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Arbitration of Workplace Age Discrimination Given Approval by Supreme Court

On April 1, 2009, the United States Supreme Court found, in the case of *14 Penn Plaza LLC v. Pyett*, No. 07-581, that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate workplace age discrimination claims is enforceable as a matter of law. The ruling may reopen the door so that employers again may consider using arbitration provisions in some employment contracts in an effort to avoid prolonged and costly civil litigation.

With this ruling, the Supreme Court clarified its earlier decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which some courts construed to preclude a union, through a collective-bargaining agreement, from agreeing to arbitrate employment discrimination claims. The ruling in *14 Penn Plaza* leaves no doubt that collective-bargaining agreement provisions requiring arbitration of statutory discrimination claims are enforceable.

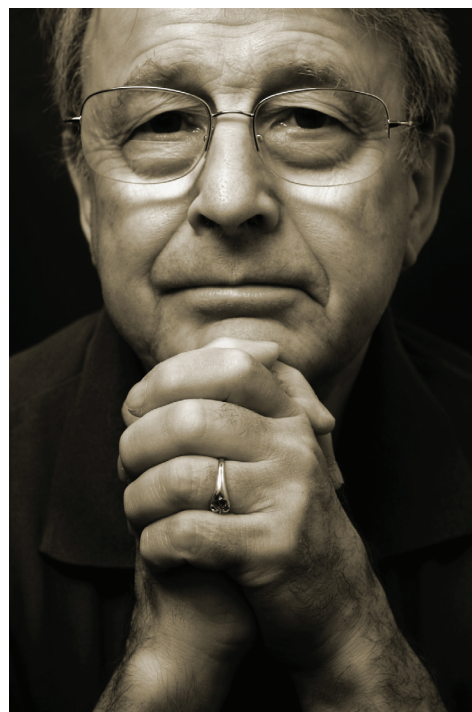
In *14 Penn Plaza*, union members, who were reassigned to less than desirable jobs than they had previously held, filed a suit in U. S. District Court alleging age discrimination under the Age Discrimination Employment Act ("ADEA"). The employer filed a motion to enforce the collective-bargaining provision, which required that all employment discrimination claims be adjudicated by binding arbitration.

The District Court denied the employer's motion, and the Second Circuit affirmed, holding that under *Gardner-Denver* collective-bargaining provisions requiring arbitration of employment discrimination claims were unenforceable. The Supreme Court granted certiorari to provide clarity over whether provisions in collective-bargaining agreements that require the arbitration of discrimination claims are enforceable.

The five-Justice majority in *14 Penn Plaza* held that agreements that clearly and unmistakably require a union member to arbitrate discrimination claims are enforceable as a matter of law. Justice Thomas, writing for the majority, first concluded that there was no legal basis for the Court to strike the provision. The Court explained that arbitration provisions qualify as a "condition of employment" subject to mandatory bargaining under the National Labor Relations Act. Generally, the Court will not interfere with bargained-for contract terms, unless a statute precludes what has been bargained for. Because the claim was filed under the ADEA, the Court examined the statute and concluded that it does not preclude arbitrating claims arising under it. Therefore, the Court did not have a legal basis to strike down the arbitration clause.

The Court went on to hold that *Gardner-Denver* does not stand for the proposition that collective-bargaining agreements cannot waive an individual employee's right to a judicial forum. The Court explained that *Gardner-Denver* did not deal with enforceability of collective-bargaining agreements, but rather whether the arbitration of a contract claim can preclude any subsequent judicial resolutions of a statutory claim. The Court further explained that the language in *Gardner-Denver* that was highly critical language of arbitration was based on a misconceived view that the Court has since abandoned.

Two dissenting opinions were filed in the case. One dissenting opinion, authored by Justice Souter and joined by Justices Stevens, Ginsburg, and Breyer, argued that *Gardner-Denver* is controlling and there is no reason to abandon precedent. The other dissent, authored by Justice Stevens, emphasized that the Court is bound by its prior decisions and that it should not abandon a prior decision in favor of promoting policy.



Arbitration of Workplace Age Discrimination Given Approval by Supreme Court (cont'd)

In the wake of *14 Penn Plaza*, it appears that employers again may consider using arbitration provisions in employment contracts in an effort to avoid prolonged and costly litigation in the court system. It is important to note, however, that the decision in *14 Penn Plaza* likely does not signal a return to previous practices of imposing arbitration provisions on all employees through their use in employment applications or acknowledgments which the Supreme Court previously found to be unenforceable (*Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002)).

It, in fact, may be seen as the logical extension of the cases that preceded it, where the bargaining positions of the parties to the agreement that contains the arbitration provision appears to be the lynchpin. If an arbitration provision can truly be construed as having been bargained for by the parties to the agreement (in the case of an individual's employment contract where the individual demonstrates legal sophistication and/or was in a strong bargaining position), or in cases where the arbitration provisions are included through collective bargaining or a similar process, then they are likely to be enforced.

On the other hand, if the provisions are "forced" on employees who lack bargaining power (particularly when included in applications for employment for minimum wage or low hourly-wage jobs, or acknowledgments signed when the employees are first employed), then those arbitration provisions are likely to still be unenforceable.

Huddleston Bolen and DeemHR to Offer Employment Law Need2Know on Employee Handbooks in Charleston, West Virginia, August 20th, 8:00 – 10:00 am

Huddleston Bolen LLP and DeemHR will offer an Employment Law Need2Know business seminar on Thursday, August 20 at Huddleston Bolen's Charleston, West Virginia office. The seminar, presented by employment lawyer, Scott Sheets, and human resource professional, Bernie Deem, will focus on employee handbooks. The seminar is free, but pre-registration is required.

Huddleston Bolen's Employment Law Need2Know seminar series provides human resource professionals, managers and business owners with practical information they can use to improve morale, increase productivity, and minimize the risk of employment lawsuits.

The Employment Law Need2Know on Employee Handbooks will be held on Thursday, August 20th, from 8:00 – 10:00 am, at Huddleston Bolen's Charleston, WV office, 13th Floor of Chase Tower. The seminar includes a free breakfast from 8:00 – 8:30. Attendees may register at www.huddlestonbolen.com/events or by contacting Debra Burge at dburge@huddlestonbolen.com or 304-691-8349.

Contact your Huddleston Bolen Labor & Employment Attorney for more information



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