RECENT JUDICIAL DECISIONS REINFORCE THE IMPORTANCE OF DRAFTING ARBITRATION AGREEMENTS WITH EMPLOYEES TO MINIMIZE CLASS ACTION RISKS

Recent decisions by the United States Supreme Court and Second Circuit Court of Appeals demonstrate that courts have become increasingly willing to enforce properly drafted arbitration contracts that require employees to waive (i.e., give up) their rights to bring class action lawsuits. These decisions also confirm that companies should pay close attention to how their arbitration contracts with employees are worded to minimize legal risks associated with potential class action litigation.

SUPREME COURT DECISIONS

On June 20, 2013, the United States Supreme Court ruled in American Express v. Italian Colors Restaurant that arbitration contracts requiring plaintiffs to arbitrate their cases individually rather than through a class action are legally enforceable, even if the costs of individual arbitration outweigh the potential financial recovery.

The case involved a group of merchants that had signed arbitration contracts with American Express prohibiting them from arbitrating legal disputes on a class-wide basis. The Supreme Court held that the class action waiver that the merchants signed would be enforced even if the costs of proving their claims in individual arbitration would be prohibitively expensive.

On June 10, 2013, the Supreme Court upheld an arbitrator’s decision to permit a case to proceed in arbitration as a class action. The plaintiffs in Sutter were doctors who sued Oxford Health Plans in a proposed class action alleging that they were not properly paid for medical care they had provided under an agreement with Oxford.

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THE BOTTOM LINE

Based on these recent cases, employers that require employees to sign arbitration contracts would be well-advised to review and revisit these contracts to ensure that they provide adequate protections in the event of legal disputes. Contract provisions that require employees to waive their right to bring class action lawsuits in both court and arbitration should cover, at a minimum, employment discrimination claims under Title VII and analogous state and city laws. And in light of the significant deference that courts give to the decisions of arbitrators and the limited circumstances under which arbitration decisions may be reversed, employers should specify in arbitration contracts that the question of whether an employee may bring a class action is an issue for a court – not an arbitrator – to decide.

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or not their contract permitted arbitration on a class-wide basis.

Based on the language of the contract, the arbitrator decided that the doctors could proceed with a class action lawsuit in arbitration. Oxford argued that the arbitrator made the wrong decision.

In upholding the arbitrator’s determination, the Court explained that it would only overturn an arbitrator’s decision if the arbitrator acted beyond his or her authority in interpreting the contract. In this case, the Court held that the arbitrator did what the parties had requested by providing an interpretation of the arbitration contract that resolved a disputed issue.

The Court found that because Oxford agreed to permit the arbitrator to decide the issue of class arbitration, it had to “live with that choice.” Even if Oxford believed the arbitrator’s decision was mistaken, it is not a judge’s role to question whether an arbitrator interpreted the contract correctly.

SECOND CIRCUIT DECISION

The issue of whether a person who signs an arbitration agreement can bring a class action was also addressed earlier this year by the Second Circuit Court of Appeals in the case of Parisi v. Goldman, Sachs & Co. Parisi, a former Goldman managing director, brought a proposed class action with two other former employees alleging that Goldman had engaged in a pattern and practice of sex discrimination in violation of Title VII.

Goldman moved to compel the arbitration of Parisi’s individual claims, arguing that Parisi had signed an arbitration contract during her employment and that the contract did not permit her to bring class action claims in arbitration. Parisi disagreed with Goldman on the ground that submitting her claim to individual arbitration would prevent her from pursuing a class action in court on a “pattern-or-practice” theory of discrimination under Title VII.

On appeal, the Second Circuit determined that employees do not have a substantive right to pursue “pattern-or-practice” claims as a class action. The court held that under Parisi’s arbitration contract, she could only pursue her individual claims in arbitration. However, Parisi could still submit evidence of Goldman’s patterns, practices or policies that she believed were discriminatory in the arbitration of her individual claims.