

Update on the Law: The Supreme Court Upholds Union-Negotiated Mandatory Arbitration of Statutory Discrimination Claims

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On April 1, 2009, the United States Supreme Court issued its decision in *14 Penn Plaza LLC v. Pyett*, holding that a provision in a collective-bargaining agreement ("CBA") requiring arbitration of claims brought under the Age Discrimination in Employment Act ("ADEA") is enforceable under federal law. This decision is significant to all employers who have employees who are subject to CBAs, as it permits employers and unions to negotiate a requirement that employees subject to the CBA must arbitrate statutory employment discrimination claims.

In *14 Penn Plaza*, the plaintiff employees were employed pursuant to a CBA negotiated by the Service Employees International Union, Local 32BJ, the exclusive bargaining representative of building services industry employees in New York City, and the Realty Advisory Board, a multi-employer bargaining association for the New York City real estate industry that negotiated on behalf of 14 Penn Plaza. The CBA explicitly provided that statutory discrimination claims, including those arising under the ADEA, are subject to the CBAs grievance and arbitration provisions as the sole and exclusive remedy for violations.

After the employees were reassigned to different job duties when their employer entered into a new contract for security services, the Union, on behalf of the employees, filed grievances challenging the reassignments on the grounds of age discrimination and violations of the CBA. When the Union failed to obtain relief under the grievance procedure, it requested arbitration for the statutory and contractual claims. The Union, however, withdrew the age discrimination claim after determining that it could not legitimately object to the reassignments as discriminatory because it had consented to the contract that resulted in the reassignments.

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statutory claims.

In *14 Penn Plaza*, the Supreme Court reversed the Second Circuit's decision and held that the National Labor Relations Act authorized the Union and the RAB, negotiating on behalf of 14 Penn Plaza, to negotiate in good faith and agree that employment-related discrimination claims must be resolved in arbitration. As a result, the Supreme Court explained, the CBAs mandatory arbitration provision must be enforced by the judiciary unless the ADEA itself precludes arbitration, which the Court concluded it did not.

The Supreme Court explained that it was not overruling *Gardner-Denver*, but that *Gardner-Denver's* holding was narrower than the interpretation relied upon by the Second Circuit. It did not prohibit the enforcement of provisions requiring arbitration of statutory claims in CBAs. Rather, *Gardner-Denver* held that the arbitration of contractual claims did not preclude subsequent judicial resolution of statutory claims where the CBA did not cover statutory claims. The Court also reiterated that mandatory arbitration provisions do not waive any substantive rights under the ADEA, but waive only the right to seek relief from a court in the first instance.

The Court further clarified that any language in its prior decisions suggesting that statutory employment claims were not appropriate for arbitration was based on misconceptions about arbitration that the Court has since abandoned. In addressing the Court's previously raised concern that a conflict-of-interest may arise when the Union weighs the collective interest of all employees against that of the individual, the Court concluded that it could not rely on judicial policy concern as a source of authority to introduce a qualification into the ADEA that is not found in its text. Further, the Court found that protections against this potential conflict-of-interest already exist through the Union's "duty of fair representation" and subjection to liability for discrimination under the ADEA itself, and the individual's right to file discrimination claims with the EEOC and the NLRB.

Assuming that Congress does not enact legislation exempting statutory discrimination claims from arbitration, it is now clear that a union-negotiated CBA may waive union members' right to a judicial forum for statutory claims. To that end, employers should review the arbitration provisions of their existing CBAs to determine if the provisions are enforceable under *14 Penn Plaza* for statutory claims. If not, employers may want to consider negotiating for revisions when the contracts are up for renegotiation. Remember, the mandatory arbitration clause must use clear and unmistakable language establishing that the statutory claims are subject to arbitration, must identify the specific statutory claims subject to arbitration, and must not waive any substantive statutory rights, including the right to all remedies available under the law.

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