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LEGAL ALERT

Legal Alert: Unilateral Right to Amend Arbitration Agreement Makes Employment Arbitration Clause Unenforceable

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Executive Summary: The Fifth Circuit recently allowed a collective action claim for overtime pay under the Fair Labor Standards Act (FLSA) to proceed and held that an arbitration agreement was unenforceable because the employer could unilaterally modify the arbitration agreement. *John Carey v. 24 Hour Fitness USA, Inc.*

While employed by 24 Hour Fitness, the plaintiff, Carey, received an employee handbook that included an arbitration agreement providing that all employment-related disputes would be resolved by an arbitrator through final and binding arbitration. Carey signed an Employee Handbook Receipt Acknowledgment indicating that he had received the Handbook. The Acknowledgment reiterated the arbitration policy and also stated that the terms of the Handbook are subject to change (the "Change-in-Terms" clause). Specifically, the Change-in-Terms clause stated, "I acknowledge that, except for the at-will employment, 24 Hour Fitness has the right to revise, delete, and add to the employee handbook. Any such revisions to the handbook will be communicated through official written notices approved by the President and CEO of 24 Hour Fitness or their specified designee. No oral statements can change the provisions of the employee handbook."

After Carey's employment ended, he filed a collective action lawsuit against 24 Hour Fitness seeking compensation for overtime worked by employees but allegedly not paid. The employer filed a motion to stay and compel arbitration; however, Carey countered that the arbitration agreement was not valid because the employer retained the right to amend the handbook. The trial court ruled in favor of Carey and directed the case be tried. The employer appealed decision, pointing to other language in the agreement that required the company to give the employee notice of any changes and further to obtain the employee's acknowledgement of the changes.

The Fifth Circuit held that the Change-in-Terms clause permitted the employer to unilaterally amend the arbitration agreement and apply those changes retroactively. Of the arbitration clause, the court said:

If a 24 Hour Fitness employee sought to invoke arbitration with the company pursuant to the agreement, nothing would prevent 24 Hour Fitness from changing the agreement and making those changes applicable to the pending dispute if it determined the arbitration was no longer in its interest.

The Fifth Circuit agreed with the trial court that the arbitration agreement was illusory:

[T]he fundamental concern driving this line of case law is the unfairness of a situation where two parties enter into an agreement that ostensibly binds them both, but where one party can escape its obligations under the agreement by modifying it.

The court also noted that there was no provision in the arbitration agreement to prevent the amendment by the employer after a demand for arbitration had been made, making the amendment process retroactive.

Note, this is a statutory rights case and the terms of the arbitration agreement must clearly fall within the parameters required by the Supreme Court in *Gilmer v. Interstate/Johnson Lane* to permit arbitration of statutory rights. The Court in *Gilmer* confirmed that statutory rights conferred by Congress can be arbitrated provided that the arbitrator can award the relief and remedies the same as in a court of law. In other words, the arbitral forum could be substituted for court enforcement so long as the arbitral forum provided the same protections of the substantive rights that were afforded under the statute. Providing the employer with the unilateral right to retroactively change the arbitration agreement did not afford the employee the intended protections required by *Gilmer*, thus the agreement was not enforceable.

Employers' Bottom Line:

To help ensure the enforceability of arbitration agreements, employers should make sure the terms of the agreements are fair and do not appear to give the employer an advantage over employees. If you have any questions regarding this decision or other labor or employment related issues, please contact the author of this Alert, John Allgood, jallgood@fordharrison.com, an attorney in our Atlanta office, or the Ford & Harrison attorney with whom you usually work.