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14 Penn Plaza's Impact on Collective Bargaining

Employers and Unions Should Consider Negotiating Agreements to Arbitrate

By Paul Salvatore and Brian Rauch

Years ago, arbitration was frowned upon by the courts as a second-class system of justice that was unable to provide the thoughtful and full relief that courts could award. Recent jurisprudence has repudiated these antiquated beliefs regarding arbitration, and courts today readily enforce arbitration agreements. In *14 Penn Plaza v. Pyett*, 07-581 (S. Ct. April 1, 2009), the Supreme Court continued this trend by clearly stating that a union-negotiated arbitration agreement can bind individual employees to arbitrate statutory discrimination claims. Accordingly, employers and unions should consider taking advantage of the benefits of arbitration by including provisions in future collective bargaining agreements ("CBAs") that require unionized employees to arbitrate statutory claims.

The Supreme Court's Decision

The underlying lawsuit was brought by three night watchmen and porters employed by Temco Service Industries, Inc., and represented by Local 32BJ, SEIU ("Local 32BJ" or "Union"). As a result of 14 Penn Plaza hiring licensed security officers, the employees were reassigned from their duties monitoring the building's lobby to different duties within their job descriptions. The Union demanded arbitration under the Local 32 BJ / Realty Advisory Board on Labor Relations, Inc.'s ("RAB's") CBA for alleged contract and statutory age discrimination violations relating to the reassignment. The Union arbitrated the contract claims, but withdrew the discrimination claims.

The employees then filed a federal lawsuit under the Age Discrimination in Employment Act ("ADEA") in the Southern District of New York rather than bringing these claims in arbitration. Defendants moved to compel arbitration pursuant to the Local 32 BJ / RAB's CBA requirement that all claims of discrimination, including claims under the ADEA, be submitted to arbitration. The district court denied the motion to compel, and the Second Circuit sustained the denial.

In a 5-4 decision, the Supreme Court reversed, holding that the National Labor Relations Act ("NLRA") gives unions the ability to negotiate with employers over a clause that requires arbitration of ADEA claims, as such a term "easily qualifies" as a condition of employment that is subject to mandatory bargaining. The majority opinion, written by Justice Clarence Thomas, noted that courts generally may not interfere in a collectively bargained-for exchange. Thus, a CBA's arbitration provision must be enforced unless the underlying statute precludes arbitration of claims brought under the statute. As the absence of any ADEA prohibition against arbitration was previously recognized by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S.20 (1991). There, the Court held that "there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal."

Benefits of an Arbitration Agreement for Employees And Employers

The Supreme Court's decision permits parties to a CBA to agree to provisions requiring arbitration of statutory claims. Therefore, employers and unions should explore the benefits of arbitration. The benefits of arbitrating, rather than litigating, employment claims are well documented. Having an arbitrator rule on employment claims provides many advantages to employees and employers. For example:

- Expertise of the Decision-maker — Because the parties select the arbitrator, they can choose a decision-maker who is an expert in employment claims and the applicable industry.
- Finality of the Decision — Arbitration agreements usually have a provision stating that the arbitrator's decision is final and binding; thus there would be extremely limited grounds for any appeal.
- Privacy of the Proceeding — As opposed to litigation, arbitration is a private forum with limited public access.
- Procedural Informality — Parties to arbitration can opt for informality in the hearing, which would eliminate the time and cost expended

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Paul Salvatore is Co-Chair of Proskauer Rose LLP's Labor and Employment Law Department and was lead counsel for *14 Penn Plaza* before the Supreme Court. **Brian Rauch** is a Senior Associate in the department and was a member of the team representing 14 Penn Plaza. The authors thank **Rebecca Berkebile**, an Associate at Proskauer, for her assistance in preparing this article.

in adhering to a court's procedural formalities.

- Low Cost — Arbitrations typically cost less than litigations due to the lack of formality, limited avenues of appeal and limited discovery.
- Speed — The same factors that lead to low costs also lead to speedy resolutions. Moreover, the parties do not have to wait for a trial date to be assigned by the court, but can proceed to arbitration as soon as they and the arbitrator are ready.

In addition to these general benefits of arbitration provisions, in the collective bargaining context, employers and employees stand to enjoy more specific benefits from including broad arbitration provisions in CBAs. Employers that obtain such arbitration provisions in their CBAs will no longer have to face the heavy burden of defending against both a grievance arbitration and a lawsuit over the same events. Bringing both sorts of claims into the same forum stops employees from having "two bites at the apple" over claims arising out of the same factual circumstances — once with respect to contractual claims in arbitration, and then again in a judicial forum with respect to related statutory claims.

Moreover, most employees will benefit by having the help of their unions in prosecuting discrimination claims. In arbitration, the employee would typically be represented by an attorney provided by the union. In court, an employee also has to navigate the legal system on his own, or pay a lawyer substantial fees for representation (if he can get one to take his case). Employees also will benefit from being able to resolve all their claims (contractual and statutory) with respect to a single factual dispute in a single forum.

Employees may be concerned that their unions will subordinate the interests of individuals to the collective interests of all employees in the bargaining unit. This potential conflict-of-interest between unions and employees did not concern the Court in *14 Penn Plaza* — and for good reason. First, an arbitration agreement merely changes the forum in which the dispute will be heard. It does not waive any substantive rights. Second, employees have ample protection from such conflicts of interest by virtue of a union's "duty of fair representation" and potential liability under the Age Discrimination in Employment Act if they discriminate against members based on age. Finally, individual employees also always retain the ability to safeguard their rights by filing claims with the Equal Employment Opportunity Commission, National Labor Relations Board and any other administrative agency.

Benefits for Unions

In *14 Penn Plaza*, the Court empowered unions to "agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer." If the Court had ruled the other way and found that such arbitration clauses were not legitimate subjects of bargaining, unions would be cut out of the equation, leaving employers free to compel all employees, including those in unions, to sign agreements to arbitrate discrimination claims. The advantages employees derive from belonging to a union would be minimized, and they could be forced to arbitrate their discrimination claims without receiving any benefits through the bargaining process.

On the other hand, as a result of this decision, unions may be able to make other collective bargaining gains for the benefit of their members by negotiating over arbitration provisions. Unions may use these provisions as a bargaining chip through which they can negotiate other concessions (such as higher wages or other better terms of employment) from employers.

Being able to negotiate arbitration agreements also permits unions to provide an additional service to their members. Most employees likely will find the union's availability to assist in vindicating their statutory rights, as opposed to having to retain an attorney or proceed *pro se*, extremely valuable. Critics of the decision have expressed concern that certain unions may be unable to take on all of their members' discrimination claims. Significantly, the Supreme Court did not hold that all unions must agree to these provisions. Thus, only those unions prepared to take on this additional responsibility and that view arbitration agreements as beneficial for their members will agree to include an arbitration agreement in their CBAs.

Tips for Drafting an Enforceable Arbitration Provision

As a result of their legal enforceability, employers should consider bargaining over provisions requiring arbitration of statutory discrimination claims in future union negotiations. If an agreement to arbitrate statutory claims is reached, great care should be taken in drafting the arbitration provision in the collective bargaining agreement.

Arbitration clauses must use clear and unmistakable language that specifically identifies the types of statutory discrimination claims to be arbitrated — such as the ADEA, Title VII, Americans with Disabilities Act, and state and local statutory claims. Moreover, employers and unions must ensure that all of an employee's substantive statutory rights are preserved, including the right to all remedies available under the law.

Conclusion

The Supreme Court's decision in *14 Penn Plaza* presents a meaningful opportunity for employers, unions, and employees to reap the substantial benefits of arbitration. Unions and employers should work together to carefully construct arbitration provisions that maximize these benefits for all.