Arbitrability of Statutory Discrimination Claims

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Congress enacted the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. (the "FAA") in 1925 as a solution to the "costliness and delays of litigation," but arbitration has other benefits as well, including keeping potentially embarrassing discrimination claims private. Whether statutory discrimination claims are arbitrable has been the subject of debate and conflicting legal analysis, leaving employers with no reliable option other than defending claims publicly and at great expense. However, a few recent cases shed some light on the subject for employers who wish to take advantage of the benefits of arbitration to resolve statutory discrimination claims.

Is a Statutory Discrimination Claim Arbitrable?

In principle, courts have been open to the concept that employment discrimination claims may be arbitrated for some time. For example, in *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 24-26 (1991), the Supreme Court held that the FAA allows for the arbitration of federal employment discrimination claims, unless otherwise barred by law. The applicability of arbitration clauses to discrimination claims is, therefore, complicated by various federal and state anti-discrimination statutes, which often guarantee claimants access to administrative avenues to redress their claims. Such administrative remedies are attractive to employees because they are often designed to permit a claimant to file a complaint without retaining counsel or expending any fees.

Moreover, even when an employment agreement contains an arbitration clause, if an employer and an employee disagree over whether a discrimination claim is arbitrable, courts are called upon to interpret whether the parties have a contractual agreement to submit the particular claim to arbitration. While judicial rulings on the arbitrability of discrimination claims have been inconsistent, a few recent cases provide some practical guidance for employers on this subject.

Recent Cases Provide Guidance to Employers

In 2009, the Supreme Judicial Court decided the case of *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, in which the plaintiff, a former chief of anesthesiology, sued her employer for gender-based discrimination and retaliation under Massachusetts law, and asserted other factually related common-law claims. In the trial court, the employer moved to compel arbitration on the ground that the employment agreement with the plaintiff mandated arbitration of all of her claims. The Supreme Judicial Court of Massachusetts disagreed, holding that the plaintiff's statutory discrimination claims did not fall within the scope of the arbitration clause contained in her employment agreement. The agreement contained a broad arbitration clause similar to that found in many employment agreements, which required that "[a]ny claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations

shall be settled by arbitration." The court found that such language did not evidence an intent to arbitrate the plaintiff's statutory discrimination claims. In reaching that conclusion, the court held that Massachusetts' public policy against workplace discrimination is so strong that any employment contract in which an employee limits or waives any of the rights or remedies conferred by Massachusetts' anti-discrimination laws will only be enforceable if the arbitration agreement "is stated in clear and unmistakable terms," and is "unambiguous."

In reaching its decision, the *Warfield* Court relied, in part, upon another recent ruling of the United States Supreme Court - *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) - which upheld the validity of agreements to arbitrate statutory discrimination claims in the collective bargaining context. In Pyett, the Supreme Court held that as long as the agreement to arbitrate is "explicitly stated" in the collective bargaining agreement, it would be enforceable. In reaching that conclusion, the Court stated that "[n]othing 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."

Similarly, in *Garfinkel v. Morristown Obstetrics & Gynecology Assoc.*, P.A., 773 A. 2d 665 (N.J. 2001), the Supreme Court of New Jersey held that "[t]o be enforceable, a waiver-of-rights provision should provide at least that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination."

Take Away for Employers
Whether a statutory discrimination claim will be arbitrable will depend upon the applicable law in the jurisdiction and the language of a particular employment agreement. Such agreements must be crafted carefully, and particular attention must be paid to the language of the arbitration clause if it is to be enforced. In general, public policy arguments will favor a plaintiff's right to assert administrative and judicial claims against the employer absent a clear and unmistakable waiver of such rights. In the absence of laws prohibiting the arbitration of discrimination claims, the more explicit and unambiguous the arbitration agreement is, the more likely it is that a court will require the employee to arbitrate all covered claims, including statutory discrimination claims.

As the *Warfield* Court advised employers in Massachusetts, "parties seeking to provide for arbitration of statutory discrimination claims must, at a minimum, state clearly and specifically that such claims are covered by the contract's arbitration clause." Standard and commonly used language making "any and all disputes arising out of or in connection with an employment agreement" arbitrable is likely to be insufficient to force the arbitration of a statutory discrimination claim. Given the strong public policy behind anti-discrimination statutes, and the fact that discrimination claims are often based upon allegations of intentional, tortious behavior, courts interpreting such language may very well exclude discrimination claims from the scope of such an arbitration clause because such claims do not necessarily "arise out of or concern" the written agreement.

Rather, to position a discrimination claim for arbitration, an employment agreement should state as clearly as possible that the employee is specifically agreeing to arbitrate his or her common law and statutory discrimination claims, thereby waiving the right to seek applicable

administrative or judicial remedies. Employers should also consider including express references to all applicable statutory provisions in the arbitration clause, so that the waiver of rights under those statutes is unambiguous. In addition, the agreement should clearly reflect the employee's understanding of the type of claims subject to arbitration. For example, employers should consider including terms, in the employee's primary language, which reflect that:

- the employee knows that options other than arbitration, such as federal and state administrative procedures and judicial remedies, are available to resolve his or her discrimination claims;
- despite knowledge of such remedies, the employee agrees to arbitrate his or her discrimination claims;
- the employee understands that by signing the agreement he or she is waiving, and will forever be precluded from asserting, the right to utilize available statutory administrative procedures and to seek judicial remedies; and
- regardless of the nature of the employee's discrimination claim, the employee understands that such claim can only be resolved by arbitration, which is binding that upon all parties.

Because laws governing discrimination claims vary by jurisdiction, employers must first determine whether such claims are arbitrable. If so, judicial interpretation of arbitration clauses in a particular state may provide helpful guidance which can shape the language of the arbitration clause. In the absence of a clear directive, however, an employer should work with counsel to draft a clear, unambiguous arbitration clause, which is understandable to the contracting employee. While there are no guarantees that a particular discrimination claim will be subject to arbitration even if there is an express agreement between the parties, entering into an agreement which unequivocally requires arbitration of discrimination claims will make it more likely that a court will enforce the provision and that the employer will receive the benefit of its bargain.