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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Keys To Drafting Effective Arbitration Provisions

Law360, New York (December 04, 2009) -- The question of arbitrability is not a novel subject. To the contrary, countless courts, arbitrators and authors have explored this issue.

However, drafting enforceable and effective arbitration provisions for collective bargaining agreements ("CBAs") has remained a challenge as evidenced by the recent flood of decisions that have addressed whether an issue can proceed to arbitration.

Perhaps the most important of these decisions was issued by the United States Supreme Court this past spring in 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (April 1, 2009).

The court addressed whether union members can waive their rights to a judicial forum for statutory employment discrimination claims and be compelled to arbitrate such claims pursuant to the parties' CBA.

In answering these questions in the affirmative, Pyett held that the CBA's arbitration provision must "clearly and unmistakably" require union members to arbitrate such claims.

Unfortunately, however, this decision left open a host of additional questions including: 1) the question of how specific arbitration language must be in order to constitute a waiver; 2) whether the waiver will be enforceable if the union maintains exclusive control over the claims that can proceed to arbitration; and 3) whether, and to what extent, discovery will be available to the parties.

Although Congress is currently contemplating differing bills which would potentially overrule Pyett or address some of these concerns, Pyett and similar cases provide a reminder to practitioners that caution must be exercised when drafting arbitration provisions for CBAs.

Practitioners can take certain steps during the negotiations and drafting stages to increase the likelihood that an arbitration provision will be enforced and to minimize the possibility of it being rendered ineffective. Some of these steps are outlined below.

Clarify Goals

First, before engaging in negotiations, it is essential to meet with the client to establish, clarify and rank goals, and to develop the justification for the proposed contract language.

During this meeting, careful consideration should be paid to the particular industry, work force and bargaining history of the parties.

Obtaining a thorough understanding of the parties' relationship is also necessary in order to avoid damaging long-standing good will between the parties by insisting on specific arbitration language.

Keeping notes from the client meeting and negotiation session(s) is advisable in the event that determining the intent of the parties becomes an issue later.

Be Specific About Arbitrable Issues

Second, when drafting an arbitration provision, as a general rule, be specific about what will constitute an arbitrable issue.

This can be accomplished by limiting the definition of a grievance, and by not defining what constitutes a grievance too broadly.

Broad grievance definitions typically state that "any dispute" may be raised in the arbitration procedure with the result that many issues that are outside the express terms of a CBA, such as human resource policies and procedures, may become arbitrable disputes.

The better practice is to have a "limited" grievance definition in the CBA which limits the definition of a grievance to those "disputes arising out of the interpretation or application of the CBA," or by using exclusionary language which clearly and unequivocally states that certain matters are outside the scope of the grievance process.

In either case, certain matters can be precluded from proceeding to arbitration.

Consider the Impact of Individual Agreements on Arbitrability

Third, when drafting arbitration clauses, be sure to consider whether individual agreements between the employer and employee exist. This may occur in certain industries, such as sports and entertainment, and in public sector/school board employment.

The issue was recently confronted by the New Jersey Supreme Court in Mt. Holly Twp. Bd. Of Educ. v. Mt. Holly Educ. Ass'n., 199 NJ 319 (2009), and Amalgamated Transit Union, Local 880 v. New Jersey Transit Bus Operations, 200 N.J. 105 (2009).

In Mt. Holly, the court held that a public employee's individual employment contract with a school board was invalid because it minimized and conflicted with rights under a collective negotiations agreement ("CNA").

The individual agreement allowed the board to terminate him without cause on 14 days' notice, but the CNA had a more favorable "just cause" provision, and allowed the employee to arbitrate his dismissal.

In Amalgamated, the court held that an arbitration panel properly found that a dispute was not arbitrable under the terms of an individual agreement where the agreement was incorporated into the terms of the parties' CBA and did not minimize or conflict with it.

These cases provide several important lessons to practitioners, including to make sure that: 1) an existing individual agreement does not conflict with a co-existing CBA; 2) the CBA makes reference to the alteration of its rules discussed in the individual agreement; and 3) the individual agreement explains how it alters the rules of the CBA.

Guidelines for Waivers

Fourth, when negotiating and drafting an effective arbitration provision, it is essential that counsel consider the circumstances in which the union and the employer may seek to compel arbitration, e.g., the employer will usually seek to ensure that disputes do not end up in court.

An arbitration clause can require that employees submit grievances that are based on individual statutory claims to arbitration prior to any judicial forum.

In the aftermath of Pyett, if the parties are seeking to require mandatory arbitration of individual statutory claims in a CBA, the waiver of the judicial forum must be "clear and unmistakable." For instance, it can state, as in Pyett, the following:

"§ 30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, [it then cites specific state and federal discrimination statutes] ... or any other similar laws, rules or regulations.

"All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbi-trators [sic] shall apply appropriate law in ren-dering [sic] decisions based upon claims of discrimination."

The Pyett court found that this provision was “clear and unmistakable” because it clearly indicates that arbitration is mandatory and it cites to the specific statutes to be waived.

However, as noted above, several other issues were left open following Pyett, including: 1) How specific must the arbitration provision be to ensure that an employee’s statutory discrimination claims go to arbitration; and 2) will a CBA’s waiver be enforceable when the union controls or limits (whether in the CBA or otherwise) the employee’s access to arbitration?

A number of post-Pyett cases analyze these issues including: Shipkevich v. Staten Island Univ. Hosp., 2009 U.S. Dist. LEXIS 51011, at *5-7 (E.D.N.Y. June 16, 2009) (holding that without an “explicit statement” that statutory discrimination claims are subject to mandatory arbitration, the arbitration provision’s waiver will be rendered invalid); Kravar v. Triangle Servs., 2009 U.S. Dist. LEXIS 42944, at *8 (S.D.N.Y. May 12, 2009) (holding that where a union prevented an employee from arbitrating her disability discrimination claim, an arbitration provision’s waiver was rendered unenforceable as to the employee); and Markell v. Kaiser Found. Health Plan of the Northwest, 2009 U.S. Dist. LEXIS 95891, at *19 (D. Or. Sept. 14, 2009) (finding that an arbitration provision did not require arbitration of statutory discrimination claims where it provided that the parties are “free to arbitrate” disputes regarding “problems arising in connection with the application or interpretation of” the CBA).

With respect to the first issue, two lessons seem clear from the Shipkevich and Markell decisions: 1) the provision should state that “statutory antidiscrimination claims are subject to mandatory arbitration,” or have language clearly indicating that arbitration is mandatory; and 2) the contract should not allow for different methods of dispute resolution, or state that the parties are “free to arbitrate” disputes, as this will negate the mandatory effect of the waiver.

With respect to the second issue, Kravar held that where a union prevented an employee from arbitrating her statutory disability claim, the arbitration provision’s waiver was rendered unenforceable as to that employee.

Although a union may prevent an employee from arbitrating his or her claim without acting under any specific provision of the CBA, one lesson from this case is clear — don’t draft a provision that allows the union to prevent employees from arbitrating their statutory discrimination claims.

This can be accomplished by allowing either the grievant or the union to appeal a denied grievance to arbitration.

Consider Limiting the Authority of the Arbitrator on Issues of Discovery or Evidence

Fifth, due to the probability that arbitrators will be hearing significantly more individual statutory employment discrimination claims as a result of Pyett, counsel should consider outlining the authority of the arbitrator to decide discovery and evidentiary issues.

This will provide greater certainty to the arbitrator and the parties on how the arbitration proceeding will be conducted when such claims arise in the future.

Final Thoughts

Likely to be overshadowed by the constant focus on a CBA's wage and benefits provisions during negotiations and drafting, arbitration provisions may be unnecessarily discounted. That is a mistake.

In addition to the increase in arbitration that is likely to arise as a result of the Pyett decision, the benefits of arbitration can include greater efficiency, lower costs, and less rigid procedural and evidentiary rules.

By utilizing these keys to drafting arbitration provisions, employers will be able to continue unlocking the benefits of arbitration as an efficient dispute mechanism.

--By Kenneth A. Rosenberg (pictured) and Daniel N. Kuperstein, Fox Rothschild LLP

Kenneth Rosenberg is a partner with Fox Rothschild's labor and employment department, resident in the Roseland, N.J., office. Daniel Kuperstein is an associate with the firm's labor and employment department, also in the Roseland office.

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