Texas Council Risk Management Fund

Arbitration Agreements

The Texas Council Risk Management Fund has the responsibility for protecting its members with broad and comprehensive coverage for all kinds of risks. Part of that responsibility is to protect the assets and ability of the Fund to provide protection for the members. For that reason, there are exclusions and limitations in the coverage documents to protect the Fund from uninsurable risks or risks that could be so severe that the Fund is endangered. Coverage exclusions for nuclear contamination, war or civil disturbance are examples of risks that could be so widespread and devastating that all of the Fund's assets could be quickly exhausted. Other exclusions apply to repetitive events that could have the same cumulative effect.

A similar serious risk arose a few years ago. A Fair Labor Standards Act claim was filed at a center that involved over 40 center employees alleging numerous violations of the wage and hour provisions of the FLSA. The allegations in this "collective action" related primarily to overtime rules and mis-classification of employees as exempt instead of non-exempt. A collective action under the Fair Labor Standards Act is similar to a "class action" where multiple claimants band together in one legal proceeding. Over the two years that the case was moving to its ultimate resolution, dozens of depositions were taken, and huge amounts of staff time were expended researching time sheets, center policies, job descriptions, phone records, system access and usage times and e-mails. Statistical studies were performed by both sides and expert witness and attorney's fees mounted on an almost daily basis.

There were several attempts to settle the case. When all offers to settle the case made by the center were rejected, the judge ordered mediation to try to resolve the matter. The final settlement was reached following a second mediation and approved by the judge in early August 2015. The initial suit had asked for damages of over $2,000,000. The final settlement was for $575,000 with the plaintiff's attorney receiving 45% of the award. This left most of the plaintiffs with a modest amount, representing only a portion of what they originally claimed. The largest cost associated with the claim was for the center's defense. Legal fees plus the settlement award brought the total of the claim to over $1.3 million.

In response to this claim and to protect the fund from the unlimited liability of future collective actions, the Fund's coverage was revised to encourage the implementation of arbitration agreements with all center employees. The revised coverage provides a much lower limit of liability for employment related disputes when no arbitration agreement is in place. The coverage change limited the total amount of liability for the Fund's duty to defend to $25,000 if there were no arbitration agreement. If arbitration agreements were in place, the Fund would pay the cost of arbitration from an FLSA action by the individual employee. Although some employees initially perceived the arbitration agreement negatively the use of arbitration does not limit an employee's right to file an FLSA claim. The agreement requires that the action be settled in the arbitration process with no restriction on the statutory award amount. The arbitration agreement also limits

the employee's ability to join a "collective action" with its potentially huge legal expenses and lengthy litigation process.

The applicable language in the Expanded Employment Practices endorsement states:

> For **claims** brought under the Fair Labor Standards Act, or other similar wage and hour laws, where the **member** has an enforceable arbitration agreement with its employees to resolve employment disputes, including an agreement that employees will not enter into a collective action on employment matters, the **Trust's** duty to defend shall include the costs of arbitration. An enforceable arbitration agreement in this section means, the center has enacted an arbitration agreement approved by the Fund.

There are several advantages to using an arbitration process to settle disputes. One important advantage is that final settlement of a dispute can occur much sooner than a case litigated in court. The arbitrator allows each party some discovery and a limited number of witnesses leading to a session in which the matter is settled by the arbitrator. Arbitration processes we have observed recently rarely last more than six months. Arbitration also greatly reduces legal costs for both the center and the employee. The fact that there is no appeal to an arbitrator's decision also reduces duration and legal cost. Arbitration also eliminates the unpredictable legal environment in certain venues.

Before implementation of the requirement for arbitration agreements in the Expanded Employment Practices endorsement for the period from 2012 through 2015, there were nine FLSA related claims (including the collective action mentioned earlier). Since 2015 there have been five FLSA related claims. The dramatic change is illustrated in the following table:

FLSA Related Claims 2012 - 2019

	Total Legal	Awards	Total Incurred
Pre-Arbitration	$ 1,755,871.61	$ 356,475.49	$ 2,112,347.10
Post Arbitration	$ 9,426.06	$ 2,000.00	$ 11,426.06

To date (January 2020) 23 centers have arbitration agreements in place with 100% of their employees. Although there were a few threats by employees to resign if required to sign an arbitration agreement, none actually did. There have been a few problems emerge regarding the agreements themselves. The few agreements that were not written by the team of Bill Helfand and Pam Beach or were modified by local counsel were found to not be enforceable. Another difficulty arose when the American Arbitration Association that was being used to provide arbitrators changed its procedures to allow for unlimited discovery and other provisions that eroded the savings in legal costs. The solution to this problem was to quit using the American Arbitration Association and institute a process for using retired judges. Contact Pam Beach for assistance in recruiting arbitrators not affiliated with the American Arbitration Association.