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Preserve your right to arbitrate!

(Or you may have to litigate.)

Think you've got an iron-clad arbitration agreement? Think again. Even when an arbitration clause directs parties to settle their differences through alternative dispute resolution, the end result could be litigation. That's the word, based on two recent decisions—one from the Michigan Court of Appeals and one from the U.S. Supreme Court.

Michigan Court of Appeals Ruling

In *Madison District Public Schools v Myers*, the plaintiff school district argued that since its lawsuit was limited to nonarbitrable claims, it had not waived its right to arbitrate other matters. The Michigan Court of Appeals ruled otherwise, citing specific actions and positions taken by the school district's counsel during aggressive pre-arbitration litigation. The school district, said the court, waived its right to arbitrate through its own actions.

At the same time that the Court of Appeals' ruling reinforces Michigan's strong policy to encourage arbitration as an inexpensive and expeditious alternative to litigation, it also emphatically confirms that arbitration rights must be asserted promptly and preserved zealously for them to survive in any court action. Implied in the decision is a message that the judicial system will not tolerate exploitation of the courts as a testing ground for arbitration.

The lesson? If you find yourself in court, you must aggressively assert your right to arbitrate or risk losing that opportunity. Do not engage in pretrial procedures or other conduct inconsistent with your agreement to arbitrate. For example, participation in mediation, facilitation, discovery, exchange of witness lists, filing requests for admissions, and conducting depositions are all litigation strategies that the Michigan Court of Appeals cited as inconsistent with the preservation of arbitration rights.

U.S. Supreme Court Ruling

Even when an employee has not waived the right to arbitrate, the Equal Employment Opportunity Commission (EEOC) can initiate litigation on the employee's behalf. That's the outcome of *EEOC v Waffle House, Inc.*, in which the United States Supreme Court ruled that employers could rely on mandatory arbitration agreements to limit their exposure to litigation with employees, but not with the EEOC. Although the Court reiterated its support of arbitration, it found that a private arbitration contract did not trump the EEOC's independent authority to initiate litigation.

The case involved a Waffle House employee who signed an employment application containing a broad arbitration agreement. Shortly after beginning work, the employee suffered a seizure at work and was discharged. Although the employee did not initiate arbitration, he did file a charge of discrimination with the EEOC, alleging his discharge violated the Americans with Disabilities Act.

In its ruling, the Court found that the EEOC had the authority to pursue victim-specific relief, regardless of the forum that the employer and employee had chosen to resolve their disputes.

Both of these cases require us to recognize the limitations of mandatory arbitration agreements. These decisions provide a powerful warning that arbitration can be waived by conduct of the parties inconsistent with the agreement to arbitrate, and, when not waived, arbitration is binding only on the parties to the agreement—not governmental agencies such as the EEOC, or other governmental enforcement entities that are not signators.

Given these recent court rulings, it may be time to revisit your company's employment applications and arbitration agreements to avoid a misstep that could result in unexpected litigation. Our experienced ADR Team can ensure that you fully understand and realize both the benefits and the limitations of your arbitration agreements. Give us a call if you'd like some help.