MORRISON | FOERSTER

EMPLOYMENT LAW COMMENTARY

Volume 21, No. 4 April 2009

Inside

Arbitration Agreements in Light of *114 Penn Plaza v. Pyett*

By Timothy L. Reed

On April 1, 2009, the United States Supreme Court handed down its decision in *114 Penn Plaza v. Pyett*, holding that a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.[1] The Court's 5-4 decision, while a positive development for employers, may nevertheless have limited practical effect. While *114 Penn Plaza* indicates that the U.S. Supreme Court remains supportive of compulsory arbitration, California courts have appeared increasingly hostile to compulsory arbitration. A recent California decision may signal a reversal of that trend.

FACTUAL AND PROCEDURAL BACKGROUND OF *114 PENN PLAZA*

In *114 Penn Plaza*, the plaintiffs, who worked as night lobby watchmen in a New York City office building, were members of the Service Employees International Union ("SEIU"). Pursuant to the National Labor Relations Act, the SEIU is the exclusive bargaining representative of employees within New York City's building services industry. The SEIU and the Realty Advisory Board ("RAB"), a multiemployer bargaining association for the New York City real estate industry, had previously negotiated a collective bargaining agreement ("CBA") that required SEIU members to submit all employment discrimination claims to binding arbitration. That clause of the CBA read as follows:

> § 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, the Americans with Disability Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code . . . or any other similar laws, rules or regulations. All such claims shall be subject to grievance and arbitration procedures . . . as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

The owner and operator of the office building where the plaintiffs worked engaged a security company to staff the building's lobby and entrance with licensed security guards. Consequently, the plaintiffs were reassigned from their positions as night lobby watchmen to night porters and light duty cleaners in other locations in the building. According to the plaintiffs, their reassignments resulted in lost income and emotional distress, and were otherwise less desirable than their night watchmen positions.

The SEIU, in accordance with the plaintiffs' request, filed grievances against their employer challenging the reassignments. In those grievances, the plaintiffs alleged: (1) that their employer discriminated against them based on their ages in violation of the CBA; (2) that their employer violated seniority rules by not promoting one of the plaintiffs to a handyman position; and (3) that their employer failed to equitably rotate overtime. The SEIU requested arbitration under the CBA after it failed to obtain relief for any claims through the grievance process. After arbitration ensued, the plaintiffs withdrew their age discrimination claims. They continued to arbitrate their seniority and overtime claims, which were eventually denied.

New I-9 Forms in Effect

By Timothy L. Reed

Effective April 3, 2009, all employers are required to begin using the new version of U.S. Customs and Immigrations Service ("USCIS") Form I-9. Employers are required to complete a Form I-9 for all newly hired employees to verify identification and authorization to work in the U.S. Identity and employment authorization may be verified using (1) documents from List A, which verify identity and employment authorization; (2) documents from List B, which only verify identity; and (3) documents from List C, which only verify employment authorization.

Among the most significant changes in the new form are:

1. Only *unexpired* documents will be acceptable to verify identity;
2. Several new documents may be used to prove identity and employment authorization in List A, including:
   - Passport Cards (a U.S. alternative to the traditional passport, which the State Department began issuing in mid-2008);
   - Passports used by foreign countries that contain a permanent residence notation printed on machine-readable immigrant visa; and
   - Passports from the Federated States of Micronesia or the Republic of the Marshall Islands with Form I-94 or Form I-94A.
3. The following documents are obsolete versions of the Employment Authorization Document ("EAD") and may *no longer be used* to verify identity and work authorization: Forms I-688, I-688A, and I-688B. However, I-766, the current version of the EAD, may still be used as a List A document.

For more information and to download copies of the new I-9 form, please visit the USCIS website at http://www.uscis.gov/portal/site/uscis. ■

During the arbitration, the plaintiffs filed complaints with the Equal Employment Opportunity Commission ("EEOC"), in which they alleged that their reassignments violated the Age Discrimination in Employment Act ("ADEA"). Approximately one month later, the EEOC notified each plaintiff of his right to sue. Subsequently, the plaintiffs brought claims against their employer in the United District Court for the Southern District of New York, alleging that their reassignments violated the ADEA and state and local discrimination laws prohibiting age discrimination. Plaintiffs' employer moved to compel arbitration pursuant to the CBA and the Federal Arbitration Act ("FAA"). The District Court denied the plaintiffs' employer's motion, and the Second Circuit Court of Appeal affirmed. Plaintiffs' employer appealed to the United States Supreme Court.

THE SUPREME COURT'S HOLDING

The Supreme Court, in a 5-4 decision, reversed the Second Circuit and held that "a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."

The Court, in an opinion authored by Justice Thomas, reasoned that "[a]s in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective bargaining agreement in return for other concessions from the employer," noting that "[c]ourts generally may not interfere with this bargained-for exchange" concerning a "condition of employment" such as an arbitration provision. Moreover, the Court relied on its previous decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[2] in which it held that "an individual employee who had agreed individually to waive his right to a federal forum could be compelled to arbitrate a federal age discrimination claim." The Court, reasoning that its interpretation of the ADEA in *Gilmer* "fully applies in the collective bargaining agreement context," found that that the ADEA's legislative history does not preclude waiver and that "arbitrating ADEA disputes would not undermine the statute's remedial and deterrent function." Furthermore, the Court reasoned that "an agreement to arbitrate statutory antidiscrimination claims must be 'explicitly stated' in the collective bargaining agreement," as was true of the provision negotiated between the SEIU and the RAB. Therefore, the Court was obligated to refrain from invalidating the arbitration clause at issue because it was freely negotiated by the SEIU and RAB, it "clearly and unmistakably" required arbitration, and Congress chose to allow arbitration of ADEA claims.

In arriving at its holding, the Court also largely overturned its previous decision in *Alexander v. Gardner-Denver Co.*,[3] a case that Justice Thomas described as being "highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights." The Court reasoned that its decision in *Alexander* reflected an outdated "mistrust of the arbitral process" that was no longer justified based on the current ability of arbitrators to resolve complex factual and legal questions, including those presented in claims brought under the ADEA. Thus, given the increased sophistication of the arbitral process, the Court held that ADEA claims could be resolved through private adjudication.

IMPLICATIONS OF *114 PENN PLAZA*

The Court's decision in *114 Penn Plaza* is a positive development for employers. Although the Court only addressed ADEA claims, *114 Penn Plaza* may eventually be applied to a broad spectrum of antidiscrimination laws. In addition, the Court upheld the language in the disputed provision requiring that arbitration be the "sole and exclusive remedy" for violations of the discrimination laws specified. Therefore, *114 Penn Plaza* makes it more likely that employers will experience the benefits of arbitration when litigating a broad range of discrimination issues and will be able

to address all discrimination claims in a single forum.

Nevertheless, the effects of *114 Penn Plaza* may be limited, at least initially. Most existing CBAs lack the "clear and unmistakable" language necessary to constitute an enforceable waiver. Accordingly, most existing CBAs will have to be renegotiated and the inclusion of such language in new CBAs may not come easily.

From a practical standpoint, when deciding whether or not to include a provision requiring arbitration of discrimination claims in CBAs, employers should weigh the advantages and disadvantages of arbitrating employment disputes. Generally, the advantages of arbitration include:

- Arbitration involves less expense and delay compared to traditional litigation;
- There is less potential that punitive damages will be awarded by an arbitrator;
- Employers' claims are not decided by unpredictable juries;
- Employers are able to avoid the time and expense associated with full-blown discovery; and
- Proceedings are confidential, which lessens the chance of potentially embarrassing information about employers becoming public knowledge.

On the other hand, the disadvantages of arbitrating claims against employees generally include:

- Employers may forego the opportunity to move for summary judgment;
- Arbitrations are becoming more procedurally akin to court proceedings with greater opportunities for discovery reducing the cost advantage;
- An arbitrator's remedy is more likely to include reinstatement; and
- Arbitration decisions are difficult to appeal.

It should be noted, however, that the generalizations above do not apply in all situations. For example, at times arbitrators can be as unpredictable as juries, and the likelihood of obtaining summary judgment varies by jurisdiction. Consequently, employers that decide to include arbitration clauses in CBAs should consult with counsel to facilitate weighing the relevant factors and assess whether the language used in such provisions is sufficiently "clear and unmistakable" to pass muster under *114 Penn Plaza*.

CALIFORNIA COURTS' VIEW OF ARBITRATION AGREEMENTS

While *114 Penn Plaza* indicates that United States Supreme Court remains receptive to arbitration agreements, in recent years, some California courts have demonstrated a reluctance to compel arbitration. In *Armendariz v. Foundation Health Psychcare Servs.*,[4] decided in 2000, the California Supreme Court outlined requirements that must be met for an arbitration agreement for claims arising under the state's Fair Employment and Housing Act ("FEHA") to be upheld. The court noted that "California law . . . favors the enforcement of valid arbitration agreements," while acknowledging that "arbitration agreements that encompass *unwaivable* statutory rights must be subject to particular scrutiny." Pursuant to *Armendariz*, an arbitration agreement is unenforceable under California law, unless it: (1) provides for a neutral arbitrator; (2) provides for at least minimal discovery; (3) requires a written decision by the arbitrator; (4) provides for all of the types of relief that would otherwise be available in court; (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum; (6) provides for a written decision with limited judicial review; and (7) provides for mutuality between the parties. Often, as was the case in *Armendariz*, California courts have used these factors as a means to invalidate arbitration agreements arising under FEHA and other laws.

However, the most recent California appellate court to address whether to

compel arbitration of claims arising under FEHA held that the provision at issue was enforceable. In *Roman v. Superior Court*,[5] decided on April 13, 2009, the Second District Court of Appeal upheld an arbitration provision that included the following language: "I agree, in the event I am hired by the company, that all disputes and claims that might arise out of my employment with the company will be submitted to binding arbitration." The court held that the arbitration agreement at issue, signed in 1997, was sufficiently mutual, reasoning that "the mere inclusion of the words 'I agree' by one party in an otherwise mutual arbitration provision [does not destroy] the bilateral nature of the agreement." Moreover, the court held that the agreement's cost-splitting provision, which may have required the employer and employee to equally bear the financial burden of arbitration, could be severed from the agreement. The court reasoned that "the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement." In addition, the court held that the American Arbitration Association's employment dispute rules did not unduly restrict discovery.

Even so, most recent California court decisions have refused to enforce arbitration agreements based on *Armendariz*. On March 17, 2009, the Second District Court of Appeal refused to compel arbitration of an employee's class action wage and hour claims in *Sanchez v. W. Pizza Enters., Inc.*[6] Relying on *Armendariz*, the court held that a provision that allowed an employer to select a single arbitrator lacked mutuality because the employee had no input with regard to the arbitrator's selection. Moreover, the court noted that the provision gave "rise to a significant risk of financial interdependence between [the employer] and the arbitrator . . . and an opportunity for [the employer] to gain an advantage through its knowledge of and experience with the arbitrator."

Similarly, in a 2008 decision in *Ontiveros v. DHL Express (USA), Inc.*,[7] the First District Court of Appeal declined to require arbitration of an employee's sex discrimination, sexual harassment, and retaliation claims. The court held that several provisions in the arbitration agreement in dispute were unenforceable, including a provision requiring the employee to pay portions of the costs unique to arbitration and a provision severely limiting discovery.[8]

While it has appeared that California courts were becoming increasingly hostile to compulsory arbitration, *Roman* may be indicative of a halt or reversal of that trend, or may merely demonstrate ambivalence among California's judiciary. This uncertainty makes it even more important that employers carefully review the provisions in their arbitration agreements to make certain that they comply with the stringent legal requirements set forth in *Armendariz*. ■

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1 2009 WL 838159 (U.S. April 1, 2009).

2 500 U.S. 20 (1991).

3 415 U.S. 36 (1974).

4 24 Cal. 4th 83 (2000).

5 2009 WL 975994 (Cal. App. 2 Dist. April 13, 2009).

6 172 Cal. App. 4th (2009).

7 164 Cal. App. 4th (2008).

8 *See also Fitz v. NCR Corp.*, 118 Cal. App. 4th 702 (2004) (holding arbitration agreement to be unenforceable under *Armendariz*); *Martinez v. Master Prot. Corp.*, 118 Cal. App. 4th 107 (2004) (same); *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638 (2004) (same); *Mercuro v. Superior Court*, 96 Cal. App. 4th (2002) (same). *Cf. Jones v. Humanscale Corp.*, 130 Cal. App. 4th 401 (2005) (holding arbitration provision to be enforceable under *Armendariz*); *Fittante v. Palm Springs Motors, Inc.*, 105 Cal. App. 4th 708 (2003) (same); *Little v. Auto Stiegler*, Inc., 29 Cal. 4th 1064 (2003) (same); *Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416 (2000) (same).

Timothy L. Reed is an associate in our San Francisco office and can be reached at (415) 268-7611 or treed@mofo.com.

Editor: Lloyd W. Aubry, Jr., (415) 268-6558

San Francisco

Lloyd W. Aubry, Jr.	(415) 268-6558 laubry@mofo.com
James E. Boddy, Jr.	(415) 268-7081 jboddy@mofo.com
Karen Kubin	(415) 268-6168 kkubin@mofo.com
Linda E. Shostak	(415) 268-7202 lshostak@mofo.com
Eric A. Tate	(415) 268-6915 etate@mofo.com

Palo Alto

Christine E. Lyon	(650) 813-5770 clyon@mofo.com
David J. Murphy	(650) 813-5945 dmurphy@mofo.com
Raymond L. Wheeler	(650) 813-5656 rwheeler@mofo.om
Tom E. Wilson	(650) 813-5604 twilson@mofo.com

Los Angeles

Timothy F. Ryan	(213) 892-5388 tryan@mofo.com
Janie F. Schulman	(213) 892-5393 jschulman@mofo.com

New York

Miriam H. Wugmeister	(212) 506-7213 mwugmeister@mofo.com

Washington, D.C./Northern Virginia

Daniel P. Westman	(703) 760-7795 dwestman@mofo.com

San Diego

Rick Bergstrom	(858) 720-5143 rbergstrom@mofo.com
Craig A. Schloss	(858) 720-5134 cschloss@mofo.com

Denver

Steven M. Kaufmann	(303) 592-2236 skaufmann@mofo.com

London

Ann Bevitt	44-20-7896-5841 abevitt@mofo.com

If you wish to change an address, add a subscriber, or comment on this newsletter, please write to:
Wende Arrollado
Morrison & Foerster LLP
12531 High Bluff Drive, Suite 100
San Diego, California 92130
warrollado@mofo.com

Swine Flu Alert

The media has been filled with reports about the potential for a swine flu pandemic based on the outbreak in Mexico and illness around the world connected to the return of travelers from that country. As of April 28th, 64 cases have been reported in the United States by the Center for Disease Control (CDC) in Atlanta, although that number may be rapidly increasing. The CDC has a very helpful website, which updates the number of current cases as well as provides advice on how to manage during the spread of the disease. That site at this point states: "The current Phase 4 alert is characterized by confirmed person-to-person spread of a new influenza virus able to cause 'community-level outbreaks.' The increase in the pandemic alert phase indicates that the likelihood of a pandemic has increased."

Almost 3 years ago, we faced the potential for a similar pandemic based on the avian flu. In July 2006, we issued an Employment Law Commentary that described employers' potential duties under OSHA and suggested various preparation measures that employers take in preparation for an avian flu pandemic. For those employers who might want to think about similar preparation for a potential swine flu epidemic or even pandemic, you can click here to review that Commentary. ■