[Alerts and Updates]

Employers May Require Union Employees to Arbitrate Statutory Discrimination Claims Under the Arbitration Provision of a Labor Contract

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In a 5-4 decision, the U.S. Supreme Court held in *14 Penn Plaza LLC et al., v. Pyett et al.*, 2009 U.S. LEXIS 2497 (U.S. Apr. 1, 2009) that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims under the Age Discrimination in Employment Act ("ADEA") is enforceable as a matter of federal law. In other words, a collective bargaining agreement with an arbitration provision that is "clear" and "unmistakable" with regard to its inclusion of ADEA claims requires the employee to arbitrate the claim rather than litigate it in a judicial forum. This decision is likely to open the door for employers to substantially decrease the time expended, expense of and potential exposure from discrimination claims asserted by union workers, provided their negotiated arbitration provisions are carefully drafted.

Facts Considered by the Court

A group of night lobby watchmen ("Employees") who were members of the Service Employees International Union, Local 32BJ ("Union"), and employed by a maintenance service and cleaning contractor at 14 Penn Plaza ("Employer"), filed a claim of age discrimination after being reassigned to jobs as night porters and light duty cleaners in other locations of the building, which they considered to be less desirable and less lucrative than their former positions. The reassignment followed the Employer's engagement, with the Union's consent, of licensed security guards of an affiliated company to staff the lobby and entrances of its building. At the Employees' request, the Union filed a grievance challenging the reassignments on the grounds that they violated the collective bargaining agreement's ("CBA") ban on age discrimination and violated seniority and overtime rules. After failing to obtain relief on any of these claims, the Union requested arbitration under the CBA. Following the first hearing, the Union withdrew its claim that the reassignments were based upon age discrimination since it had consented to the Employer's employment of the new security personnel.

Thereafter, the Employees filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that the Employer had violated their rights under the ADEA. Upon receipt of a Dismissal and Notice of Rights from the EEOC stating that the evidence failed to indicate that a violation had occurred, they commenced an action under the ADEA in federal district court, wherein they also alleged a violation of the state and city human rights laws. The Employer, and the Realty Advisory Board ("RAB"), which represents employers in New York City's building service industry for bargaining purposes, immediately filed a motion to compel arbitration of their claims based upon the arbitration provision of the CBA. The CBA provision expressly prohibited discrimination on the basis of age and other protected characteristics and provided that all claims for violations of the discrimination statutes, each of which was expressly set forth within the arbitration clause, were to be resolved through arbitration as the sole and exclusive remedy, with the arbitrator to apply the appropriate law in rendering decisions based upon claims of discrimination. Both the district court and the U.S. Court of Appeals for the Second Circuit denied the motion to compel arbitration based upon the Supreme Court's 35-year-old decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-51 (1974) and its progeny, which those courts interpreted as holding that an arbitration provision of a CBA "could not waive covered workers' rights to a judicial forum for causes of action created by Congress."

The Court's Analysis

In ruling that the Employees' age discrimination claims were mandatorily arbitrable under the CBA, the Court distinguished *Gardner-Denver*, explaining that the actual holding of the case was that an arbitration provision of a CBA will not require the arbitration of statutory claims where the arbitration provision fails to clearly and specifically reference the statutory claims being subject to arbitration. In *Gardner-Denver*, while the agreement prohibited discrimination based upon race, the arbitration provision did not expressly incorporate the litigation of Title VII claims within the confines of the arbitration provision and, instead, addressed claims arising only under the CBA or as a result of "trouble aris[ing] in the plant."

The Court explained that under the National Labor Relations Act ("NLRA"), the Union and the RAB/Employer had the right to bargain over mandatory terms and conditions of employment, which clearly includes arbitration. Since there is nothing in the ADEA that forbids parties from agreeing that age discrimination claims shall be resolved by arbitration, and since the Supreme Court has held in *Gilmer v. Interstate/Johnson Lane Corp.* that individuals may waive their right to litigate age discrimination claims in a judicial forum, it is not appropriate for the Court to judicially limit the parties' right to negotiate arbitration agreements that include statutory claims; any such limitation should be imposed by the legislature.

The Court dismissed the Employees' argument that the arbitration clause here is outside of the permissible scope of the collective bargaining process because it affects the Employees' statutory non-economic rights. The Court explained that parties generally favor arbitration precisely because of the economics of dispute resolution and, as in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in return for other concessions from the employer.

The Court went on to distinguish the many other concerns expressed by the Court in *Gardner-Denver* about allowing the arbitration of statutory claims pursuant to the grievance and arbitration machinery of a CBA. As a preliminary matter, the Court held that these points (discussed below) were dicta, as the *Gardner-Denver* case turned on the fact that the arbitration clause in the CBA did not expressly and unmistakably include the arbitration of statutory claims. With regard to the specifics, the Court first observed that the *Gardner-Denver* Court erroneously assumed that an agreement to submit statutory claims to arbitration was tantamount to a waiver of the employee's statutory claims. Rather, such agreement was a limitation only on where the claim would be litigated. Likewise, the Court explained that an agreement to arbitrate statutory claims was not a "prospective" waiver of any substantive right, but only of the right to a judicial forum. This way of thinking was "pervaded by . . . 'the old judicial hostility to arbitration," which has been repeatedly disavowed with modern judicial thought and decisions.

Second, the Court dismissed the *Gardner-Denver* concern that a union may subordinate the interests of a discriminatee to the interests of the majority of the bargaining unit, noting this argument constitutes a "collateral attack" on the NLRA. However, the Court explained that this result does not give a union the right to discriminate against members on account of protected characteristics by failing to pursue their cases to arbitration. Any member so impacted can file a claim against the union for the breach of the duty of fair representation, which occurs when a union's conduct toward a member is "arbitrary, discriminatory, or in bad faith," including the failure to enforce an agreement's non-discrimination clause on behalf of older workers. In addition, a union is subject to liability under the ADEA if it discriminates against its members on the basis of age. In any event, the Court held that any policy determination that unions should not be responsible for arbitrating an employee's statutory claims should be made by legislature, not the courts.

Finally, the Court dismissed the argument raised by the Employees that the Union has the right to block arbitration of their claims because it controls the arbitration procedure. The Court held that this fact was contested and was not fully briefed to this or the lower courts, so it was not ripe for adjudication in this case.

What This Means for Employers

While the *14 Penn Plaza LLC* decision specifically addressed claims under the ADEA, its reasoning is very likely to apply to broad calls of discrimination claims under statutes such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, as well as claims under state and local discrimination statutes and common law. Employers who wish to avail themselves of arbitration as the means for dispute resolution for a wide range of claims that could be asserted by unionized employees via the collective bargaining process, may want to obtain the union's buy-in and ensure that the arbitration provision is drafted clearly and explicitly to cover the class of claims it wishes to have included. The arbitration provision should be drafted with care to ensure that employee substantive rights are preserved and that basic procedural due-process rights are intact to comply with the host of other arbitration-related precedent that the courts have established in determining whether a particular arbitration provision is enforceable.

For Further Information

If you have any questions about this Alert or would like more information about the issues presented above, please contact any member of the Employment & Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.