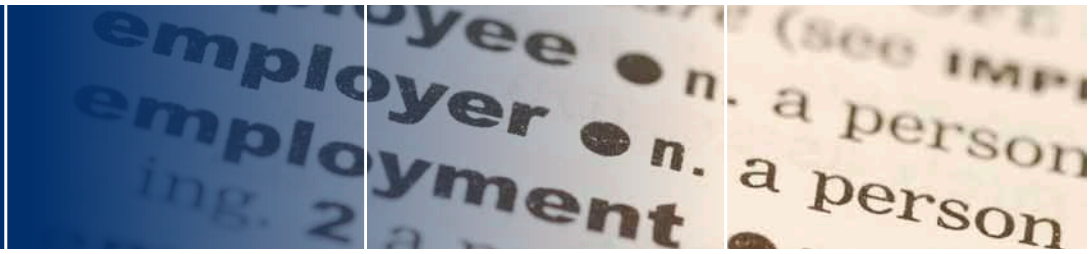
WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

EMPLOYMENT & LABOR



NEWSLETTER
April 2013

Second Circuit Upholds Arbitration Agreement Blocking Title VII Class Claims

In a victory for employers, the Second Circuit issued a decision enforcing an arbitration agreement and denying plaintiff's request to pursue class-wide litigation of her Title VII claims in court in *Parisi v. Goldman, Sachs & Co.*, No. 11–5229, 2013 WL 1149751 (2d. Cir. March 21, 2013). This decision provides proactive employers within the Second Circuit's boundaries with a tool to potentially decrease certain kinds of class-action litigation through carefully drafted arbitration agreements.

The Case: *Parisi v. Goldman, Sachs & Co.*

Plaintiff, a former managing director at Goldman Sachs, had signed an arbitration agreement as part of a promotion in 2008. After the termination of her employment, plaintiff and two former colleagues filed a complaint in federal court alleging gender discrimination under Title VII on a class-wide basis. When Goldman Sachs moved to compel individual arbitration, plaintiff argued that the agreement was unenforceable and that a judicial forum was appropriate because she and her former colleagues were alleging "a continuing pattern and practice of discrimination based on sex," in violation of Title VII. Plaintiff's arbitration agreement was silent on the ability to bring class claims.
Continued


Celena Mayo
Partner, New York
212.915.5854
celena.mayo@wilsonelser.com


Rachel Cartwright
Associate, New York
212.915.5796
rachel.cartwright@wilsonelser.com

For more information about Wilson Elser's Employment & Labor practice visit our website.

Plaintiffs in *Parisi* argued that the arbitration agreement was unenforceable because (1) it would require her to arbitrate her claims on an individual basis, (2) she had a substantive statutory right under Title VII to bring a class action gender discrimination claim, and (3) when she signed the agreement, she did not understand it would impair her ability to bring a class claim. The Second Circuit agreed with Goldman Sachs that no substantive statutory right exists under Title VII for employees to pursue a class action "pattern-or-practice" claim.

This ruling is perceived as a "win" for employers because it confirms that nothing inherent in Title VII puts it beyond the bounds of mandatory individual arbitration.

Application of Arbitration Agreements

Parisi is the latest in a series of cases underlining the federal courts' enthusiasm for binding arbitration – and employers should take heed. Although arbitration is not a silver bullet (for example, the relaxed rules of evidence make it easier to admit dubious or highly prejudicial material), a well-managed and thoughtful arbitration agreement can result in a significant reduction in litigation-related costs because in an arbitral forum:

- Discovery is limited and the employer is generally in possession of most of the documents and information relating to the employee's case.
- There are no juries.
- The time line is expedited.
- The bases for appeal are very limited.

Finally, arbitration is usually a private process; there are no public records and no public hearings, which can be of particular value for discrimination and harassment complaints.

Employers would be wise to note that not all arbitration agreements are created equal. Both the timing and manner of the arbitration agreement are integral to enforceability.

Arbitration agreements that are implemented either at the beginning of employment or when an employee receives some sort of benefit, such as a promotion, are generally more enforceable than post-hire arbitration agreements not tied into a job benefit.

For a contract such as an arbitration agreement to be enforceable both parties must receive some sort of benefit. At the pre-employment stage, the benefit is clear: an employment relationship. Although courts in different federal circuits have found that continued employment is a sufficient benefit, as in *Josie-Delerme v. American General Finance Corp.*, No. 08–3166, 2009 WL 2366591 (E.D.N.Y. July 31, 2009), employers must make sure to take the right steps when implementing a policy mid-employment. In *Morvant v. P.F. Chang's China Bistro, Inc.* 870 F.Supp.2d 831 (N.D.Cal. 2012) the court declined to compel arbitration where the agreement did not expressly state that continued employment would constitute acceptance, and the employer could not produce a signed copy of the agreement proving the employee had agreed to arbitration. Similarly, the court in *Campbell v. General Dynamics Government Systems Corp.*, 407 F.3d 546, (1st Cir. 2005) found that the employer's email announcement of its new arbitration policy was insufficient to put employees on notice that their continued employment expressed a willingness to arbitrate rather than litigate their federal ADA claims. The *Campbell* court found that the notice was deficient in that it did not require affirmation that the employee had read the email announcement, it did not state directly that the policy contained an arbitration agreement, and it did not state that continued employment would constitute acceptance. *Continued*

Enforcement of Arbitration Provisions Contained in Employee Handbooks

Arbitration provisions contained in employee handbooks are also frequently challenged in court. Employees have challenged the validity of such agreements on the basis that they are buried in the text of a document over which they have no negotiation power. Consequently, some courts enforce handbook arbitration agreements – but others do not.

- In Hawaii, for example, an employee's signature acknowledging receipt of the company handbook was insufficient to compel arbitration, as the acknowledgment form did not notify the employee of the arbitration provision. *Douglass v. Pflueger Hawaii, Inc.*, 110 Haw. 520, 135 P.3d 129 (2006).
- However, a Texas court upheld a handbook arbitration agreement despite this same omission. *Hatton v. D.R. Horton, Inc.*, No. 14-09-00054, 2010 WL 454926, 1 (Tex.App.-Houston (14 Dist.) February 11, 2010).

Employers would be wise to not rely solely on handbook provisions, and instead create separate arbitration agreements.

Ultimately, employers should be aware that effectively drafted arbitration agreements can preserve their interests, but that the timing and manner of these agreements is critical.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Feel free to contact any of the following partners to access the experience and capabilities of this formidable team.

Contacts:

National Practice Chair
Ricki Roer
ricki.roer@wilsonelser.com
212.915.5375
Northeast

By Region:

Midatlantic
Robert Wallace
robert.wallace@wilsonelser.com

Midwest
David Holmes
david.holmes@wilsonelser.com

West
Marty Deniston
martin.deniston@wilsonelser.com

Southeast
Sherril Colombo
sherril.colombo@wilsonelser.com

Southwest
Linda Wills
linda.wills@wilsonelser.com