RMKB EMPLOYMENT LAW ALERT

EMPLOYERS HAVE A GREEN LIGHT FOR MANDATORY ARBITRATION

by Clint D. Robison

The rule. Employers can now require employees to arbitrate Title VII claims as a mandatory condition of employment. *EEOC v. Luce, Forward, Hamilton & Scripps* (October 1, 2003) DJDAR 11055. The decision, which has been the subject of recent press coverage, aligns the Ninth Circuit with existing law in California, providing a higher degree of certainty to employers hedging against potential employment law claims. In general, an employee's refusal to sign may be ground for refusal to hire or a ground for termination of employment.

Prior law. The Ninth Circuit previously held that "employees may not [emphasis added] be required, as a condition of employment, to waive their right to bring future Title VII claims in court." *Duffield v. Robertson Stephens & Co.* (9th Cir. 1998) 114 F.3d 1182, 1190. The U.S. Supreme Court declined to review the case. However, the Supreme Court did render an important subsequent decision in *Circuit City Stores v. Adams* (2001) 532 U.S. 105. In that case the Court's "language and reasoning decimated Duffield's conclusion that Congress intended to preclude compulsory arbitration of Title VII claims." *EEOC, supra,* at 11058. It was just a matter of time before the Ninth Circuit's *Duffield* decision was formally pronounced dead. Now, employers can mark October 1, 2003 on *Duffield's* gravestone and look to arbitration agreements with a greater degree of comfort.

EEOC Case facts. Donald Lagatree was hired as a fulltime legal secretary by the law firm of Luce, Forward. He was employed conditionally for two days while he considered whether to sign an at-will offer letter with an arbitration provision. Luce, Forward terminated Lagatree after he refused to sign the letter. Lagatree filed a state suit and the Superior Court dismissed, holding that the firm did not unlawfully discharge its employee. Lagatree also filed a complaint with the EEOC, which filed a separate suit against Luce, Forward on behalf of Lagatree and the public interest arguing that 1) *Duffield* forbade the firm from requiring the employee to sign an arbitration agreement and 2) that the firm unlawfully retaliated against Lagatree for asserting his constitutional right to a jury trial. The Ninth Circuit Court held that *Duffield* no longer remains good law and that the firm could require appropriate compulsory arbitration of employees as a condition of employment. The Court also ruled in favor of Luce, Forward on the retaliation claim.

Unified law will benefit employers. The EEOC decision unifies Ninth Circuit case law and brings the federal court in line with its Sister Circuits and the Supreme Courts of California and Nevada. *Id*. at 11058. The ruling is also consistent with Congress' pronouncement that "arbitration is encouraged to resolve disputes arising under Title VII." *Id.* "Of course, not all compulsory arbitration agreements will be enforced; they must still comply with the principles of traditional contract law, including the doctrine of unconscionability." *Id.* California employers should treat this statement as a reminder that their agreements will be scrutinized to ensure that they are not one-sided. Thus, while the ruling confirms that the light is green, speeding through the intersection is never advisable.

Practical Information. The ruling in *EEOC v. Luce, Forward* is helpful, but what about state law claims? Even if an employee can be required to arbitrate state law claims, is there guidance for constructing the arbitration agreement? These are good questions, answered in part below.

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First, in 2000 the California Supreme Court held that substantive rights created by statute can be subjected to arbitration if certain minimum procedural requirements were satisfied. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. Second, the Court in Armendariz provided guidance for constructing an arbitration agreement. An appropriate agreement is one which: "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (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." *Id.*

While *Armendariz* provides a good starting point, there is a developing body of law on the subject of arbitration agreements. The case law must be assessed as a whole and applied to each employer's facts. For example, *Armendariz* does not address arbitration of disputes not arising from FEHA. Nevertheless, employers may want to consider the benefits of an arbitration agreement, given the green light in *EEOC v. Luce, Forward*. Just proceed with caution. Implementation of an arbitration agreement is not a "cookie-cutter" process and employers should seek legal advice before traveling down that road.

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