# PUBLICATION

## Can You Enforce Your Employment Arbitration Agreement?

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Many employers prefer the speed, reduced cost and procedural simplicity promised by arbitrations when resolving disputes with current or former employees. After briefly encouraging this form of alternative dispute resolution as an alternative to litigation, courts have increasingly stepped up their oversight of arbitration agreements and have begun striking agreements deemed too one-sided for employers. Accordingly, employers who attempt to mandate arbitration of employment claims should review their agreements in light of some recent judicial guidance.

By way of background, the United States Supreme Court issued its first ruling related to compelled employment arbitration in 1991 with *Gilmer v. Interstate/Johnson Lane Corp*., ruling that employees' federal statutory claims could be directed to arbitration absent a showing of contrary congressional intent. Ten years later, in *Circuit City Stores, Inc. v. Adams (2001)*, the Supreme Court clarified that such agreements to arbitrate must be entered prior to the dispute arising (with limited exception for seamen, railroad employees, and other transportation workers). And earlier this year, the Supreme Court held that unions can collectively agree to arbitrate discrimination claims – thereby waiving individual workers' rights to bring claims under federal law – in *14 Penn Plaza LLC v. Pyett (2009)*.

In between these holdings, lower courts have set about to define when the parties to such agreements truly "agreed" to submit their claims to arbitration. Harkening back to ordinary state-law principles of contract law, these courts look to ensure that: (1) a "meeting of the minds" occurred between the employer and its employees over the scope and details of the agreement; (2) the agreement is supported by adequate consideration; and (3) the agreement is not vulnerable to other contract defenses, such as unconscionability.

Several courts have recently used these factors to strike down arbitration agreements in high profile cases. Chief among these is *Jones v. Halliburton Co. (September 15, 2009)*, where the Fifth Circuit Court of Appeals ruled that an employee did not need to arbitrate her claim that her co-workers raped her while she was working on assignment overseas. The incident, which took place at employer-provided housing, occurred after work hours when neither the plaintiff nor the alleged perpetrators were on duty. Accordingly, the Court ruled that the plaintiff's claims were not "related to employment" and did not result in personal injuries "arising in or about the workplace" that were otherwise covered by the parties' arbitration agreement.

Likewise, a federal court in the District of Columbia recently ruled that an agreement to arbitrate an employee's discrimination claims was unenforceable because no "meeting of the minds" occurred. In *Davis v. Joseph J. Magnolia Inc. (July 31, 2009)*, the Court noted that the arbitration agreement was contained in an employee manual provided after the incidents giving rise to the complaint began. The Court further held that the agreement was not supported by adequate consideration because the employee manual containing the agreement stated that the policies contained therein were subject to change at the company's sole discretion.

On the other hand, in *Dieng v. College Park Hyundai (July 31, 2009)*, an arbitration agreement between former car salesmen and their former dealership was found enforceable. Unlike the agreement in *Davis*, the *Dieng* agreement was issued separately from employee handbook, such that the handbook's provision giving the dealership the unilateral right to alter the handbook's policies did not impact the arbitration agreement. The

*Dieng* Court further noted with approval that the agreement contained adequate consideration given that it impliedly required both the employer and the employee to arbitrate disputes.

In sum, this and other judicial guidance about arbitration agreement enforcement should encourage employers to: (1) break out arbitration agreements as a free-standing documents separate from an employee handbook; (2) ensure that the arbitration clause clearly compels both parties to waive their right to sue in court; (3) refrain from limiting relief otherwise available in court; and (4) refrain from requiring employees to pay excessive costs, or arbitrators' fees or expenses, as a condition of arbitrating their claims.

Baker Donelson stands ready to assist you with these and other labor and employment-related challenges. Contact any one of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville* and *New Orleans, Louisiana; Jackson, Mississippi;* and *Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee*.

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