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Make Forum Selection Like Barbeque

by ALAN BUSH and LEE WINKELMAN

Everybody wants their pick of forum to settle disputes. Why else would lawyers go toe-to-toe about it at the courthouse? But duking it out with an unhappy current or former employee is kind of like having a meal. The cooking always tastes better at home. Barbeque and lawsuits: They're both better in your own backyard.

LABOR & EMPLOYMENT

Disputes with an employee-turned-plaintiff are no exception. Last December in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, the U.S. Supreme Court dealt a better hand to companies seeking to enforce a forum selection clause if an employee comes after them in court.

In-house counsel now have a choice. Break out a streamlined employment dispute resolution process, like arbitration or jury waivers, with a forum selection provision? Or tread the path to the employee's chosen courthouse to pick a jury?

Employment Agreements

Selecting a battleground can start with an employment agreement that everybody signs, like a confidentiality or jury waiver agreement. It's a natural place for a forum selection clause, but make sure the clause covers all disputes the parties might have with each another.

Will the forum stick? Presumptively so, says the U.S. Supreme Court. In *Atlantic Marine*, SCOTUS came down hard for forum selection clauses. Anyone who doesn't like the forum in the contract forum has a big job ahead: Prove that the suit shouldn't happen there.

Hoping to bust a forum selection clause, employee-plaintiffs often complain about their travel costs. But SCOTUS has that covered. An unhappy party can override a forum selection clause, says the court,

"only under extraordinary circumstances" unrelated to the parties' convenience. The parties' "private interests" can't trump a forum selection clause. That's a strong hand for the company.

Atlantic Marine wasn't an employment dispute, but there's no reason why it shouldn't apply to one. After all, SCOTUS said it was dealing with a civil defendant who wanted to enforce a forum selection clause. Where's the wiggle room there?

No doubt, local courts sometimes blow past forum selection clauses (not to mention the multitude of cases enforcing them). Normally, when that happens, the court has bought the employee-plaintiff's claim that litigating in the contract forum would deprive him of his day in court.

The U.S. District Court for the Northern District of California made that exact move this February even after *Atlantic Marine*. In *Monasterio v. appMobi, Inc.*, the California court found that an unemployed plaintiff didn't have the money to hire a lawyer in Pennsylvania and pay for several witnesses and himself to travel there. Yet, that's an extreme result. Many other travel cost arguments haven't gone so well for the employee-plaintiff.

Arbitration Policy

Forum selection clauses also have found their way into arbitration policies. Courts routinely enforce them, unless the forum is unconscionable.

Unconscionability can be a tough sell for an employee-plaintiff. Courts usually look to the same "deprived of a day in court" standard for an arbitration hearing's forum that they do for a court trial. For example in 2011, a California Court of Appeals in *MacIntosh v. Powered, Inc.* held an employee-plaintiff to his company's arbitration policy that picked Texas. The court acknowledged that the plaintiff would have to pay to travel to Texas, but reasoned that he hadn't shown the costs were an "insurmountable impediment" to pursuing his claim. The next year in *James v. Conceptus, Inc.*, the U.S. District Court for the Southern District of Texas cited *MacIntosh* to send a Texas employee to arbitrate his claim in California. Again, the court brushed aside the travel costs because they weren't an "insurmountable impediment" to the employee getting his day in court. Sauce for the goose is sauce for the gander.

Even SCOTUS didn't bat an eye at an arbitration clause that picked Houston as the forum for two Oklahoma employees. The Oklahoma court, said SCOTUS, was powerless to decide if the underlying noncompete agreement was enforceable. That was the arbitrator's job. Check out the high court's decision last year in *Nitro-Lift Technologies, LLC v. Howard* for that one.

Worth the Effort?

Even assuming the occasional employee-plaintiff wins the forum fight, in-house counsel might ask: "Is the chance to pick forum worth that effort?" A few things to consider:

- How many frivolous lawsuits will a forum selection clause prevent when plaintiff's counsel sees the clause?
- How much settlement leverage will the clause give the company?
- How much more predictable will rulings become in a forum the company knows?
- How much can the company save by centralizing and streamlining dispute resolutions?

Adding a severance clause to the contract or arbitration policy can take the edge off the odd case where an employee pulls out a win on the forum. Courts almost always honor severance clauses. That way, only the forum changes, leaving the rest of the company's streamlined dispute resolution system in play.

Barbeque and employment disputes give the cook plenty of choices up front. Jury waiver, arbitration or jury trial? Dry rub, sauce or both? Just don't let the decision slip by and wind up road kill.

Alan Bush is the managing director in and **Lee Winkelman** is of counsel at the Bush Law Firm in The Woodlands. They represent companies in labor and employment matters, speak and write extensively, and break the law down into actionable business points. They blog at hrriskybusiness.com.

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