Employers: Have You Carefully Reviewed Your Mandatory Arbitration Provisions?

Judge Abraham J. Gafni (Ret.)
Published on April 16, 2020 in The Legal Intelligencer

There is a general sense that employers and providers of goods or services, when preparing agreements relating to contracts of employment or the sale of products, prefer the inclusion of mandatory arbitration provisions that incorporate a prohibition against class actions by employees or consumers. These restrictions are often condemned by both employee and consumer groups as having been designed to make it financially impossible for one who has a small claim to bring a claim. (Think of employees who claim that their pay has been reduced by a few cents an hour or a consumer who claims that a service provider has included an additional $10 fee per month). Nonetheless, the U.S. Supreme Court has made clear in cases such as Epic Systems v. Lewis, 138 S. Ct. 1612 (2018), that such agreements are valid.

Recently, however, employer groups have started to understand that mandatory arbitration requirements when coupled with prohibitions against class actions may, on occasion, represent more of a threat to them than to those upon whom these restrictions have been imposed.

A graphic illustration of such arose most recently in California, a state where courts have not always favored such provisions. The case, Abernathy v. DoorDash, in the U.S. District Court for the Northern District of California (No. C 19-07545 WHA, filed 2/10/20) involved in excess of 5,000 individuals who work for DoorDash. As a condition of serving as a courier, each was required to click a “mutual arbitration provision” that applied to any disputes relating to the agreement, including the classification of each as an independent contractor, and requiring that the arbitration be administered by the American Arbitration Association (AAA). The agreement also provided that the parties mutually “agree that by entering this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard as, or arbitrated, or to participate in a class action, collective action and representative action …” The AAA’s Commercial Arbitration Rules required that each individual petitioner pay a filing fee of $300, and the responding company pay a filing fee of $1,900.

The petitioner-couriers claimed that they had been improperly classified as independent contractors rather than as employees. Individual demands were filed for each of the petitioner-couriers who collectively paid over $1.2 million in filing fees. DoorDash, in accordance with the rules of arbitration, therefore, was required to pay its share of fees in the amount of nearly $12 million. The AAA imposed a deadline for DoorDash to pay its fees.

In fact, DoorDash was confronted with potential costs of even greater magnitude. The petitioner-couriers had further requested that if DoorDash did not comply with its contractual obligations relating to payment of fees, it would, in addition, be required to pay all attorney fees and costs related to the arbitration under a California statute which took effect Jan. 1. This statute provided that if the drafting party failed to pay the required fees and costs within 30 days of the due date, it would be in material breach of the arbitration agreement. In such circumstances, the court “shall impose a monetary sanction … by ordering the drafting party to pay the reasonable expenses, including attorneys fees and costs incurred by the employee or consumer as a result of the material breach.” Some commentators have suggested that these reasonable costs would include arbitrator fees and would average $60,000 per case. The court rejected this demand by petitioner-couriers solely on the ground that the petition had been filed in 2019, before the effective date of the new statute that was not subject to retroactive application.

DoorDash refused to pay the $12 million filing fees, claiming there were deficiencies in the petitioner-couriers’ filings. As a result, the AAA administratively closed its files.

Thereafter, petitioner-couriers brought this action to compel arbitration.

In response, in addition to claiming that the arbitration demands were deficient, DoorDash, contrary to its own class action waiver provisions, contended that the petitioner-couriers' claims should be stayed and ultimately decided in a class-action lawsuit.

In support of this request for a stay, it referred to another pending class action against it (Marciano v. DoorDash, San Francisco County Superior Court Case No. CGC-18-567869), which had a pending settlement that would effectively bar the claims of some of the Abernathy claimants. Interestingly, DoorDash had initially opposed the Marciano class action based on its class action waiver provisions, the very ones that it now wanted to have declared null and void.

The court found that DoorDash's varying positions in such circumstances, initially arguing that the class action waiver provisions barred class actions, and then contending that they could not be enforced was unacceptable. In a very strong statement in this regard it stated:

"For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the U.S. Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a classwide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order."

Parenthetically, another action arising during the action was also found objectionable by the court. After AAA had closed its files, the Institute for Conflict Prevention and Resolution (CPR) had assumed the AAA's future arbitration duties. In fact, the attorneys for both CPR and DoorDash had engaged in discussions arising out of "issues DoorDash was having with filing fees for mass arbitrations" and seeking "to find a solution to prevent an 'abuse of process.'" Drafts of protocols were exchanged between counsel regarding new DoorDash contracts providing for arbitration under CPR administration. CPR sought to have these records sealed on the ground that they were confidential as they "contain, among other thing, trade secrets, proprietary information and sensitive information." The Judge denied this request, stating that the court would not "be a party to concealing this information from the public, especially as it concerns an arbitration organization that holds itself out to the public as impartial. These documents would be useful to the public in evaluating the true extent to which the organization is impartial."

In summary, counsel and client are repeatedly advised to consider a multitude of factors such as venue, discovery, available parties and rights of appeal before opting for

arbitration. In this regard it is understandable why mandatory arbitration provisions, accompanied by class action waivers, are often preferred by employers (as well as by those who are doing business with consumers). Nonetheless, as the Abernathy case reflects, such provisions may, unexpectedly, create greater risks for employers, as they did for DoorDash, and other organizations that insist on them. Counsel and clients are well-advised, therefore, to consider and rethink possible unanticipated obligations, such as filing fees and costs, to which they may find themselves subject under either existing or proposed mandatory arbitration agreements and class action waivers. •

Abraham J. Gafni is a retired judge and mediator/arbitrator with ADR Options. He is also a Professor of Law Emeritus at the Villanova University Charles Widger School of Law.