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M E M O R A N D U M

TO: Valdez City Council

COPY TO: Elke Doom, City Manager
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FROM: Robin O. Brena, Esq.
Kevin G. Clarkson, Esq.

DATE: October 29, 2018

RE: Valdez/Human Resources
Pros and Cons of Mandatory Employment Arbitration
Our File No. 1374-018

I. EXECUTIVE SUMMARY

Employees have a right to pursue claims related to termination, suspension, and demotion. If the City's Personnel Regulations do not direct that such employee claims must be brought in mandatory arbitration, then employees will have the right to take their claims to a court of law. Eliminating mandatory arbitration does not eliminate employee claims, it simply directs those claims into a court of law.

The City can lessen the risk of expensive, lengthy, unpredictable, public employee litigation in a court of law by directing all employee disputes regarding termination, suspension and demotion into binding arbitration. The pros of establishing a system of binding employee arbitration regarding termination, suspension, and demotion are (1) lessening the expense of employee disputes, (2) eliminating the risk of unpredictable juries, (3) gaining efficiency in dispute resolution, (4) gaining informality in dispute resolution, (5) gaining privacy in employee disputes, (6) getting relatively quicker resolutions, (7) gaining a dispassionate arbitrator as a decision maker, and (8) bringing disputes to final resolutions quicker.

The cons of mandatory employee arbitration include (a) discovery limitations, (b) informality, (c) inability to appeal unfavorable decisions, (d) administrative charges can proceed regardless, and (e) baby-splitting by arbitrators.

All considered, the benefits of mandatory arbitration outweigh the detriments.

II. DISCUSSION

Whether the City requires mandatory arbitration for its employees who are terminated, suspended, or demoted, those employees have the right to pursue claims against the City. Eliminating mandatory arbitration from the City's personnel regulations and the employee grievance procedures will not eliminate employee claims, it will simply direct the employee claims into the more formal forum of a court of law. Providing or not providing for mandatory employee arbitration directs employee claims into either (a) an informal litigation procedure before an arbitrator, or (b) a formal litigation procedure in a court of law. Myriad legal scholars and employment law practitioners have written about the pros and cons of requiring or not requiring mandatory employment arbitration and they nearly always identify the following same considerations.

There are pros and cons to both approaches. The pros and cons are set forth below.

A. Pros of Mandatory Employment Arbitration.

There are numerous pros to requiring employees to take their employment-related disputes to binding arbitration. These pros are as follows:

1. Expense. Arbitration is, as a general matter, less expensive than litigation in a court of law. Arbitration can at times be drawn out and expensive, but when compared to formal litigation in a court of law, arbitration will nearly always be significantly less expensive. Arbitration is typically two-thirds less exp**e**nsive than litigating in a court of law. Shortened discovery methods and discovery schedules along with less motion practice, help lessen the expense of employment arbitration in comparison to formal litigation in a court of law.

2. No Juries. In arbitration, the decision maker is a single arbitrator or a panel of arbitrators. Arbitrators tend to be attorneys or former judges. These types of professional arbitrators tend to be more dispassionate in their decision making and more predictable and reasonable in awarding relief, including damages, to employees as compared to juries. Juries, which are comprised of citizens from the community, can be both impassioned and unpredictable. An unfavorable decision from an arbitrator is less likely to be extreme whereas a jury can magnify the impact of a losing litigation on an employer.

3. Choice of the Arbitrator. In a court of law, there is only minimal control over the choice of judge who will preside over a case. If an employee files a claim

in federal court, there is no control over the selection of the presiding judge. In Alaska state courts a party has a right to one preemption of a judge and, thereafter, has no control over the selection of the judge. In arbitration, the parties have more control over the selection of the arbitrator. Arbitrators are selected by either a process of elimination—a list is presented by a neutral organization like the American Arbitration Association and each side then strikes a certain number of names from that list—or by agreement of the parties.

4. Efficiency and Early Resolution. Litigation in a court of law can take from one to one-and-a-half years to complete and another one to two years to complete on appeal. If the appellate court reverses and remands the trial court or a jury verdict, then the case can take even longer. Arbitrations can be streamlined to be completed in less than one year, and there are only limited appeal rights from an arbitrator's decision. If an employer prevails in arbitration, and the empolyee appeals, the arbitrator's decision is subsequently reviewed in a court of law based upon an extremely favorable standard of review. An arbitrator's decision can be reversed on appeal only for serious errors by the arbitratror.

5. Informality. Arbitration hearings are more flexible in terms of their location, venue, and daily schedule. A court is extremely rigid and inflexible in all of these areas.

6. Privacy. There are no public records in arbitration. The media and press do not have access to an arbitration proceeding or hearing. Thus, in the case of public City employees, there is less risk of the arbitration becoming a news item. Records filed in a court of law are generally public, and the media and press can have access to the courtroom and court files.

7. Finality. Arbitration proceedings generally resolve matters without further litigation. This is true because of the very favorable standard of review under which arbitration decisions are reviewed on appeal to a court. Arbitration decisions are reviewed and reversed only for such things as serious arbitrator misconduct, bias, corruption, and acting outside the scope of authority. Because it is extremely less likely to have an arbitrator's decision overturned on appeal, it is much less frequent that parties appeal an unfavorable arbitration decision.

B. Cons of Mandatory Employment Arbitration.

There are cons to requiring employees to take their employment-related disputes to binding arbitration. These cons, many of which are similar to the pros, are as follows:

1. Finality. The reduced options to successfully appeal an arbitrator's decision is a two-edged sword. The protective standard of review on appeal that requires an arbitrator to have made a significant error in order to overturn his decision, runs to the benefit of an employer if it prevails in the arbitration but works against the employer if it

loses in the arbitration. Arbitration decisions are reviewed and reversed only for such things as serious arbitrator misconduct, bias, corruption, and acting outside the scope of authority. Unlike a trial court, an arbitrator's decision cannot be overturned for general errors in fact or law.

2. **Discovery Limitations.** The compacted and limited discovery practices in arbitration can also work for or against an employer. In some cases, the employer may need a broad range of discovery from third-parties, and litigation in a court offers more rights to subpoena and compel witnesses and documentary evidence than does arbitration. These types of expanded discovery activities add to ligitation expense.

3. **Informality.** Arbitrators tend to be much more lax in terms of the types and forms of evidence they will permit a party to present. This can cut both ways, for and against an employer, but if the employer wishes to prevent an employee from presenting a great deal of material that would be inadmissible under the Rules of Evidence, then a court of law is a better forum. The informality can, however, work in favor of the employer as well as the employee.

4. **Administrative Charges.** Arbitration does not prevent government agencies like the Department of Labor, Civil Rights or Equal Rights Commissions, and/or the Equal Employment Opportunity Commission from investigating and pursuing employee complaints. In some instances, an employer could arbitrate a matter only to have a government agency initiate an investigation, prosecution, or an enforcement action.

5. **Baby Splitting.** One common objection to arbitration is that arbitrators are often reluctant to dismiss an employee claim outright and sometimes search for a way to award an employee something even if only a token amount. This kind of spli-the-baby approach is less likely in a court of law.

III. CONCLUSION

There are pros and cons to establishing mandatory arbitration for the resolution of employee disputes. As a whole, considering the comparative costs and the risks of unpredictable jury determinations, the pros of requiring mandatory employment arbitration outweigh the cons.

KGC/emh