HOGAN & HARTSON LLP

focus on

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Recent Developments Regarding Arbitration of Employment Disputes and Disciplinary Meetings with Employees

Two recent decisions affect how employers address employment-related disputes and disciplinary meetings with employees. First, the United States Supreme Court held on January 15, 2002 that arbitration agreements do not bar the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific relief in court. Second, the District of Columbia Circuit recently affirmed a National Labor Relations Board decision that an employee not represented by a union has the right to request the presence of a co-worker at an investigatory interview if the employee reasonably believes it may result in disciplinary action. This update summarizes these important decisions and discusses their implications.

1. U.S. Supreme Court Holds That Valid Arbitration Agreements Cannot Bar The EEOC From Pursuing Victim-Specific Judicial Relief

Last term, the Supreme Court upheld an employer's compulsory arbitration program under the Federal Arbitration Act. See Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001). On January 15, 2002, in EEOC v. Waffle House, Inc., the Supreme Court held that an agreement between an employer and employee to arbitrate employment-related disputes does not bar the EEOC from pursuing judicial relief, such as back pay, reinstatement, and damages, on behalf of the employee. Although this decision permits courts to award damages to compensate victims of discrimination in cases initiated by the EEOC, it does not mean that employers should abandon the arbitration option. Rather, employers should consider various factors in deciding whether or not to use arbitration as a dispute resolution mechanism.

The Waffle House Decision

In his application for employment with Waffle House, Eric Baker agreed to resolve any employment-related dispute or claim by binding arbitration. When Baker suffered a seizure at work and was discharged, he did not initiate arbitration proceedings, but instead filed a charge of disability discrimination with the EEOC.

Following an investigation and failed attempt at conciliation, the EEOC filed an Americans with Disabilities Act (ADA) enforcement action against Waffle House in the Federal District Court in South Carolina. The EEOC sought, among other relief, back pay, reinstatement, compensatory damages and punitive damages. The United States Court of Appeals for the Fourth Circuit granted an interlocutory appeal and held that a valid, enforceable arbitration agreement existed. The Fourth Circuit also held that the agreement did not foreclose an enforcement action by the EEOC, but that it did preclude the EEOC from seeking victim-specific relief.

The Supreme Court reversed the Fourth Circuit's decision, finding that Title VII and the ADA authorize the EEOC to obtain victim-specific judicial relief. The Court found that the Federal Arbitration Act does not preclude enforcement by public agencies or limit a nonparty's choice of judicial forum and that the EEOC had discretion to determine whether public resources should be committed to recovery of victim-specific relief.

Arbitration Agreements After Waffle House

After Waffle House, arbitration agreements will still be an effective way to prevent many claims from reaching the courts. As the Supreme Court noted, the EEOC initiates less than two percent of all the anti-discrimination claims that are filed in federal court each year. The great majority of all discrimination actions are filed by individuals, rather than by the EEOC, and arbitration is a potential alternative method to resolve most of those claims.

Employers should recognize that arbitration presents certain advantages and disadvantages. Potential advantages of arbitration include:

- avoidance of jury trials;
- lower risk of excessive damage awards;
- lower levels of publicity; and
- reduced direct and indirect costs in some circumstances;

Potential disadvantages of arbitration include:

- low cost may encourage individuals to initiate claims and not settle;
- discovery and evidentiary limits may hinder defense efforts;
- arbitrators' decisions may be less grounded in the law;
- limited judicial review; and
- some claims may not be arbitrable and arbitration does not preclude EEOC enforcement.

In sum, even after Waffle House, employers should carefully weigh whether a mandatory arbitration program is appropriate in their particular circumstances.

2. D.C. Circuit Court of Appeals Affirms NLRB's Extension Of Weingarten Rights To Nonunion Employees

The District of Columbia Circuit Court of Appeals recently affirmed a National Labor Relations Board decision (discussed in our December 2000 Labor & Employment Update) that certain employees not represented by a collective bargaining unit are entitled to have a co-worker present during investigatory interviews that the employee reasonably believes may result in disciplinary action. See Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001). The Epilepsy Foundation decision applies to all employers covered by the National Labor Relations Act (NLRA), even those without a union. But not all employees are protected. The NLRA generally does not cover managers, supervisors, and certain confidential employees and they therefore cannot invoke the Epilepsy Foundation right to co-worker presence. Epilepsy Foundation does not give covered employees a right to have a family member or attorney present.

Pending guidance from the National Labor Relations Board and federal courts, we offer here several observations on the implications of the decision.

- Consider who at the organization should be informed of the Epilepsy Foundation principle. While an employer has no affirmative obligation to inform employees of their right to request co-worker presence, organizations should inform those who may conduct investigatory and disciplinary interviews (such as human resources administrators, managers, and supervisors) that covered personnel are entitled to request the presence of a co-worker in investigatory interviews the individual reasonably believes may result in discipline.
- Review corporate policies to remove language that could be interpreted as preventing covered personnel from bringing a co-worker to investigatory interviews.
- Do not take adverse action against an employee because he or she exercises the right to have a co-worker attend.
- Consider such questions as what role the co-worker may have during the interview, whether there are limits on selection of the co-worker and whether unavailability of a designated co-worker can delay the interview. In Epilepsy Foundation, the court described the role of the co-worker as "a potential witness, advisor, and advocate in an adversarial setting." Under NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), a union representative may assist an employee and clarify facts, but may not interfere with the investigation.
- Balance employees' rights under Epilepsy Foundation with the organization's obligation to investigate certain highly sensitive, confidential workplace matters. For example, in defending sexual harassment claims, an organization may need to show that it took reasonable care to prevent and correct promptly any harassing behavior, and that the complainant unreasonably failed to utilize preventive or corrective opportunities. The extent to which organizations can insist on confidentiality in such investigations (through waivers, for example) without violating the NLRA has not been fully resolved. Employers may be more justified in insisting on confidentiality if the privacy of employees other than the employee being investigated, or trade secrets, are at issue.
- Do not necessarily forego an investigatory interview because of an employee request to have a representative present. Although the court in Epilepsy Foundation noted that "an employer is completely free to forego the investigatory interview and pursue other means

of resolving the matter," incomplete investigations may entail legal risks in some circumstances.

- Monitor pertinent NLRB decisions. Epilepsy Foundation affirmed as "reasonable" an NLRB statutory interpretation that reversed more than 15 years of precedent. The court deferred to the new NLRB interpretation, stating, "It is a fact of life in NLRB lore that certain substantive provisions of the [NLRA] invariably fluctuate with the changing compositions of the Board."
- Review other legal developments. Whether law developed in the union context under NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), will apply fully in the nonunion context is unclear. Many questions are unresolved, such as whether employers are required to grant paid (or unpaid) leave to a co-worker representative who attends.

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