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Building Blocks of Enforceability: Constructing Valid Predispute Arbitration Agreements

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Like the ever-growing wave of employment-related lawsuits, the use of arbitration agreements to resolve employment claims continues to rise. With the evolution of statutory employment claims under federal and state laws, employers and the legal community have focused much of their attention in recent years on the enforceability of mandatory, predispute arbitration agreements. The main issue is whether an employer, before a dispute arises with an employee, can properly compel the employee to arbitrate employment-related claims as a condition of employment.

The purpose of this article is to provide practical information for employers and their legal counsel to use in making stronger, more effective arbitration agreements. As background, this article will briefly address the development of the use of arbitration in resolving employment disputes. Then, after reviewing the advantages and disadvantages of binding arbitration to resolve employment litigation, discussion will focus on the required and recommended features any good mandatory arbitration agreement should have. This formula for employment arbitration agreements can provide a solid foundation for a determination that such an agreement is enforceable.

The issue of whether predispute arbitration agreements are enforceable has spawned two very important questions. One involves the applicability of the Federal Arbitration Act (FAA) as the authority for judicial enforcement of arbitration clauses in the employment context. The United States Supreme Court recently addressed this question, clarifying that the FAA compels enforcement of written arbitration agreements in employment contracts (except for a limited class of contracts with certain types of employees), even when the employee's claims include statutory claims similar to those available under Title VII. The other important question focuses on identifying the features that an arbitration agreement must contain to be deemed enforceable. Several cases in the past few years, including one that resulted in a significant decision by the California Supreme Court, have shed light on this issue.

In *Circuit City Stores, Inc. v Adams*, 121 S Ct 1302 (2001), the United States Supreme Court held that the only types of contracts that are exempt from the scope of the FAA are employment contracts of transportation workers. In doing so, the Supreme Court resolved a conflict between the Ninth Circuit Court of Appeals and all of the other federal circuit courts of appeals that have addressed the issue. The *Circuit City* case means that the FAA compels judicial enforcement of a written arbitration agreement with an employee, even where the employee's claims include statutory claims under federal and state law. In the aftermath of this decision, it is appropriate for employers

