Rethinking Arbitration Agreements in Employment

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New U.S. Supreme Court Opinion: AT&T Mobility v. Concepcion

At the end of April 2011, the U.S. Supreme Court issued an opinion in AT&T Mobility v. Concepcion, holding that arbitration agreements that limit or prohibit class actions are valid. Though the case was not an employment case (it was a dispute over AT&T's charging customers sales tax on phones that were offered for "free"), it could have important implications for employers. Employers who use arbitration agreements should consider revising them to include limits on class actions, and employers who do not use arbitration agreements should consider implementing them as a way to limit potentially expensive class-action employment litigation.

Courts in some states, including California, Washington, and Oregon, had held that arbitration agreements that limited or barred class actions were unconscionable and therefore unenforceable. The U.S. Supreme Court's recent decision held that the Federal Arbitration Act overrides state law decisions like these. The Court held that federal law controls this area, and that federal law does not necessarily prohibit an agreement to arbitrate that limits or bars class action lawsuits or class action arbitration. With this decision by the U.S. Supreme Court, it is now more likely that such provisions will be upheld, so that employers who require that employees agree to arbitration and bar class actions in their arbitration agreements are less likely to face costly and risky employment-related class actions.

Arbitration Pros and Cons for Employers

Many employers have employees enter into arbitration agreements or have arbitration provisions in their employment agreements. Arbitration can benefit employers because disputes are typically heard more quickly, can involve less discovery, and are more likely to be kept out of the public eye. They are not without their downsides, however, because an employer typically has to pay the arbitrator's fee, there is no opportunity to appeal a bad decision, and summary judgment may be more difficult to obtain.

The new Supreme Court decision enhances an employer's ability to limit or bar employment-related class actions, which is a pro for employers who are considering requiring employees to enter into arbitration agreements. Employment class actions are claims that a particular employment practice is discriminatory and affects a broad group of employees, such as wage-and-hour disputes. These class actions can be costly and pose significant risk to employers. Arbitration agreements that limit employees' ability to bring a class action are therefore likely to benefit to employers.

Employers Should Review or Reconsider Arbitration Agreements

In light of this Supreme Court case, employers who do not currently require that employees agree to arbitration should revisit whether to do so. Employers who do currently require that employees agree to arbitration but who do not have limits on class actions in their arbitration agreements should consider whether to now include these limits. Be aware that some states also have specific requirements for arbitration agreements in the employment context. For example, Oregon requires an employer to provide an arbitration agreement to a potential employee two weeks before hiring or before a "bona fide" advancement to be effective. Arbitration agreements are another tool that can help employers more effectively manage employment-related risks. Each employer should carefully assess the pros and cons of

arbitration agreements based on their business, industry, and workforce. For more information about this U.S. Supreme Court case, or to discuss arbitration agreements or other employment agreements or policies, please contact a lawyer in the Bullivant Houser Bailey employment group.