PULLMAN &COMLEY

New Guidance from State and Federal Courts for Employers Who Require Arbitration of Employment Disputes

Working Together

07.17.2018
By Margaret Bartiromo

There is an on-going debate in the field of employment discrimination law as to whether an employer can require an employee to take a discrimination claim to arbitration rather than filing a lawsuit. A recent decision of the Connecticut Superior Court at Hartford in the case of Grose v. Didi, LLC gives some guidance on the necessary ingredients for a valid arbitration agreement.

The case involved a former employee who filed an age discrimination claim in Superior Court. The employer filed a motion asking the Court to compel the plaintiff to participate in arbitration pursuant to an arbitration agreement that had been signed by the employee and the employer's president, and to stay (that is, postpone) the court proceedings until the arbitration occurred. The Court found that the arbitration agreement was valid, and granted the motion.

The Court started with a finding that Connecticut has a clear public policy in favor of arbitration. The plaintiff argued that nevertheless the arbitration agreement was not a valid contract because she had been told approximately a year and a half after starting her employment that she must sign the arbitration agreement or be fired. She also argued that the agreement was unconscionable; that is, fundamentally one-sided and unfair. However, the Court ruled that because the plaintiff was an employee at will and could be fired at any time, the fact that the employer refrained from firing her at that particular time was a benefit to her. Moreover, she expressly consented to the arbitration agreement by signing it. Finally, the employer was also binding itself to participate in arbitration, so the obligation was mutual.

The Court also decided that the agreement was not unconscionable because the choice of arbitrator was by mutual agreement, not by a unilateral imposition by the employer, and because the employer would pay the arbitrator's filing fees and costs, subject only to a contribution from the employee in an amount equal to the court filing fee (currently $360). The Court stayed the lawsuit and ordered the employee to arbitrate her claims.

Note that this lawsuit was stayed shortly after it was commenced. As a general proposition, lawsuits stayed in favor of arbitration are subject to dismissal after the arbitration is concluded and the arbitration award is confirmed by a court.

PULLMAN & COMLEY

New Guidance from State and Federal Courts for Employers Who Require Arbitration of Employment Disputes

The U.S. Supreme Court has also recently weighed in on employment arbitration agreements, holding that employment agreements requiring disputes to be resolved by *individual* arbitration (as opposed to *class action* arbitration) are enforceable. These provisions are often called "class action waivers," since the employee gives up the right to bring or participate in a class action in arbitration. In Epic Systems Corp. v. Lewis, the Court determined that under the Federal Arbitration Act (the "FAA"), courts must enforce agreements to arbitrate according to their terms, including terms mandating individualized proceedings, and that while the FAA recognizes defenses that apply to contracts generally (e.g, fraud, duress, unconscionability), those defenses did not apply to the agreements under the Court's review.

In light of these decisions, Connecticut employers seeking to arbitrate employment disputes should:

- Plainly state in handbooks and hiring materials that employment is at will;
- Have a written arbitration agreement signed by employees that unambiguously states that all disputes will be resolved by arbitration; if class action waivers are included, they should be clear and explicit;
- Provide a neutral arbitrator selection process;
- Absorb the cost of arbitration (which can be several thousand dollars), imposing no more than the cost of commencing litigation on the employee; and
- Give employees time to consider the arbitration agreement and to consult with counsel. Under the FAA, courts can refuse to enforce arbitration agreements on the same grounds that make any contract unenforceable, including duress or coercion. Providing employees a reasonable period of time to review an arbitration agreement before they must sign it makes the agreement less vulnerable to attack.

Posted in U.S. Supreme Court

Tags: Arbitration, CT Superior Court