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Labor and employment law for business leaders.

Arbitration Can Deter Plaintiff's Overtime Lawyers

Plaintiff's overtime lawyers love class warfare. A well-written overtime lawsuit always asks the court to create a class of your current and ex-employees to sue you as a group. Lawyers call that an overtime collective action. It's deadly—plaintiff's lawyers leverage the high potential liability to broker class-wide settlements with eye-popping dollars.

One way to curb the problem is to break up these classes before they form. A plaintiff's lawyer is less likely to aggressively pursue an single employee's overtime claim against you because the lawyer's up-side is much smaller. Employee arbitration programs may let you duke out an overtime dispute *mano y mano*.

Arbitration agreements and policies may prohibit your employees from ganging up on you in a class. You can insist that all employment disputes go to arbitration, but strip away the arbitrator's power to lump individual claims into a class. But can you get away with that? Probably so.

In *AT&T Mobility v. Concepcion*, the US Supreme Court looked at a consumer contract with an arbitration provision that forced consumers to litigate their claims individually. No class actions allowed. Despite the plaintiff lawyer's sleek argument for class warfare, the Court sent him to arbitration with one client. This ruling bodes well for employers too.

Think about starting an arbitration program for your employee disputes. If you go arbitration, look carefully at your policy or agreement. Does it specifically prohibit class arbitration? Does it limit pre-arbitration discovery to capture the speed and cost efficiencies of arbitration? What about limiting how long the claim can linger before the final arbitration hearing?

But arbitration programs aren't for everybody. Jury trial waivers are another realistic option to get a handle on runaway jury awards. Either way, put some thought into how you'll resolve employee disputes. You always want the home field advantage.

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Arbitration

Employee handbook

Employee Manual

Federal Overtime Law

Fair Labor Standards Act

Overtime pay