

## **MAKING JURY WAIVERS PART OF YOUR PROGRAM**

Applicants for employment commonly sign background check authorizations, “employment-at-will” disclaimers, confidentiality agreements, patent and invention assignments, non-competition agreements, and even arbitration agreements. Employers can also ask applicants to sign “jury waivers.” The employer and employee agree that, should they ever become opposed in a court suit, they waive any right to a jury trial. Instead, a judge would decide the case.

Reasons for jury waiver agreements are that juries can be hostile to corporations and sometimes wildly excessive in jury awards.

In an age discrimination case in Ohio, a jury awarded a single laid off employee almost \$31 million, including \$30 million in punitive damages.<sup>1</sup> In another such case, the jury awarded the terminated employee \$25.7 million. In other recent cases, juries awarded \$61 million to two employees<sup>2</sup> and \$29 million to a single employee.<sup>3</sup>

Such gargantuan jury verdicts can be reversed or significantly reduced on post-trial motions or appeals. In the meantime, they generate negative publicity and embarrassment for the employer. Such verdicts encourage other employees to sue and damage morale in the workplace.

Although Taft lawyers have had many successful jury trials, we recommend employers consider other safeguards, such as arbitration or jury waiver agreements. These can be included in the documents an applicant signs in the application process.

A jury waiver can also be used with current employees, either by itself, as part of a comprehensive dispute resolution program, or as part of a more comprehensive employment agreement that could include provisions such as non-competition, confidentiality, and at will termination.

Arbitration agreements have some advantages over court trials under jury waiver agreements. Arbitration is private and informal and can be quicker and less expensive.

Jury waivers have some advantages over arbitration agreements. Appeals from arbitration decisions are extremely limited compared to appeals from trials before a judge. And judges are usually more willing than arbitrators to dismiss cases before trial.

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<sup>1</sup> <http://www.dukeemployees.com/newsdecember2000.shtml#ohio>

<sup>2</sup> [http://www.usatoday.com/money/companies/2006-06-03-fedex\\_x.htm](http://www.usatoday.com/money/companies/2006-06-03-fedex_x.htm)

<sup>3</sup> <http://www.law.com/jsp/article.jsp?id=1112778312781>

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Jury waivers can in some ways be easier to enforce in court than arbitration agreements. Jury waivers need not address thorny issues of how to select the arbitrator, what procedures should apply in arbitration, and how arbitration costs should be allocated.

Jury waivers are not a panacea. Arbitration or even a jury trial could be better for an employer than a trial to an unsympathetic judge. Although several courts have upheld jury waivers, the enforceability of jury waivers in the employment context is not as well established as arbitration agreements because jury waivers have been less common and the Federal Arbitration Act, which promotes arbitration, does not reference jury waivers. Jury waivers are not enforceable in all states, including California and Georgia.

Employers should carefully consider all options to safeguard against a potential runaway jury. Because of the legal issues involved, counsel should be consulted before implementing an arbitration or jury waiver program.

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