

Employment Law Outlook

U.S. SUPREME COURT RULES THAT EMPLOYERS MAY FORCE EMPLOYEES TO ARBITRATE (RATHER THAN LITIGATE) EMPLOYMENT DISPUTES

~ William M. Furr, Esq. ~

On March 21, 2001, the U.S. Supreme Court ruled that employers may compel their employees to arbitrate employment-related claims. In *Circuit City Stores, Inc. v. Adams*, the Supreme Court held that federal courts have the power to require employees who have signed compulsory arbitration agreements to present their disputes to an arbitrator in an arbitration hearing rather than to a jury at a trial.

The Federal Arbitration Act was enacted in 1925 and requires federal courts to enforce arbitration provisions if they apply to transactions "involving commerce." The Act specifically excludes employment contracts of seamen, railroad employees and other transportation employees. In interpreting the FAA, the Supreme Court disagreed with the lower appeals court that employment contracts are not governed by the FAA. The Supreme Court reasoned that the FAA's specific exclusion of employment disputes by seamen, railroad employees and transportation employees would be meaningless if employment disputes for all employees were excluded from the Act's coverage.

The primary reason that employers use compulsory arbitration agreements is to avoid the risks and the costs of jury trials. Employers in states with more liberal employment discrimination laws have embraced the arbitration agreements in order to avoid the prospects of million dollar jury verdicts. Employers in more conservative states have not been as quick to require all of its applicants and employees to sign compulsory arbitration agreements.

Studies suggest that arbitrators' monetary awards are smaller than monetary awards by juries. However, a study several years ago concluded that employees who submit their claims to arbitration win their cases more frequently than those who take their case into federal court. One explanation for this is that many employers prevail on summary judgment in federal court before the case ever goes to trial.

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REVERSAL OF EEOC DETERMINATIONS IS MORE DIFFICULT

~ Wm. E. Rachels, Jr., Esq.~

From time to time we are requested to represent employers who initially arrive in our office with an EEOC Determination which is adverse to them. Typically, the employer had represented itself in the EEOC process and had failed to provide the persuasive presentation with supporting

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Employing Foreign Workers: A Free Seminar About Employment-Based Immigration Law

On Thursday, May 10, 2001, the Willcox & Savage Labor and Employment Law Group will present a free 90-minute seminar about Employment-Based Immigration Law. The seminar will cover what employers need to know about U.S. visas and work authorization. The program is intended for managers, human resource professionals, recruiters and others who make hiring decisions.

Immigration Questions Answered

This seminar will review the most popular visa categories used by businesses and will answer common questions about employment-based immigration, including:

- How can non-immigrant visas help your company fill key positions despite a shortage of qualified workers in the U.S.?
- What documentation must an employer have to hire foreign professionals?
- How can international businesses transfer qualified workers to the U.S.?
- How can domestic businesses hire foreign professionals?
- How long does it take to get an employment-based visa?

Thursday, May 10, 2001
Norfolk Waterside Marriott
8:30 a.m. – 10:00 a.m.
Free of Charge
Call to Register: 628-5635

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Employers considering the use of compulsory arbitration agreements should consider:

1. the history of large verdicts for employment cases in the cities and states in which the company does business;
2. the company's experience (*i.e.*, number of cases, number of adverse verdicts and amounts of verdicts) in defending employment discrimination or wrongful discharge cases;
3. the damages provisions in the state employment laws in states in which the company does business; and
4. the time and expense in implementing a compulsory arbitration procedure.

If the arbitration agreements are drafted correctly, the federal courts will now enforce them. Please feel free to contact us for assistance in deciding whether to implement an arbitration process and in drafting the actual compulsory arbitration agreements.

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documentation which is usually necessary to avoid that result. The employers had submitted some information in response to the EEOC's inquiries, but had done so insufficiently. The employer wants to reverse that Determination. The adverse Determination leads to the EEOC's efforts for a "conciliation," absent which either the EEOC or the Charging Party can bring a lawsuit. While the employee can bring a lawsuit without a Determination in the employee's favor, the Determination adverse to the employer opens the door for a lawsuit by the EEOC and encourages private party plaintiff attorneys. Even when the employer wins, the defense of the lawsuit is expensive.

There was a time when it was easier than now to obtain a thorough reconsideration by the EEOC of the adverse Determination. However, that opportunity has been considerably limited recently. The EEOC appears to have taken a much harder line against employers who do not submit sufficiently convincing information at the pre-Determination stage, particularly where the information was previously available for the employer, as opposed to truly "after discovered evidence." The post-Determination submission of the previously available information cannot be expected to cause a change in the Determination despite the otherwise merits of that information.

It is therefore critical that the employer's position be submitted thoroughly and timely with a presentation that convincingly presents the employer's position. After the Determination is probably going to be too late.

BUSH SIGNS LEGISLATION RESCINDING OSHA ERGONOMICS RULES

~ Timothy M. McConville, Esq. ~

President Bush last month signed legislation to rescind ergonomics regulations adopted by the Occupational Safety and Health Administration ("OSHA") in the waning days of the Clinton Administration. The ergonomics regulations became effective on January 16, 2001, and employers' obligations to provide information to and handle complaints from employees under the rules were to be triggered in October.

The action by Congress and President Bush, however, invalidated the new rules and prevents OSHA from issuing a substantially similar standard in the future. Many employers and business groups criticized OSHA's ergonomics rules as overly burdensome on employers and because of the lack of any requirement that a covered musculoskeletal disorder ("MSD") actually be caused by any workplace condition. Under the rescinded rules, employers were required to provide significant benefits to covered employees with covered MSDs. Specifically, the regulations required maintaining an employee's employment rights and benefits and at least 90 percent of the employee's earnings for up to ninety days while the employee was out of work due to an MSD.

While the ergonomics regulations enacted late in the Clinton Administration have now been rescinded, Secretary of Labor Elaine L. Chao has indicated that she will pursue her own "comprehensive approach" to ergonomics. She also has indicated that such an approach "may include a new rule making . . . that will provide employers with achievement measures that protect their employees before injuries occur."

Willcox & Savage's *Employment Law Outlook* will continue to keep readers up-to-date regarding any OSHA ergonomics rule-making activity.

NEW GUIDANCE ISSUED BY EEOC REGARDING THE APPLICATION OF THE ADA TO TEMPORARY WORKERS

~ John T. McDonald, Esq. ~

On December 22, 2000, the EEOC issued a Guidance entitled "Application of the ADA to Contingent Workers Placed by Temporary Agencies in Other Staffing Firms." The Guidance addresses the responsibilities of staffing firms and their clients under the ADA, specifically: (1) providing reasonable accommodations to temporary employees; (2) using qualification standards and pre-employment tests;

and (3) asking disability-related questions or requiring medical examinations of applicants and employees.

1. Reasonable Accommodations

The EEOC Guidance states that in most cases only the staffing firm is obligated to provide reasonable accommodations during the application process. However, if a client sends an applicant to apply for work through a staffing firm, then the obligation extends to the client as well. Even where a client is not obligated to provide accommodations during the application process, it may still violate the ADA if it continues to obtain workers from a staffing firm when it knows or has reason to know that the firm is not complying with the ADA. Once the application process is complete, both the staffing firm and the client are obligated to provide the employees with reasonable accommodations.

The EEOC Guidance suggests that staffing firms and their clients include provisions in their contracts detailing their respective responsibilities for making reasonable accommodations. Through these provisions, the entities may allocate responsibility for providing accommodations in any way they choose. The EEOC cautions, however, that such contractual arrangements will not alter either entity's obligations under the ADA.

The only way for either entity to avoid this obligation is by demonstrating that the accommodation poses an undue hardship. If the accommodation involves significant expense even when considering the resources of both entities, then they can each show an undue hardship and avoid the accommodation. Even if the combined resources of the staffing firm and the client are sufficient to provide an accommodation to the applicant/employee, the staffing firm or the client may still demonstrate undue hardship if it can prove that the other entity refused to contribute to its good faith accommodation efforts. If the individual entity's resources alone are sufficient to provide the accommodation, it must do so. If an entity obligated to provide an accommodation refuses to contribute, it remains liable for violating the ADA even if the other entity provides the accommodation on its own.

An undue hardship may also be shown regardless of cost if either entity demonstrates that a reasonable accommodation cannot be provided quickly enough to enable a staffing firm worker to begin or complete a temporary assignment in a timely manner.

2. Qualification Standards and Other Selection Criteria

The EEOC Guidance lists the circumstances under which a staffing firm and/or client may be liable for applying selection criteria to disqualify workers on the basis of a disability when the selection criteria is not job-related and consistent with business necessity. A staffing firm is liable if it applies such a standard either directly or at its client's

direction. A client is liable for such a standard if it applies such directly or indirectly through a staffing firm. Either entity may also be liable for the application of such a standard by the other if it knows or has reason to know of the practice and fails to take corrective action within its control.

3. Disability-Related Questions and Medical Exams

The EEOC Guidance states that staffing firms and clients may not ask disability-related questions or require medical examinations prior to an offer of employment. An offer of employment exists only when a staffing firm assigns an individual to a particular client. Therefore, under the Guidance no disability-related questions or medical examinations may be required until a staffing firm worker is assigned to a particular client. Once assigned to a particular client, the client or the staffing firm may ask any disability-related questions or require any medical examinations it chooses, as long it does so for all individuals entering the same job. If a qualified individual is screened out because of a disability as a result of this process, the client or staffing firm must show that the exclusionary criteria is "job-related and consistent with business necessity," and that there was no reasonable accommodation that could render the individual able to meet the criteria.

REVERSE DISCRIMINATION "A DELICATE BALANCE OF INTERESTS"

~ Samuel J. Webster, Esq. ~

The subtle nuances of Title VII have led to cases involving "reverse discrimination," in which a member of a majority seeks the protected class status created by Title VII. More recently, reverse discrimination has taken on a more subtle hue:

- Male bank worker states claim for sexual harassment when his female coworkers hire a male stripper for the office Christmas party.
- Single kick in male's groin performed by a female employee may be sufficiently severe to rise to the level of unlawful sexual harassment; equated to sexual assault.

Contrast the above with the following strange examples:

- Lewd sexual comments directed by supervisor to both men and women was merely "indiscriminately vulgar" and not harassment on account of sex.
- Supervisor seeking sexual favors from husband and wife and grabbing both; "authentic bisexual or equal opportunity harassers may avoid Title VII liability."

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Reverse Discrimination Continued from Page 3

Five of the twelve U.S. Courts of Appeals impose a higher proof standard in reverse discrimination cases than in discrimination cases brought by minorities: the majority plaintiff must show “background circumstances” that support the suspicion that the defendant employer discriminated against a member of a majority class. Under this analysis, it is not sufficient for the majority plaintiff that he was qualified for the position, that he was rejected, and that the employer continued to seek applicants. The majority plaintiff must also show “background circumstances” establishing that the defendant is “that unusual employer who discriminates against the majority.”

At least one U.S. Court of Appeals (3d Circuit) has rejected the heightened “background circumstances” standard for reverse discrimination. The Fourth Circuit Court of Appeals, which governs federal law in Virginia and other mid-Atlantic states, has avoided deciding whether to apply the “background circumstances” test. Once the position is filled, as it would be before reverse discrimination can even occur, the Fourth Circuit has stated that the plaintiff must then show “other evidence” of discrimination, which in and of itself imposes a higher standard of proof.

Regardless of what standard the courts apply, employers should understand that an employee, minority or majority,

may sue for employment discrimination. What these various cases and proof schemes illustrate is that employers must continue to make employment decisions based upon legitimate, nondiscriminatory reasons. Moreover, employers should document and substantiate the basis for the employment decision.

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LABOR, EMPLOYMENT & EMPLOYEE
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Outlook is published for the clients, friends, and associates of Willcox & Savage, P.C. to encourage and promote communication about labor and employment law development.

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