

Legal Q/A

by Bruce E. Wood, Esquire

Where To Do Battle: Arbitration or the Courts?

Q: Should our medical practice consider requiring employees who wish to pursue claims against us to submit them to arbitration rather than allowing them to sue us in a court, and if so, how do we accomplish that?

A: Most definitely, yes. Arbitration can be an efficient method to resolve disputes, for both the employer and the employee.

Let's look at the path of a typical lawsuit brought by an employee or former employee against the employer. After the suit is started, the parties engage in months, or sometimes years, of document discovery and oral depositions known as pre-trial discovery. Then there may be many applications to the court ("motions") - to change the location of the trial, to compel testimony of unwilling witnesses, or to ask the court for an early ruling in one side's favor. Eventually, the case goes to trial, often in front of a jury, and then after the verdict the parties fight over post-trial motions, and then appeals, and more appeals...etc.

The cost of litigation today can be staggering. And unless a statute or contract provides for an award of attorney's fees to the winner, each side must pay its own way.

Perhaps the greatest drawback to litigation, at least for employers, is the possibility of a "runaway" jury, swayed by emotion or punitive intentions. The desire to avoid a jury trial may be the biggest single reason why employers

tend to favor arbitration.

Arbitration is a contractual agreement between parties to submit their dispute for resolution to one or more (sometimes three) arbitrators. It has several advantages over the courtroom process. First, it is confidential. An arbitration is a private proceeding conducted behind closed doors (no reporters allowed), unlike the open access of a courtroom. And the results are not published in a public record and usually won't make the newspapers.

The parties can decide in advance who will arbitrate the case and where. For example, a medical practice might wish to designate a trained arbitrator associated with the American Health Lawyers Association because that person is more likely to understand issues affecting physicians. The place of the arbitration can be designated at a location convenient for one or both of the parties.

One of the cost saving features of arbitration is the lack of extended pre-trial discovery. Unless the arbitration agreement allows depositions and exchanges of documents, there won't be any. Of course, this can be a drawback in some instances since a party will not be able to know in advance of the arbitration hearing exactly what certain witnesses will say under oath.

There is also a certain finality to arbitration decisions. Except in rare circumstances, it is almost impossible to overturn the decision of the arbitrator

upon appeal, so arbitration tends to be great for winners and bad for losers. This does, however, shorten the entire process and therefore reduce the cost of litigating.

Despite the lower costs of arbitration, it isn't free. The parties will still have to pay their attorneys and the arbitrator (unlike a judge) will charge a daily fee for hearing the case.

Arbitration means that the parties are waiving their right to take their dispute to court so it requires an agreement by the parties to submit to arbitration. The agreement, however, can take many forms. For physicians, the agreement to arbitrate disputes will usually be found in the employment contract. However, many employees such as clerical staff won't usually have a written employment contract.

There are two alternative methods for obtaining an agreement to arbitrate. One is the office employee handbook. A clearly stated provision in the handbook mandating arbitration is legally

enforceable. The other method involves pre-employment applications. When the employee applies for a job, the medical practice should use a pre-employment application and that document can require the employee, if hired, to submit all disputes involving the employer to arbitration. The application form can even require the person to submit to arbitration a claim that he or she was denied initial employment on the grounds of discrimination, i.e., race, sex, religion, ethnicity, etc.

Can you require an employee who is already working for you to submit future claims to arbitration? The answer is yes, but in that circumstance the employee should sign an agreement to submit future claims to arbitration and specifically recite that the agreement is a condition of continued employment.

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