Employment Alert: Employers May Benefit from Supreme Court Decision Upholding Arbitration Requirements

4/6/2009

In a clear win for employers, on April 1st the United States Supreme Court held, in *14 Penn Plaza LLC v. Pyett*, that a provision in a collective bargaining agreement (CBA) that clearly and unmistakably requires union members to arbitrate claims under the Age Discrimination in Employment Act (ADEA) is enforceable. In so holding, the Supreme Court overturned decisions by the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, and cast doubt on the continued validity of long-standing precedent.

At issue in *Penn Plaza* was a provision of the CBA that prohibited discrimination, but that stated "all such claims shall be subject to the [applicable] grievance and arbitration procedures… as the sole and exclusive remedy for violations."

The plaintiffs in *Penn Plaza*, members of the Service Employees International Union (SEIU or the "Union"), were employed by a maintenance service and cleaning contractor, Temco Services Industries, Inc. ("Temco"), to provide security services to a New York City office building owned and managed by 14 Penn Plaza. After 14 Penn Plaza engaged an affiliate of Temco to provide licensed security guards to staff the building's lobby and entrances, Temco, with the SEIU's consent, reassigned the plaintiffs to jobs as night porters and light duty cleaners in other locations in the building. Alleging that these reassignments were based on unlawful age discrimination and violated seniority and other provisions of the CBA, the employees filed complaints of age discrimination with the Equal Employment Opportunity Commission (EEOC) against both Temco and 14 Penn Plaza (collectively, the "Employer"). The EEOC dismissed the claims, and the employees sued. Arguing that the CBA required union members to submit all claims of employment discrimination to binding arbitration, the Employer asked the court to compel arbitration, in accordance with the terms of the CBA. The District Court denied the Employer's motion, finding that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." The Second Circuit affirmed.

A sharply divided Supreme Court overturned the lower courts' decisions, holding that a union may bargain for a mandatory arbitration provision related to individual employment rights. In so holding, the Court came perilously close to overturning precedent set in its 1974 decision, *Alexander v. Gardner-Denver*, which held that a CBA could not waive covered workers' rights to a judicial forum.

In *Gardner-Denver*, the Court held that a CBA's mandatory arbitration provision that did not specifically reference statutory claims did not preclude an employee from bypassing arbitration

to sue in federal court under Title VII, even where that employee had submitted other, contract-based claims to arbitration that were based on the same facts.

The *Penn Plaza* Court distinguished *Gardner-Denver* from the case at hand, stating that, in contrast to the CBA provision at issue in *Gardner-Denver*, the CBA provision at issue in *Penn Plaza* expressly covered both statutory and contractual discrimination claims. A vigorous dissent found the two cases indistinguishable, stating that *Gardner-Denver* and its progeny requires the Court to find that a union cannot bargain away in a CBA an employee's statutory right to bring an ADEA claim in court.

Nevertheless, the *Penn Plaza* decision makes clear that CBA provisions that mandate arbitration of individual statutory rights will be enforced, provided they are clear and unmistakable. Moreover, it emphasizes that Congress, not the Court, must provide policy against the use of union-negotiated arbitration provisions.

The decision comes at an interesting time, in light of the ongoing debate over the Employee Free Choice Act (EFCA). The EFCA, if passed in its current form, would allow unions to more easily organize work forces because it eliminates the secret ballot requirement that exists under current law; clearly, an increased risk of unionization would not be welcomed by most employers. In light of the *Penn Plaza* decision, however, there could be a silver lining to unionization. Specifically, those employers that are successful in negotiating clear, unmistakable, and comprehensive mandatory arbitration provisions into a CBA may at least reap the benefit of avoiding jury trials in favor of arbitrations of discrimination and other employment-related claims.

This decision affects all employers that are, or become, unionized. It has been said that the only benefits an employer gains in collective bargaining are the arbitration clause and the no-strike clause. In arbitration, the costs are often significantly less and the chance of success significantly greater than in litigation, if only because employers avoid juries. Given the ruling in *Penn Plaza*, employers should negotiate specific language in their collective bargaining agreements that provides for the arbitration of all statutory claims. More broadly, this decision indicates that the Supreme Court supports the enforcement of well-crafted arbitration agreements. Employers should pay attention to the language of any arbitration provision they negotiate into an employment agreement, and should work with counsel to be sure such provisions are drafted clearly and unmistakably.

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