SpencerFane®

Administrative Agencies Cracking Down on Overly Broad Arbitration and Severance Agreements

JULY 29, 2014| PUBLICATIONS

The Supreme Court's pro-arbitration and pro-alternative dispute resolution jurisprudence is being met with opposition from administrative agencies, especially the National Labor Relations Board ("NLRB") and the Equal Employment Opportunity Commission ("EEOC"). As a result, common employment practices, such as mandatory arbitration provisions and severance agreements, are being subject to intense legal scrutiny.

The Supreme Court began its journey down the pro-alternative dispute resolution road in 2011 with *AT & T Mobility v. Concepcion*, 131 S. Ct. 1740. There, the court upheld a class action waiver combined with arbitration mandates in consumer contracts. Even more recently, the Court severely limited the scope of the effective vindication exception to the Federal Arbitration Act ("FAA"). *See American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). The effective vindication exception allowed courts to invalidate arbitration agreements if they prevented the effective vindication of rights protected by federal statutes. According to the court, an arbitration agreement which requires a party to individually arbitrate all claims does not prevent the effective vindication of statutorily protected rights even if an economically rational plaintiff would never pursue claims under certain statutes if those claims had to be individually litigated. "[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." *Id.* at 2311.

Administrative agencies are reacting to this jurisprudential shift by finding alternative means to challenge what they believe are overly broad alternative dispute resolution mechanisms that prevent employees from seeking the protections of federal employment laws.

Shortly after *Concepcion*was issued, the NLRB held that a garden-variety arbitration agreement violated Section 7 and Section 8(a)(1) of the National Labor Relations Act ("NLRA"). *See D.R. Horton Inc.*, 357 NLRB No. 184 (2012). First, it found that the arbitration agreement would cause employees to reasonably believe that they were prohibited from filing unfair labor practice charges with the NLRB. Second, it found that class action litigation is a protected substantive right under the NLRA, and because the arbitration agreement required employees to forgo that right, it violated Section 7. *D.R. Horton* continues to have vitality despite the Fifth Circuit's partial rejection of its holding as to the validity of class action waivers. The NLRB has made it clear that it will continue to follow *D.R. Horton* until the Supreme Court directs it to do otherwise. Most importantly, it is one of several controversial cases that are untainted by the recess appointment fiasco.

The EEOC has also begun to question the legality of agreements which appear to severely limit an employee's ability to exercise his or her rights under the federal employment laws. It recently filed suit against CVS Pharmacy ("CVS") under Section 707 of the Civil Rights Act of 1964 ("Title VII"). *See EEOC v. CVS Pharmacy, Inc*., N.D. Ill., No. 1:14-cv-00863 (2014). Section 707 allows the EEOC to seek injunctive relief against any person who it "has reasonable cause to believe . . . is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII]." According to the EEOC, CVS is engaging in a "pattern or practice of resistance" to its employees enjoyment of their rights under Title VII by requiring all departing employees to sign a severance agreement which could reasonably be read to prohibit them from filing charges with the EEOC or participating in EEOC investigations.

D.R. Horton and *EEOC v. CVS Pharmacy* are not aberrations. They are part of a continuing trend within administrative agencies to watch closely for alternative dispute resolution mechanisms that may deter employees from exercising their rights under federal employment statutes. With this in mind, employers should review their

AUTHORS

- Brian Peterson

BLOG TOPICS

- Human Resource Solutions
  - Employment Litigation
  - HR Counseling and Training

© 2019 Spencer Fane LLP | The choice of a lawyer is an important decision and should not be based solely on advertisements.

arbitration agreements and their severance agreements to ensure that they are in compliance with the new rules being created by the EEOC and the NLRB.

© 2019 Spencer Fane LLP | The choice of a lawyer is an important decision and should not be based solely on advertisements.