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Congress May 'Carve Out' New Arbitration Rule

Legislation would ensure employees' right to take cases to court

By CARA ANN CERASO

Should pre-dispute arbitration agreements preclude employees from litigating employment disputes and statutory civil rights claims in court? Congress may answer this question with proposed legislation that would invalidate pre-dispute agreements to arbitrate employment, consumer or franchise disputes or disputes "arising under any statute intended to protect civil rights." H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009).

The proposed legislation generally would not cover agreements to arbitrate between an employer and a labor organization or between labor organizations. However, there is a "carve out" provision stating that no arbitration agreement between an employer and a labor organization or between labor organizations can waive an employee's right to seek judicial enforcement of statutory civil rights. This would have the effect of reversing the Supreme Court's recent holding in *14 Penn Plaza v. Pyett* that an arbitration provision in a collective bargaining agreement could be enforced and thus prevent an employee from pursuing statutory discrimination claims in court.

The proposed legislation comes in response to a series of U.S. Supreme Court decisions that have extended the scope of the Federal Arbitration Act – originally intended to resolve disputes between commercial entities having similar sophistication and bargaining power – to apply arbitration to resolve disputes between employers and employees.

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Condition Of Employment

In the common employer-employee relationship, the employee does not secure representation to negotiate a contract. As a result, he or she must choose between signing an employer-generated contract or foregoing an employment opportunity. Particularly in today's economy, that is not much of a choice.

Employers regularly include broad arbitration clauses that encompass "all disputes arising under the employment contract" or "all disputes arising out of [the employee's] employment or termination of employment." In the majority of cases, employees accept these broad pre-dispute arbitration agreements as a condition of employment. Without fully understand that they are doing so, they may be waiving constitutional and statutory rights, including the right to litigate an employment claim and consequently the right to a trial by jury. In any event, the result is that employees often have to arbitrate claims they never consciously decided to submit to arbitration, when they might prefer to exercise their right to a civil court proceeding.

Determining the scope of an arbitration agreement can be difficult, especially when the language is broad. The scope of an arbitration agreement necessarily depends on the terms of the agreement itself. This is a fact-based inquiry and one which varies greatly from case to case. One question that frequently arises is whether statutory rights – and particularly civil rights claims – not mentioned in the arbitration agreement are covered. It has been held that a union's agreement to arbitrate statutory antidiscrimination claims must be "explicitly stated" in the collective bargaining agreement's text. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 (1998). There is no comparable case law, however, that requires an explicit agreement to arbitrate statutory claims in an individual employment contract. This often results in arbitration of statutory claims the employee never realized wouldn't go before a court.


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Many arbitration agreements contain cost-sharing provisions that requires the employee to bear half, or if unsuccessful, potentially all the costs of arbitrating. In addition to substantial filing and case service expenses, the arbitrator's hourly-based fee charges can be significant. In many instances, the cost of arbitration is far greater than the cost of bringing suit in court. Many argue that the deterrent effect of this on employees' pursuit of claims hardly seems in accord with the legislative purposes behind either the arbitration acts or the statutory employment rights created by Congress and the various state legislatures.

These are just a few examples of the issues raised in the debate over whether the current federal policy favoring arbitration leads to undesired results. The proposed legislation would respond to these concerns by excluding from valid pre-dispute

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arbitration agreements all statutory civil rights disputes and all employment disputes. In addition, under the proposed legislation, all questions about the arbitrability of claims would be decided by a court, rather than by an arbitrator.

Impact on Employers

Employers should keep this proposed legislation in mind when entering into arbitration agreements with employees. Should this legislation be passed by Congress, predispute arbitration agreements between employers and employees would be invalid in the context of employment disputes and statutory civil rights claims. Of course, the employer and employee would still have the option of entering into a post-dispute agreement to arbitrate such claims. ■