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CLIENT ALERT

UPDATE FROM THE LABOR & EMPLOYMENT TEAM

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Contacts

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Supreme Court's Holding On Arbitration May Create A Wedge Issue For Employee Advocates

A recent decision by the U.S. Supreme Court has dramatically changed the legal landscape with regard to litigation of workplace discrimination claims by employees who are subject to a collective-bargaining agreement. On April 1, 2009, the Court held that a mandatory arbitration clause in a collective-bargaining agreement can bar litigation in court of bargaining unit members' claims under the Age Discrimination in Employment Act ("ADEA"). *14 Penn Plaza LLC v. Pyett*, No. 107-581. Justice Thomas authored the majority opinion, which was joined by Chief Justice Roberts and Justices Alito, Kennedy and Scalia. Justice Souter authored a dissent, which was joined by Justices Breyer, Ginsberg and Stevens. Justice Stevens wrote a separate dissent.

This decision drastically modifies, if not overturns, more than 30 years of case law, suggesting that unions cannot negotiate away their members' rights to pursue individual discrimination claims in court. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the seminal case for that line of authority, has been widely interpreted to preclude enforcement of mandatory arbitration in discrimination claims under federal statutes.

The decision in *14 Penn Plaza* places arbitration of claims squarely among the terms and conditions of employment on which unions generally are authorized to negotiate on behalf of their members. It potentially places unions at odds with some of their members by subordinating individual rights to collective rights, and perhaps could drive a wedge between proponents of union organizing and proponents of individual employee rights.

Facts of the Case

The three plaintiffs in the district court proceedings were members of the Service Employees International Union ("Union"). The Union was a party to a collective-bargaining agreement with the Realty Advisory Board on Labor Relations, Inc. ("RAB"), a multi-employer bargaining association within the New York City real estate industry. A provision of the agreement required union members to submit discrimination claims to binding arbitration.

14 Penn Plaza LLC ("14 Penn Plaza") was a member of the RAB and owned and operated an office building located in New York City. The plaintiffs, who were employed by Temco Services Industries, Inc. ("Temco"), worked in the office building as night watchmen. In August 2003, 14 Penn Plaza contracted with a different outside security firm, and Temco reassigned the three employees to other positions, which they claimed resulted in

less desirable work, loss of income and emotional distress.

At the employees' request, the Union filed a grievance alleging, in part, that the reassignments violated their rights under the collective-bargaining agreement and under the ADEA. The matter then proceeded to arbitration. After the initial proceeding, the Union withdrew the ADEA claim.

In May 2004, the three employees filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that Temco and 14 Penn Plaza violated their rights under the ADEA. The EEOC issued a "Right to Sue" notice approximately one month later, and the employees filed suit in the U.S. District Court for the Southern District of New York. In response, 14 Penn Plaza filed a motion to dismiss or, in the alternative, to compel arbitration of the ADEA claim. The district court denied the motions, concluding that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable."

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed. Citing *Alexander v. Gardner-Denver Co.*, the court concluded that it could not compel arbitration of the ADEA claims because " 'a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress." The court recognized that *Gardner-Denver* was at odds with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which held that an individual could agree to waive his or her own right to a federal forum in an age claim, but reconciled the decisions by holding that, while an individual could agree in advance to compulsory arbitration to resolve all potential claims (including statutory discrimination claims), a labor union could not agree to such a provision on behalf of its members.

The Majority Opinion

The Supreme Court reversed the Second Circuit's decision and concluded that examination of the ADEA and the National Labor Relations Act ("NLRA") resulted in "a straightforward answer to the question presented: The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to … the ADEA."

The Court first noted that the Union and the RAB had bargained in good faith that employment-related discrimination claims would be resolved through arbitration, and that this "freely negotiated term" constituted a condition of employment that is subject to mandatory bargaining. The Court then expanded on *Gilmer*'s finding that the ADEA did not expressly preclude arbitration, and concluded that "nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." As such, the Court could find "no legal basis … to strike down the arbitration clause in this [collective-bargaining agreement] … ."

The Court distinguished the *Gardner-Denver* line of cases on the basis that it did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. It rejected *Gardner-Denver*'s general hostility toward arbitration of statutory discrimination claims on the grounds that it "rested on a misconceived view of arbitration that [the] Court has since abandoned." The Court clarified that an agreement to arbitrate a statutory discrimination claim is not tantamount to a waiver of any substantive right, and confirmed that arbitration is an appropriate vehicle to litigate statutory discrimination claims.

The Court declined to embrace any "judicial policy concern" that "in arbitration, as in the collective-bargaining process, a union may subordinate the interest of an individual employee to the collective interests of all employees." In the Court's view, Congress, not the courts, bears responsibility for balancing the interests of the individual and the bargaining unit, and can amend the ADEA and/or the NLRA as it sees fit. The Court further concluded that Congress has accounted for potential union conflicts of interest through the duty of fair representation imposed upon labor organizations.

The Court found that the employees had waived their argument that the collective-bargaining agreement did not "clearly and unmistakably require them to arbitrate their ADEA claims" by failing to raise it in the lower courts. The Court recognized the argument that the Union not only could preclude a federal lawsuit through negotiation but could also block presentation of a claim in arbitration through exercise of its role as a representative. However, because factual issues remained on that subject, the majority concluded that it would be inappropriate to decide whether the collective-bargaining agreement operated as a prospective waiver of the employees' substantive ADEA rights, as opposed to a forum waiver.

The Dissenting Opinions

Justice Souter's dissent criticizes the majority for failing to adhere to its holding in *Gardner-Denver*, which has been "unanimously described … as raising a 'seemingly absolute prohibition of union waiver of employees' federal forum rights.' " The dissent also observes, however, that the majority decision "may have little effect" because "it explicitly reserves the question whether a [collective-bargaining agreement's] waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration." Because this is "usually the case," the dissent observes, the majority decision may have limited application.

Justice Stevens' dissent largely follows Justice Souter's analysis, but emphasizes his belief that the holding reflects a preference for dispute resolution through arbitration at the expense of stare decisis.

Guidance for Employers

Taken at face value, the decision in *14 Penn Plaza* could result in a significant reduction in the amount of litigation against employers who are parties to collective-bargaining agreements that contain broad mandatory binding arbitration clauses. The decision, however, could prove to have narrow application, given that it leaves open the question whether a collective bargaining agreement's waiver of a judicial forum is enforceable when a union controls access to and presentation of employees' claims in arbitration.

Within the current political climate, this decision could spark action by Congress to clarify the ADEA, Title VII or other federal employment statutes to expressly preclude waiver of the right to federal jury trials through collective-bargaining agreements. However, that approach likely would require a public debate that might well highlight the tension between organized labor and individual employee rights. Advocates for individual rights likely would argue that unions should not be able to place the interests of the collective-bargaining unit over the interests of the individual in preserving the right to a jury trial on discrimination claims. Advocates for organized labor, on the other hand, might well argue that the mandatory subjects of collective bargaining include arbitration of any and all claims arising out of the employment relationship, and that mandatory arbitration may be key to negotiating higher wages and benefits.

In the meantime, employers can welcome the decision in *14 Penn Plaza* as a strong statement that employers should not be subjected to double jeopardy for discrimination claims when they have negotiated in good faith for mandatory arbitration of disputes in their collective-bargaining agreements.

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