations are typically subject to discovery in subsequent litigation.⁶⁴ It is, therefore, prudent to seek the advice of counsel when conducting audits or investigations that have the potential for ending up in litigation. Both the attorney-client privilege and the attorney work-product doctrine are subject to waiver when the employer seeks to rely on the attorney's investigation in support of a defense that the employer took prompt remedial action in response to a complaint of discrimination.⁶⁵

⁶² See Sarbanes-Oxley Act of 2002, Section 404.

⁶³ See, e.g., *Burlington Industries, Inc. v. Ellerth*, 524 US 742, 765 (1998) (granting employer's an affirmative defense to harassment under Title VII if the harassment has not culminated in a tangible employment action such as demotion or discharge and the employer proves that (1) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to prevent harm); see also, *EEOC Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors* dated June 18, 1999, page 3, <http://www.eeoc.gov/docs/harassment.html>; see also, e.g., *El-Hakem v. BJY, Inc.*, 262 F Supp 2d 1139, 1150-51 (D Or 2003) (applying *Ellerth* to claim for race discrimination).

⁶⁴ This often comes up where a party is relying upon counsel's advice or investigation as a defense. See generally, T. Maxfield Bahner and Michael L. Gallion, *Waiver of Attorney-Client Privilege Via Issue Injection: A Call for Uniformity*, 65 Def. Couns. J. 199 (1998); Peter H. Jarvis and Mark J. Fucile, *Eight Privilege-Related Aspects of Corporate Investigations*, 17 No. 3, The Litigation Journal (OSB 1998).

⁶⁵ See also *E.E.O.C. v. General Telephone Co. of Northwest, Inc.*, 885 F2d 575 (9th Cir 1989) ("... when an employer voluntarily uses evidence of its equal opportunity efforts to prove nondiscrimination, it 'opens the door' and waives whatever qualified privilege may have existed," including the self-critical analysis privilege.).

In the health care field, there is legislation affording immunities and/or evidentiary privileges in connection with certain types of investigations. The Health Care Quality Improvement Act of 1986 (HCQIA)⁶⁶ is a federal law that provides a limited immunity from damages for professional review bodies and individuals that participate in qualifying professional review activities. Oregon's peer review statute creates a privilege for information that qualifies as peer review "data."⁶⁷ In addition, the statute affords a person who serves on or provides information to peer review body immunity from a civil action for damages for actions taken or statements made in good faith.⁶⁸

VII. MANAGE POTENTIAL CLASS ACTION CLAIMS EARLY

Class action lawsuits have become extremely prevalent, particularly in the wage and hour context. This type of litigation is attractive to plaintiffs' attorneys because, while the actual dollar amounts recoverable by an individual employee are often quite low (even a few dollars or cents), the potential recovery may be huge when multiplied across the work force over several years. In addition to wages, the recoverable damages may include attorney fees, interest, and, in many cases, multiple penalties for arguably the same conduct.

Congress recently enacted the *Class Action Fairness Act of 2005*.⁶⁹ The Act broadly allows removal of state cases to federal court where there is the potential for at least 100 class members and the compensation sought exceeds \$5 million. On balance, it is often preferable to be in federal than state court. Most importantly, federal courts are more reluctant to certify cases as class actions than are their state court counterparts. The time available for removal is limited, so it is critical to act quickly if removal is desirable.

Notwithstanding the benefits of being in federal court, Oregon state class action procedure does provide some distinct benefits to defendants. For example, plaintiffs must provide at least 30 days' notice before filing a state class action⁷⁰ and the defendant has an opportunity to "cure" the alleged violation,⁷¹ which may limit the plaintiffs' recovery of attorney fees. In addition, the judgment against the losing defendant at trial cannot exceed the total sum of the certified claim forms actually filed by the successful plaintiffs after the trial.⁷² This means that while the jury's verdict is for the full amount of the damages of *all* of the class members, the employer's liability in the event of an unfavorable verdict is limited to those individuals who file a certified claim form with the court. Employers must act quickly, however, to take advantage of these options.

⁶⁶ 42 USC § 11101-11152.

⁶⁷ ORS 41.675(2) ("data" includes oral communications and written reports to a peer review body, and all notes or records created by or at the direction of a peer review body, including the communications, reports, notes or records created in the course of an investigation undertaken at its direction).

⁶⁸ ORS 41.675(5).

⁶⁹ Public Law 109-2, 119 Stat. 4.

⁷⁰ ORCP 32H.

⁷¹ ORCP 32I.

⁷² ORCP 32F(2).