PUBLICATION

Employers: Do Not Wait to Demand Arbitration

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The Supreme Court this term issued rulings in several cases involving arbitration. In *Morgan v. Sundance*, Plaintiff Robyn Morgan, who worked at a Taco Bell franchise owned by Sundance, filed a class action lawsuit against her employer alleging violations of federal wage and hour laws. The application Morgan completed when seeking employment at Sundance included a clause requiring her to resolve any future disputes with Sundance through arbitration. After Morgan filed suit in federal court, Sundance waited for eight months before requesting that the court compel arbitration. The only question the Supreme Court considered was whether Sundance's delay waived its right to demand arbitration.

Case Background

During the eight months between filing of the lawsuit and when the company sought to move the case to arbitration, the parties began to litigate and participated in mediation and settlement discussions. The district court ruled that, because of the delay, Morgan would be prejudiced if the matter was moved to arbitration. The Eighth Circuit Court of Appeals disagreed, holding that, because the activity in the lawsuit did not include formal discovery and did not go to the merits of the claims, Morgan would not be prejudiced by moving the case into the arbitral forum. The Supreme Court unanimously held that the issue of whether a party has been prejudiced creates a "special, arbitration-preferring procedural" rule that is not authorized by the Federal Arbitration Act (FAA).

Generally, a federal court does not consider prejudice when determining waiver outside of the arbitration context. However, prior to this ruling, a majority of courts of appeals required a showing of prejudice by the party wishing to avoid being compelled to arbitration. The Supreme Court noted, "a court must not devise novel rules to favor arbitration over litigation." Without the prejudice requirement, the Eighth Circuit can only consider the defendant's actions when determining whether arbitration has been waived. The case is now returned to the Eighth Circuit to determine whether Sundance (1) knew of its right to arbitrate and (2) acted inconsistently with that right.

Employers must now assert any arbitration agreement promptly when sued in court to avoid waiving the right to arbitrate under such agreement.

Other Notable Supreme Court Decisions

The Supreme Court issued two other notable decisions involving arbitration this term. In *Viking River Cruises v. Moriana*, the Court pre-empted a California rule that allowed workers to sue their employers on claims under California's Labor Code Private Attorneys General Act of 2004 (PAGA). PAGA allowed individuals and representatives to sue in a way that previously was only granted to the State. In *Iskanian v. CLS Transp.*, the California Supreme Court ruled that contracts waiving an individual's right to file lawsuits alleging PAGA claims were invalid. The recent Supreme Court ruling gives a victory to employers, allowing employers to include PAGA claims in provisions requiring employees arbitrate on an individualized basis.

In *Southwest v. Saxon*, Saxon brought a lawsuit on behalf of herself and other ramp supervisors alleging violations under the Fair Labor Standards Act for Southwest Airlines' alleged failure to pay overtime. Southwest

immediately moved to stay the suit pending arbitration or dismiss it altogether based on the arbitration agreement. Saxon argued that ramp supervisors, who manage and assist workers loading and unloading cargo for Southwest Airlines, were "engaged in foreign or interstate commerce." As supervisors, they are not covered under the collective bargaining agreement like ramp agents and are required to arbitrate wage disputes. Under Section 1 of the FAA, transportation workers are exempt from arbitration. The Supreme Court only answered one question: Is an airline employee who works as a ramp agent supervisor a "transportation worker" under Section 1 of the FAA and, therefore, exempt from the Act's arbitration requirement? The Court held that the work Saxon does – loading and unloading cargo on and off airplanes – qualifies as being engaged in foreign or interstate commerce. The Court found that ramp supervisors are directly involved in transporting goods across state or international borders, making the ramp supervisors "transportation employees." Employers who ship items across state or international borders may have employees whose arbitration agreements are not enforceable because they are exempt from the FAA under Section 1, even though the employee(s) may never leave the state.

Takeaway

The Supreme Court's decisions involving arbitration this term demonstrate the Court is committed to the enforcement of arbitration agreements but will strictly construe the language of the FAA. Moving forward, employers who wish to mandate arbitration for claims brought by employees should swiftly file their motion to compel arbitration after a lawsuit is filed. California employers should also review their arbitration agreements, as many provided a carve-out for PAGA claims, which is no longer necessary. If you have questions about arbitration agreements or other employment-related matters, please reach out to Melissa Vest or any member of Baker Donelson's Labor & Employment Group.