Mandatory arbitration of disputes for non-union employees has gained increasing acceptance from the courts. It originated with the idea that arbitration would be faster, less expensive, and more predictable than jury trials. But is it?

Arbitration agreements generally require the employer to pay most if not all of the arbitration expenses. By contrast, the taxpayers pay the judge. Valid arbitration agreements require providing the same procedural rights, as well as remedies (including the right to "discovery"), that the employee would have in a lawsuit. As a result, arbitration can prove to be as expensive if not more so than litigation. An employer I represented in an arbitration case got a bill up front for $30,000+ to cover administrative costs and the costs of the arbitrator. The client was not too happy.

Arbitrators may be less prone to sympathy verdicts than juries, but you lose any meaningful opportunity for early dismissal (summary judgment), and for appeal (not all arbitrators are created equal). Arbitrators are unlikely to grant a motion for early dismissal, and it is not in their short or long-term economic interests to deprive any party of its "day in court." Further, the scope of judicial review of an arbitrator's award is extremely narrow (bad faith or action clearly outside scope of authority). Being blatantly wrong does not merit review. If you have a good case that you are likely to win on summary judgment, you might do better in court than in arbitration.

This does not mean that arbitration has no benefit. Your case will be decided by someone knowledgeable in the law and more likely to decide the case on the merits, as opposed to sympathy. Arbitration, unlike a lawsuit, is private. If you have a "big stakes" case, which is likely to engender bad publicity, arbitration is still an attractive strategy. It may also serve to avoid class actions.

But, there is an alternative, which has many of the same benefits without some of the negatives, a "waiver" of the right to a jury trial. Jury trial waivers are relatively new and are largely untested in court, but logically they should be upheld for the same reason that arbitration agreements are upheld. The employee has the same procedural rights as any other litigant,
and is simply agreeing to have his or her claims decided by a judge, as opposed to a jury. The advantages to the employer are: (1) you don't have to pay the judge for his/her services; (2) you have a real chance for summary judgment, and (3) if you do not agree with the judge's decision, you have a meaningful right of appeal.

For many years I have been recommending arbitration as a means of avoiding employment litigation, but I am starting to re-think that strategy. I am now leaning towards the jury trial waiver as being a better strategy. Time will tell whether I am right, but at this point I am hard-pressed to find a downside.