

HR BULLETIN

APRIL 7, 2009

SUPREME COURT APPROVES THE USE OF ARBITRATION CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS

In a recent ruling issued on April 1, 2009, the United States Supreme Court has ruled that arbitration clauses contained in collective bargaining agreements can be used to foreclose the rights of employees covered by the agreement to bring judicial actions for violation of discrimination claims under the Age Discrimination in Employment Act (the “ADEA”). In a divided 5-4 decision in 14 Penn Plaza LLC v. Pyett, the Supreme Court indicated that employers with unionized workers should get the same treatment as employers with nonunion workers with respect to the application of arbitration clauses relating to the adjudication of ADEA claims. The case involved a group of night watchmen who filed an action alleging a violation of ADEA as a result of their replacement by employees from another security firm and their subsequent reassignment to lesser job functions with reduced levels of income.

The lower courts ruled that the workers could not be forced to arbitrate their claims under ADEA pursuant to an arbitration clause that was contained in the applicable collective bargaining agreement. The lower courts relied on a 1974 Supreme Court decision (Alexander v. Gardner-Denver Co.), which had been interpreted over the years as prohibiting the use of arbitration clauses related to employees’ statutory discrimination rights. Upon appeal, the Supreme Court came to a different conclusion. Writing for the majority, Justice Clarence Thomas stated that employers and unions have the right and authority to bargain related to the inclusion of arbitration clauses in collective bargaining agreements, and further concluded that this right is not negated by any provisions contained in ADEA. The court noted that the arbitration clause in the collective bargaining agreement at issue “clearly and unmistakably” referenced ADEA (as well as other statutory rights other federal and state laws). The Court concluded that the parties to the collective bargaining agreement had “freely negotiated” the arbitration clause, which included ADEA claims, and since ADEA does not prohibit the arbitration of claims the Court had no basis to strike the provision. The majority in Pyett distinguished the Gardner-Denver decision since the collective bargaining agreement in that case referred to contractual claims but did not explicitly reference statutory claims. Therefore, the

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Supreme Court held that a collective bargaining agreement that clearly and unmistakably requires ADEA claims to be arbitrated is enforceable.

Note that the Pyett decision refers only to ADEA claims. It is unclear whether the logic of this ruling would extend to other kinds of statutory claims, to the extent those claims are clearly and unmistakably referenced in the applicable collective bargaining agreement. Another issue left somewhat unclear in the case is whether such an arbitration clause could constitute a waiver of statutory rights by employees, which generally is precluded under applicable law, in any situation in which the union controls access to and presentation of claims in arbitration.

The decision potentially is significant, assuming parties to a collective bargaining agreement can agree on the inclusion of such an arbitration clause. The decision at least resolves doubt about the enforceability of these arbitration clauses with respect to ADEA claims. Employers with unionized employees that believe that the arbitration process, which can be cheaper, quicker and less public, is preferable to court challenges may want to take advantage of this new ruling to consider the inclusion of an arbitration clause (or at least negotiate over such inclusion) at the next opportunity to do so.

It should be noted that any advantage from this decision may be short-lived. Recently, a bill was introduced in Congress that would prohibit the enforcement of any pre-dispute arbitration agreement if it requires employees to submit employment or civil rights disputes to binding arbitration. Dow Lohnes will be tracking this legislation, known as the Arbitration Fairness Act, and its potential affect on labor arbitrations.

NEW PENSION PLAN FUNDING DISCLOSURE MUST BE PROVIDED BY

APRIL 30, 2009--

DEADLINE APPROACHES FOR CALENDAR YEAR PLANS

The Pension Protection Act of 2006 created a new funding disclosure for single-employer defined benefit pension plans, referred to as the annual funding notice. In general, the annual funding notice replaces the summary annual report (“SAR”) that these plans previously were required to provide to plan participants, and it contains much more detailed plan financial information than the old SARs. The notice must be given to plan participants and beneficiaries, to each union representing plan participants and beneficiaries and to the PBGC (note that filing with the PBGC is required only with respect to plans with liabilities that exceed plan assets by more than \$50 million). The annual funding notice requirement is effective for plan years beginning on or after January 1, 2008, and must be provided within 120 days after the end of each plan year. For a calendar year plan, this means that the plan’s first annual funding notice must be distributed by **April 30, 2009**. Small plans (generally, plans with 100 or fewer participants) have until the Form 5500 filing date (for a calendar year plan, July 31 to as late as October 15 with extensions) to distribute the notice.

On February 10, 2009, the Department of Labor (“DOL”) issued guidance, in the form of Field Assistance Bulletin (FAB) 2009-1, that clarifies the content and delivery of annual funding notices and provides model notices (one for single-employer plans and one for multiemployer plans) that plan administrators may use. The funding notice must disclose (1) the plan’s “funding target attainment percentage” for the year to which the notice relates and for the prior 2 years; (2) statements regarding the plan’s assets and liabilities; (3) the asset allocation of the plan’s investments; (4) the plan’s funding and investment policies; (5) the number of active and inactive plan participants; (6) an explanation of any plan amendment or other event that has occurred or is expected to occur in the current plan year that had or is expected to have a material effect on plan assets or liabilities; (7) a summary of ERISA’s plan termination rules; and (8) a description of the benefits that are guaranteed by the PBGC. The DOL guidance explains how to calculate a plan’s “funding target attainment percentage” and its assets and liabilities, transition rules for disclosing a plan’s funded status for years prior to 2008, the categories of assets that may be used when disclosing a plan’s asset allocation and how to determine the number of plan participants.

The model notice for single-employer plans is available on the homepage of the DOL’s Employee Benefit Security Administration. The annual funding notice may be sent electronically to participants and beneficiaries in accordance with DOL guidance on electronic distribution, including by means that satisfy the DOL safe harbor regarding electronic distribution of plan documents like summary plan descriptions.

In FAB 2009-1, the DOL states that plan administrators that comply with the guidance in the FAB and rely on a good faith reasonable interpretation of the statutory requirements that are not covered in the FAB will be treated as having satisfied the annual funding disclosure requirement.

If you have any questions, please contact Richard P. McHugh (rmchugh@dowlohn.com), Paul R. Lang (plang@dowlohn.com), Michael A. Hepburn (mhepburn@dowlohn.com), Mary K. Qualiana (mqualiana@dowlohn.com), Jill M. Harrison (jharrison@dowlohn.com), Becky DeCarlo (bdecarlo@dowlohn.com) or Russell Jones (rjones@dowlohn.com).

