LEGAL UPDATES

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Unions May Substitute Arbitration For Litigation Of Discrimination Claims

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The U.S. Supreme Court held that *clear* and *unmistakable* arbitration provisions in collective bargaining agreements requiring mandatory arbitration of statutory age discrimination claims are enforceable as a matter of federal law. See *14 Penn Plaza LLC v. Pyett*, No. 07-581, U.S. Supreme Court (April 1, 2009). The full text of the decision can be found under Related Files. This decision has great significance to employers who would like to expand the scope of enforceable arbitration clauses in collective bargaining agreements to include statutory discrimination claims.

Historically, unions could waive an employee's right to proceed in a judicial forum on a *contractual* discrimination claim, but could not waive an employee's right to proceed in a judicial forum on a *statutory* discrimination claim. Accordingly, employers in a union environment were typically faced with arbitration for an alleged contractual violation (e.g., for age discrimination), and litigation in court for an alleged statutory violation (e.g., for violation of the Age Discrimination in Employment Act [ADEA]), even though both claims were for the same alleged conduct. More recently, as courts have become friendlier toward arbitration, a conflict arose concerning whether a union actually could waive an employee's right to proceed with a statutory discrimination claim.

The *14 Penn Plaza* case has now decided this issue. In a 5-4 decision, the Court explained that a collective bargaining agreement which is freely negotiated in good faith easily qualifies as a "condition of employment," subject to mandatory bargaining under the National Labor Relations Act. As such, a union may agree to a provision that, if clear and unmistakable, requires mandatory arbitration of contractual and statutory age-discrimination claims

in return for other concessions from the employer. There is nothing in the opinion to suggest that this holding will not apply to other federal statutory claims of discrimination.

What Does *14 Penn Plaza* Mean For Employers?
Unless Congress amends the ADEA (or other federal discrimination statutes) to prohibit the mandatory arbitration of discrimination claims, this is good news for employers. For now, employers may avoid defending against the same age (and likely other) discrimination allegations in multiple forums. Although the employee may still pursue discrimination claims with the Equal Employment Opportunity Commission and National Labor Relations Board (which may then seek judicial intervention), the unionized employer may now, in many cases, avoid the courtroom and an unpredictable jury entirely. Because arbitration is less formal than federal court, it typically decreases the amount of time-consuming and expensive discovery involved, in addition to decreasing management time and company resources. In general, the quicker and more streamlined process of arbitration means faster, more cost-effective resolutions for employers.

Before employers may benefit, however, they must successfully negotiate in good faith with the union, a provision that clearly and unmistakably waives contractual and statutory discrimination claims.

Proceed With Caution
As a result of procedural issues in the case, the precedential value of *14 Penn Plaza* may be limited. The Supreme Court assumed, but did not decide, that the arbitration provision in *14 Penn Plaza* was clear and unmistakable.

Finally, employers can expect to pay a price for the "other concessions" a union is likely to request in return for such a provision. In the wake of *14 Penn Plaza*, employers will meet resistance from unions regarding the negotiation of these provisions.

14 Penn Plaza is the most recent addition to the wave of activity surrounding unions and potential legislation. Husch Blackwell Sanders' employment lawyers will keep a watchful eye on how the Obama Administration responds to this decision.

What This Means To You
If your employees are or become unionized, consider carefully the scope of the arbitration clause contained in the collective bargaining agreement. Thanks to the U.S. Supreme Court, employers can now preclude discrimination claims from being raised in court.

Contact Info
If you have any questions, please contact your Husch Blackwell Sanders attorney or one of the firm'sg Labor & Employment attorneys.

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