Arbitration & Mediation/Labor & Employment | Alert

August 2017

A Recent Florida Appellate Opinion Narrowly Interprets the Scope of a Common Arbitration Provision

The scope of arbitration clauses in the employment and commercial contexts remains the subject of varying interpretations by Florida state courts. Though employers may believe that their clauses are broad and include all statutory, contractual, tort, and other employment related claims, a Florida appellate court has created some uncertainty as to the scope of a clause commonly used in commercial and some employment agreements.

The Trial Court Compels Arbitration

In *Dr. Amanda Saunders v. St. Cloud 192 Pet Doc Hospital, LLC,* 5D17-45 (Fla. 5th DCA August 11, 2017), a former managing veterinarian of a pet hospital alleged that she had been sexually harassed in violation of a county ordinance barring sexual discrimination, and that her former employer had been negligent. She also alleged a constructive discharge due to a hostile work environment. Her employment agreement contained a typical arbitration clause found in commercial contracts which stated: "Any claim or controversy that arises out of or relates to this agreement, or the breach of it, shall be settled by arbitration in accordance with the rules of the American Arbitration Association." The former manager bypassed arbitration and filed her case in a Florida state court. The employer moved to compel arbitration and asserted that the arbitration clause was broad and encompassed the tort and sexual harassment claims. The trial court agreed and ordered arbitration.

The Appellate Court Reverses and Denies Arbitration

The Fifth District Court of Appeal disagreed, reversed the judgment and denied arbitration. It held that while the clause was broad, the former manager did not allege a breach of any specific provision of her employment agreement. In the absence of an allegation or claim that the sexual harassment was a breach of an express provision of the employment agreement barring sexual discrimination, the court held that arbitration could not be compelled by the former employer.

Can The Federal Arbitration Act Provide Protection From State Court Hostility to Arbitration?

The opinion in *St. Cloud* does not expressly apply the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.* or the Revised Florida Arbitration Code, Fla. Stat. Ch. 682 *et seq.* In general, the federal courts apply the FAA, which normally preempts Florida's statute, and often give greater deference to arbitration than state courts. One way to strengthen an arbitration clause intended to include discrimination claims is to adopt a clause similar to the one enforced by the U.S. Supreme Court in *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009), which states:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including but not limited to claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, [and relevant state or local laws] … or any other similar laws, rules, or regulations. All such claims shall be subject to … arbitration procedures … as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

However, even if this clause is adopted, some arbitrations arise under state law, and hostile state courts may still be hesitant to compel arbitration and stay court proceedings. Removal to federal court, if available, is one option. Be aware, federal law is in flux as the Supreme Court has arbitration cases before it concerning employment related class actions and federal agencies.

Impact of the Opinion

The appellate court has sanctioned an employee strategy to avoid arbitration by omitting claims for breach of the parties' employment contract where the parties use a generic arbitration clause. In our view, the *St. Cloud* opinion is flawed because it rejected arbitration of statutory or ordinance claims of discrimination on the ground that the arbitration clause was limited to contractual breaches. However, the contract contained language requiring the employer's compliance with employment laws barring discrimination, and thereby arose under the contract, and was caught by the parties' arbitration clause. Employers should review their arbitration clauses to determine whether they are relying upon the type of clause found wanting in *St. Cloud.* Arbitration clauses stating that they merely govern disputes "arising out of or relating to" employment disputes may not be broad enough to cover all types of employment related claims. Consider using a similar clause to that approved in *14 Penn Plaza* and continuously update arbitration clauses as new cases are issued.

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