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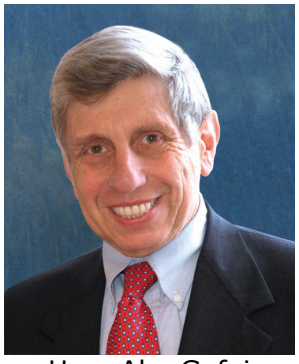
Employers: Have You Carefully Reviewed Your Mandatory Arbitration Provisions?



Hon. Abe Gafni (Ret.)

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. **READ MORE..**

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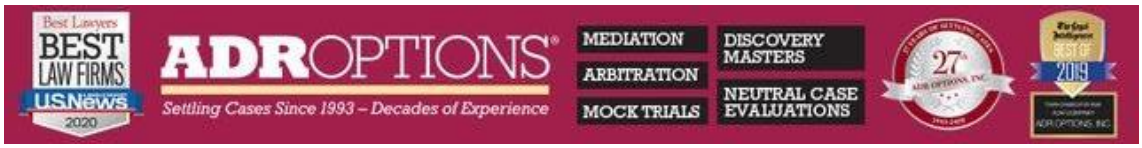

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