
Time to “Waive” Goodbye to Mandatory Arbitration Agreements? The Case for Utilization of Jury Trial Waivers in Florida

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Executive Summary

In the early 1990s, roughly two percent of American workers were subject to mandatory arbitration agreements with their employers. By 2018, that number was closer to sixty percent. But while pre-dispute mandatory arbitration agreements have become the norm for many employers, recent legislative actions are chipping away at the scope and breadth of such provisions. Coupled with the rising cost of arbitration, is it time for employers to consider alternatives? In Florida, one such alternative is the enforcement of jury trial waiver provisions for employment-related disputes. This article will address the current state of law regarding mandatory pre-dispute arbitration agreements and make a case as to why Florida employers should consider transitioning to using jury trial waivers instead.

The Status of Mandatory Pre-Dispute Arbitration Agreements

On March 3, 2022, President Biden, as expected, signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. As the name implies, this law amends the Federal Arbitration Act to invalidate pre-dispute arbitration agreements relating to claims for sexual harassment or sexual assault. While the law applies to all agreements, it will significantly impact employment-related agreements, which routinely include mandatory arbitration clauses relating to all employment disputes.

Two weeks later, the United States House of Representatives passed the Forced Arbitration Injustice Repeal Act (“FAIR Act”) in a largely party-line vote. The bill expands upon the new law and would invalidate pre-dispute arbitration agreements with respect to “an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.” The bill defines “employment dispute” to include, among other things, disputes arising between an employer and employee relating to the terms of, payment for, and discipline or discharge from, employment. While it is unclear at this time whether the bill will pass the Senate given its broad scope, the White House has endorsed FAIR Act.

This legislative assault on mandatory pre-dispute arbitration agreements provides an opportunity for Florida employers to consider whether mandatory arbitration of employment disputes is still in their best interest. In recent years, critics of forced arbitration have highlighted the slow and expensive nature of the process, as well as the difficulty in overturning a bad result. But, if not arbitration, what viable alternative is available?

Jury Trial Waiver Provisions and the Benefits of Bench Trials

One alternative particularly useful for Florida employers is a jury trial waiver provision. Such waivers offer numerous benefits, including what can be a significantly decreased cost of litigation. Studies have shown that, on average, the time between filing a case and its ultimate disposition

is shorter for non-jury trial cases, and that jury trials are twice as long as judge (“bench”) trials. Bench trials are also more employer-friendly, as one study found that successful plaintiffs in employment discrimination cases received nearly five times the damages from juries as judges.

As compared to arbitrations, bench trials also have the benefit of being subsidized by the state/federal court, and therefore do not have the added expense of an arbitrator. And, perhaps most importantly, bench trials offer all the benefits of the court system, such as rules of evidence and the opportunity for early summary judgment, with the right to appeal adverse decisions and judgments.

Florida Law on Jury Trial Waivers

Employers in Florida in particular should consider the benefits of a jury trial waiver provision in their employment agreements given the employer-friendly law in this state. Florida appellate courts have held that contractual waivers of the right to a jury trial are enforceable, and “[a] trial court commits error when it chooses to ignore the parties’ contractual waiver of a jury trial and orders a common law jury trial unless there is a showing why the waiver should not be enforced.” *Gelco Corp. v. Campanile Motor Serv., Inc.*, 677 So. 2d 952, 952-53 (Fla. 3d DCA 1996). In determining whether such a waiver should be enforced, courts consider whether it was entered into knowingly, voluntarily, and intelligently, and whether enforcement of the waiver would be “unconscionable.” *Amquip Crane Rental, LLC v. Vercon Constr. Mgmt., Inc.*, 60 So. 3d 536, 540 (Fla. 4th DCA 2011); *Vista Centre Venture v. Unlike Anything, Inc.*, 603 So. 2d 576, 578 (Fla. 5th DCA 1992).

To better ensure any challenge to an employee’s jury waiver is unsuccessful, employers should consider the following drafting tips:

- Make the provision conspicuous in the agreement so that the employees cannot later claim they were unaware of it. This can be accomplished by using a conspicuous typeface, ensuring the waiver is a stand-alone paragraph with a clear heading, and positioning the clause near the signature line(s) so that it stands out. Employers may also consider having the employee initial the provision as an additional safeguard.
- Provide that the waiver applies to both employee and employer. Courts are more likely to enforce a mutual waiver than a unilateral one.
- Include language indicating the waiver was made knowingly, voluntarily, and intelligently. While courts are split as to who has the burden of proving a waiver was given voluntarily, having such language will support the employer’s argument should the burden be placed on it.
- Incorporate language suggesting the employee consult with an attorney before executing the agreement.

Faced with such a waiver, courts are more likely to find employees knowingly, voluntarily, and intelligently relinquished their right to a jury trial. Relying on similar waivers, employers have successfully stricken jury demands for claims asserted under a variety of employment-related laws, such as Title VII, the Florida Civil Rights Act, the Family and Medical Leave Act, and Section 1981.

In drafting the jury trial waivers, employers should also consider addressing a quirk in Florida law: an advisory jury trial. While a relative rarity, Florida law does permit a trial judge to utilize an advisory jury in a case in which the parties have waived their right to a common-law jury trial.

Gelco, 677 So. 2d at 953. In such a circumstance, the trial is conducted as though it is a typical jury trial, and the advisory jury makes findings of fact at the conclusion of the case. However, the trial judge is not bound by such findings, and in fact must make his or her own findings. Due to this, Florida courts have found that the use of an advisory jury does not violate the parties' contractual agreement to a non-jury trial. *Id.* As a trial before an advisory jury presents many of the same disadvantages discussed above, employers should also consider including a waiver of advisory jury trials in their contract provisions. Whether a court would enforce a waiver to this extent remains to be seen, but inclusion may discourage a plaintiff's attorney from raising the issue.

Finally, it is worth noting that despite Florida's employer-friendly law regarding jury trial waivers, not all of an employer's dispute resolution tools are viable in this state. A recent trend in employment agreements is to shorten the statute of limitation periods for employment-related disputes. Such provisions are beneficial to employers, as they provide for timely resolution of claims when facts and circumstances are more easily recalled and can limit exposure to litigation and damages. However, many states prohibit the contractual shortening of statute of limitation periods, and Florida is one such state. See § 95.03, Fla. Stat.

Conclusion

The recent legislative enactments seeking to limit or outright prohibit mandatory pre-dispute arbitration agreements provide Florida employers a unique opportunity to reexamine their dispute resolution objectives. Given the high costs of arbitration, employers may be better served by instead enforcing jury trial waivers for employment-related disputes. Such waivers offer the benefits of the court system with reduced costs and are particularly well suited for use in the state of Florida. And because employers can ultimately decide they do not wish to enforce the provision when faced with a dispute, there is really no downside in adding the provision to their employment agreements.

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