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ALTERNATIVE DISPUTE RESOLUTION

Cost cutting through arbitration

by Lauren E. Moak

The cost of resolving employment disputes is often steep, specially if the dispute progresses beyond administrative proceedings into litigation. In addition, businesses are paying more attention to the mounting costs of employment litigation — and its impact on the bottom line — because of ongoing problems with the national economy. One method of addressing the escalating costs of litigation is including arbitration provisions in employment agreements. A recent decision from the U.S. Third Circuit Court of Appeals (whose rulings apply to Delaware employers) upheld the use of such agreements, providing added security for employers that pursue this route.

Employment arbitration — not just for unions!

Janice Quilloin began working for Hahnemann University Hospital in October 2006. At that time, she signed an acknowledgment indicating she had received the hospital's "Fair Treatment Process" brochure.

Quilloin resigned her employment with the hospital in February 2008, accepting work with another employer. She then returned to the hospital in December 2008, at which time she again signed an acknowledgment indicating receipt of the hospital's fair treatment brochure. Among other things, the acknowledgment obligated her to submit any employment disputes to arbitration with limited enumerated exceptions.

Quilloin later resigned her employment with the hospital again and filed a lawsuit. In the resulting case, she alleged a variety of claims, including violations of the Fair Labor Standards Act (FLSA). Relying on the arbitration clause in the fair treatment process acknowledgment, the hospital filed a motion to compel arbitration, asking the court to dismiss

the lawsuit and force Quilloin to submit her claims to arbitration.

A question of fairness

The question before the court was whether the dispute between Quilloin and the hospital was "arbitrable" — *i.e.,* whether it was the type of dispute that was required to be submitted to arbitration under the fair treatment process. Unless the parties expressly agree otherwise, questions of arbitrability are generally reserved for the courts, not the arbitrator who will hear the actual dispute.

In analyzing the dispute, the court first had to determine whether the parties had an enforceable contract regarding arbitration of their disputes. Quilloin alleged that requiring an employee to arbitrate employment disputes is unconscionable — that is, somehow unfair or unjust. The court ultimately held that the agreement wasn't unconscionable, and in the process, it provided the following guidance:

- To be enforceable, an arbitration provision should permit the parties to recover any remedy available in a court of law, including attorneys' fees and other fee-shifting remedies required under statutes like Title VII of the Civil Rights Act of 1964.
- Class-action waivers are permissible. The court noted that state laws prohibiting the waiver of class actions in arbitration proceedings are preempted by the Federal Arbitration Act (FAA). Consequently, arbitration agreements governed by federal law may require an employee to waive her class-action rights.
- Employers must give employees a reasonable amount of time to initiate arbitration. The agreement executed by Quilloin required that she request arbitration within either (1) one year from the date of the event leading to the dispute or (2) the statute of limitations provided under applicable law, whichever is longer. The court found this provision reasonable. While Quilloin asserted that the hospital could drag its feet to run out the clock, the court noted that she would always have recourse through a motion to compel arbitration under the agreement.
- A disparity of bargaining power between the employer and employee doesn't automatically render an arbitration agreement unconscionable. However, if an employee is dependent on the employer for more than just income — *e.g.,* immigration status or understanding the agreement when the employee has minimal education — the outcome may be deemed unfair.

Significantly, the court noted that the hospital's agreement was ambiguous on the issue of attorneys' fees. The court determined, however, that the appropriate approach was to allow the arbitrator to reach a decision and then review the decision to determine whether the arbitration agreement was applied in an unconscionable manner. Thus, the court would be involved only if necessary. *Quilloin v. Tenet Healthsystem Philadelphia, Inc.*

Bottom line

The cost of doing business, and particularly the expense of litigating employment disputes, continues to rise. In an effort to minimize litigation costs, employers should consider including arbitration clauses in their employment agreements. Keep in mind, however, that all disputes may not be subject to mandatory arbitration. In addition, it would be wise to refer to the points discussed in this article when drafting your agreement. Because of the many nuances in this area of the law, we recommend consulting with an attorney to determine whether arbitration agreements would work for your business and what to include in an appropriate and enforceable agreement.

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