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NO HYPOCRISY IN GETTING TO THE MERITS:
WHY GOOD COMPANIES WANT ARBITRATION —BUT NOT MASS ARBITRATION—OF EMPLOYMENT DISPUTES

by Patrick J. Bannon

Abstract: *For decades businesses have pushed to enforce employee arbitration agreements. But recently, some companies have asked courts for relief from "mass arbitration," prompting accusations of hypocrisy. This LEGAL BACKGROUNDER argues that the charge is unfair. Many Good Employers are motivated by the same fair principle when they try to enforce arbitration agreements as when they try to avoid mass arbitration: they don't want to be forced to settle employee claims that have no merit.*

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For at least 30 years, the battle over arbitration of employment disputes has followed a familiar pattern: businesses push for the right to enforce arbitration agreements and the plaintiffs' bar resists. In recent years, however, some plaintiff-side law firms have flipped the script. They have enlisted thousands of individuals to file individual arbitration demands against their employers. Facing millions of dollars in arbitration filing fees, the companies have scrambled to try to escape from or block arbitration.

Some observers see poetic justice. In denying one company's request to enjoin thousands of individual arbitrations, United States District Court Judge William Alsup, summarized this point of view:

> For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, . . . , faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. [] This hypocrisy will not be blessed, at least by this order.[1]

[1] *Abernathy v. Doordash, Inc.*, 438 F. Supp. 3d 1062, 1067 (N.D. Cal. 2020). We don't express any view in this article on the *Abernathy* case specifically.

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This LEGAL BACKGROUNDER argues that the charge of hypocrisy is unfair, at least as to many "Good Employers."[2] We contend that many Good Employers are motivated by the same reasonable principle when they enforce arbitration agreements as when they try to avoid mass arbitration: they don't want to have to settle employee claims that have no merit.

In litigation, Good Employers often face economic pressure to settle even the weakest cases, especially when asserted as a class action or collective action. In most class actions and collective actions, the court won't consider whether a named plaintiff's claim has merit until after the court has decided whether to certify the case as a class action or "conditionally certify" the case as a collective action. But deciding whether to certify a class action is expensive and invasive. It can involve production of documents in discovery, production of information about the members of the would-be class and depositions of company executives and of current company employees. The problem for an employer is even worse in the context of would-be collective actions. As we have noted elsewhere,[3] many judges apply a strikingly lenient test and almost routinely "conditionally certify" collective actions. The employer then must facilitate notice to their employees (usually via a document that looks to most employees as if it's coming from a court) that an employee has sued the company for violating the law and that the employees might want to consider joining the suit.

All this litigation routinely happens before any consideration of the merits. In practice, a Good Employer facing a meritless claim that is asserted as a class or collective action has only two choices. Defending the case often means paying six-figure (at least) legal bills and distracting employees, managers, and executives from the goals of the organization. The alternative is to settle. Settlement is rarely appealing, but when a plaintiff's claim is provably without merit, it is especially distasteful.[4]

The scenario described above is not only possible. It is common. In federal court alone, several thousand would-be collective actions are filed each year,[5] and many employee class actions are filed in federal and state court as well. Of course, some of these claims undoubtedly had merit. But others did not and one way or the other the defendants had to pay a high price to resolve the meritless claims.

Given what litigation often entails, it is no surprise that many Good Employers seek to require arbitration of their employment disputes. Following the Supreme Court's *Concepcion* and *Epic* decisions, an arbitration agreement can and almost always does provide that the parties will resolve claims through individual arbitration, with no class actions or collective actions allowed. The cost of defending a baseless claim in individual arbitration is often only a small fraction of the cost of defending a class or collective action. The pressure to settle an unwarranted claim is greatly diminished. That's an important reason—

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[2] A Good Employer is a company that tries to comply with its legal obligations toward its employees. Some readers may deny that Good Employers exist or doubt that employees sometimes assert baseless claims. We recognize that this article won't persuade those readers.

[3] *See* Patrick Bannon, Anthony Califano & Michael Steinberg, *3 Ways Courts Should Improve FLSA Collective Actions*, Law360 (Feb. 1, 2021), https://www.law360.com/employment-authority/articles/1350182/3-ways-courts-should-improve-flsa-collective-actions.

[4] Judges and commentators have noted that "[w]hen the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good." *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672, 678 (7th Cir. 2009). Here, we're making a slightly different point: an employer named in a class or collective action often can't avoid substantial costs, even if the employer is ***certain*** to prevail on the merits.

[5] For example, according to a Lex Machina search, 2,754 collective actions under the Fair Labor Standards Act were filed in federal court in 2021.

perhaps the most important reason—why many Good Employers require their employees to agree to resolve disputes through arbitration.

The plaintiffs' bar sometimes portrays arbitration agreements as liability-avoidance schemes, imposed by employers who want to violate employment laws with impunity. If employees must arbitrate claims on an individual basis, plaintiffs' lawyers argue, many employees won't bother asserting low-value claims while others will be too afraid of retaliation to become claimants. But this argument can't explain the tens of thousands of individuals who file individual lawsuits and individual complaints of discrimination with the EEOC and state anti-discrimination agencies every year.[6] Are there employers that see the risks of these individual claims and government-agency investigations as so low that, if they are allowed to enforce arbitration agreements, they won't worry about employment laws? We're skeptical. But our point in this article is that many Good Employers want arbitration, not to immunize themselves when they are in the wrong, but to avoid having to settle even when they are in the right.

The Good Employer's aversion to mass arbitration arises from the same motive. Mass arbitration can also force an employer to settle claims that have no merit. Here's how mass arbitration often plays out from an employer's point of view.

A company receives a letter from a plaintiffs' firm stating that the firm represents hundreds or thousands of the company's current and former employees, and that each of the employees has already filed or intends to file soon an individual arbitration demand alleging violation of some employment law. The letter invites the company to discuss settlement of the claims. The alleged violation could be allowing the employees to perform work off the clock. Or it could be treating allegedly overtime-eligible employees as overtime exempt. Or it could be treating alleged employees as independent contractors.

The alleged violation is to some extent beside the point. Regardless of the nature of the allegations—and regardless of whether the allegations have any merit—the hundreds or thousands of individual arbitration demands will cost the company hundreds of thousands or millions in upfront arbitration filing fees. And, not long after the filing fees, the company will often owe millions more in arbitrator compensation. The filing fees and probably at least some of the arbitrator compensation usually must be paid before the employer has any opportunity to challenge the merits of the demands. The Good Employer is again face-to-face with the problem that arbitration was supposed to help solve: overwhelming economic pressure to settle even if the Good Employer can prove that the claims have no merit.

Are Good Employers common or rare? Is it possible to enlist large numbers of employees to assert claims of dubious merit if the employees think the claims will net them thousands of dollars? Business advocates and worker advocates may disagree about these questions. But all sides ought to be able to agree that both class actions and mass arbitration have the potential to force an employer to settle claims that have no merit. A company that tries to avoid both procedures may be a Good Employer—not a hypocrite.

[6] In 2020, for example, the EEOC alone received more than 67,000 charges. *See* https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020.