

9 Things Your Business Needs To Know About . . . Jury Waiver Clauses in Employment Contracts



Legal TIP
Topics In Perspective

. . . is a series created by *Fernando M. Pinguelo* for busy people who want to quickly learn about legal issues that could affect them.

1. WHAT IS IT? Jury waiver clauses (“JWCs”) in the employment context are contract terms by which parties waive their right to have their grievances evaluated and decided by a jury. Increasingly, employers are adding JWCs to their employment contracts as a way to limit exposure to the unpredictability of jury trials. JWCs are an alternative to arbitration (which also inherently deprives both parties of a jury trial) for those who prefer certain dispute resolution advantages afforded by the court system, and the certainty of having a judge decide the case.

2. DOES IT AFFECT ME? If you are an employer that requires employees to sign contracts and have been subjected to employment-related lawsuits, you should strongly consider adding JWCs to your employment contracts.

3. HOW DOES IT AFFECT ME? JWCs could help insulate employers from irrationally inflated damage awards, minimize an employee’s emotional appeal, reduce the time and cost of trials, help avoid frivolous claims, and increase employers’ leverage when it comes to negotiating with plaintiffs’ attorneys.

4. WHAT DO I NEED TO KNOW ABOUT IT? JWCs outside of arbitration in the em-

ployment context are a relatively new approach to employment contracts whereby employers and employees both waive their rights to have their grievances evaluated and decided by a jury. Courts have been careful in evaluating the enforceability of JWCs entered into prior to any dispute arising out of employment, because JWCs involve the waiver of a fundamental right. Like other waivers of similar rights, waiver of a jury trial must be made in a knowing, voluntary, and intelligent manner. Courts consider the following four factors in applying this standard: (a) the disparity in bargaining power between the employer and employee; (b) the business sophistication of the parties; (c) the opportunity to negotiate the terms; and (d) the conspicuousness of the waiver clause. Jurisdictions are divided as to whether the party seeking to have the JWC declared unenforceable or the party seeking its enforcement has the burden of proof.

5. WHAT ARE THE BENEFITS? Benefits of JWCs for an employer could include minimizing the unpredictability of jury trials and the potential leverage plaintiffs might have in settlement discussions. Other benefits include retaining access to courts and the full array of remedies available in the court system (but not available in arbitration), including injunctive relief, sanctions for frivolous claims, an impartial judge who is less likely to be swayed by emotion, more deference to legal precedent, and better reception to dispositive motions such as summary judgment. Moreover, bench trials are often less costly and time consuming than either jury trials or arbitration proceedings. Judicial decisions are generally easier to challenge an appeal than those of juries or arbitrators.

6. WHAT DO I NEED TO DO ABOUT IT? If the benefits outlined above meet your objectives, then you should strongly consider consulting counsel to develop a plan that incorporates JWCs into some or all of your employment agreements. In doing so, you want to be sure that JWCs do not contradict or invalidate other provisions in the contract. Your analysis should include a discussion about: your business, the dynamic between employer and employee, the jurisdictions within which you operate, your current employment agreements, and what you intend to achieve; all with an eye towards ensuring that these clauses will be drafted appropriately and will be enforceable.

7. WHEN DO I NEED TO ACT? Now, or risk losing access to these benefits.

8. WHO DO I TALK TO ABOUT IT? Begin the dialogue with counsel trained and experienced in these matters.

9. WHAT IS THIS GOING TO COST? Cost is based on a number of factors, including the time spent representing you, the magnitude of the matter at issue, the responsibility assumed by your attorney, the result obtained, and the novelty and difficulty of the issues involved.

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