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United States Supreme Court Backs Enforcement of Union Contract Requiring Arbitration of Age Discrimination Claims

The U.S. Supreme Court has resolved a long-standing controversy about the arbitration of employment discrimination claims of union-represented employees. On April 1, 2009, the Court held, by a 5-4 margin in *14 Penn Plaza v. Pyett,* that a collective bargaining agreement that "clearly and unmistakably" requires employees to arbitrate claims under the federal Age in Discrimination in Employment Act (ADEA) is enforceable. This ruling reverses a decision of the U.S. Court of Appeals for the Second Circuit which had concluded that enforcement of the CBA was prohibited by the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver, Co*. Although the high court did not overrule *Alexander,* Justice Clarence Thomas, writing for the majority, did call it "a strong candidate for overruling".

With the door now open, whether to arbitrate or litigate employee discrimination claims is a question many organized employers will now face as a matter of labor relations strategy. Although there will be ongoing debate, some employers will seek to negotiate *Pyett*-style arbitration clauses into their collective bargaining agreements to ensure that such claims are subject to arbitration as opposed to a judicial forum. Other employers will resist arbitration preferring instead that such claims be judicially determined. The pros and cons are beyond the scope of this bulletin.

Requirements for an Enforceable ADEA Arbitration Clause

The arbitration clause must be clear and explicit to be treated as mandatory. Indeed, the Supreme Court stated in *Pyett* that an age discrimination arbitration clause will be enforceable only if its terms are "explicitly stated." That is, the language must clearly and unmistakably require the arbitration of age discrimination claims under the ADEA by specifically referencing the statute. It should be assumed that the mandatory arbitration of other types of statutory employment discrimination claims (for example, gender, race or religious discrimination claims under Title VII of the Civil Rights Act of 1964, as amended) under collective bargaining agreements will also require similar specificity in the arbitration article so as to make it clear that the arbitral forum is the exclusive forum for resolving those claims.

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Continuing Questions Under Pyett

The Supreme Court did not offer explicit guidance about what would happen if the union withdraws or refuses to arbitrate the individual employee's statutory discrimination claims. However, one view is that the employee will be free to fly solo and arbitrate his/her ADEA claim under the CBA. Another possibility is that the employee will be permitted to sue his/her employer in court to try to vindicate the employee's discrimination claims. This issue may command judicial attention down the road.

However, in *Pyett,* the Supreme Court highlighted a union's duty of fair representation and noted that a union may be liable under the National Labor Relations Act and the ADEA if it fails to pursue a member's contract grievance to arbitration in the face of a mandatory arbitration clause such as that at issue in *Pyett*. Thus, it is likely that unions will be cautious moving forward resulting in an increase in union-supported arbitration of individual discrimination claims where a valid and enforceable arbitration clause exists.

Examine Your Current Agreement

An organized employer should carefully examine each of its labor agreements to determine whether the language clearly and unmistakably includes a mandatory arbitration clause for individual statutory discrimination claims. Unfortunately, the Supreme Court did not provide extensive guidance in *Pyett* to identify the specific contours of "explicit" language in this context. The high court did not do so because the employee conceded the point during argument before the lower courts. The employee therefore effectively forfeited this argument and the Court assumed that the arbitration clause was sufficiently explicit to mandate arbitration. We encourage our employer clients to contact us with any questions regarding their CBAs in this regard.

Future Employer Bargaining Strategy

The *Pyett* decision also confirms that the arbitration of an employment discrimination claim is a mandatory subject of bargaining. Thus, an employer without a mandatory arbitration clause will need to decide whether to bargain with its union for such a clause in the future.

As stated above, whether an employer should seek a mandatory arbitration clause in future CBAs cannot be easily answered yes or no. Although employers often view arbitration as an easier and less expensive means to address employee complaints, such is not always the case. Moreover, the analysis of arbitration versus litigation is dependent upon a number of other factors unique to each employer. An employer is therefore encouraged to consult with legal counsel to determine what strategy best serves the organization. The answer may differ from employer to employer.

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