Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

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ARBITRATION AGREEMENTS MUST PROVIDE FOR CLASS ARBIRTRATION EXPLICITLY

One year passed since the U. S. Supreme Court ruled in *Epic Systems Corp. v. Lewis* that arbitration agreements which provide for individualized proceedings are enforceable and do not violate either the Federal Arbitration Act ("FAA") or the National Labor Relations Act ("NLRA"). Since *Epic*, the legality of class waivers has still been a hot-button issue with multiple arbitration cases on the Supreme Court's docket. Recently, in *Lamps Plus v.* Varela, 587 US ____ (2019), the Supreme Court ruled that arbitration agreements must explicitly contemplate and provide for class arbitration. In a 5-4 opinion, the Court's majority held that the FAA bars class arbitration if an arbitration agreement is ambiguous about the availability of such arbitration.

The underlying claim in *Lamps Plus* arose after Lamps Plus disclosed employees' personal identifying information in response to a phishing scam. Employee Frank Varela filed a class action complaint in federal district court against his employer for negligence, invasion of privacy, and breach of contract, and Lamps Plus moved to compel individual arbitration based on the arbitration agreement that Varela signed as a condition of his employment. The District Court rejected Lamp arbitration. Lamps Plus appealed, but the Ninth Circuit affirmed and ruled that class arbitration could move forward. The Court of Appeals applied the common law doctrine of *contra proferentem,* to construe contract ambiguities against the drafter and interpreted the ambiguous arbitration clause to authorize class arbitration.

On April 24, 2019, the U.S. Supreme Court reversed and held an ambiguous arbitration agreement cannot provide the necessary contractual basis for compelling class arbitration. The Court found that the availability of class arbitration is a matter of consent and parties must agree to arbitrate. Because of the fundamental differences between class arbitration and the individualized form of arbitration envisioned by the FAA, the Court reasoned it must give effect to the intent of the parties. Lastly, the Court rejected the application of common law, finding the FAA preempted the common law.

Following the decision in *Lamps Plus,* it is clear that courts may not infer the availability of class arbitration in arbitration agreements. Rather, the arbitration agreement must explicitly call for class arbitrations for it to be available

EEOC Update

On May 15, 2019, the U.S. Senate confirmed President Donald Trump's June 29, 2017 nomination, Republican Janet Dhillon, as chairwomen of the Equal Employment Opportunity Commission (EEOC). Dhillon joins Republican Victoria Lipnic, who has been Acting Chair, and Democrat Charlotte Burrows. The EEOC is a bipartisan Commission comprised of five presidentially appointed members, including the Chair, Vice Chair, and three Commissioners. Chairwomen Dhillon's confirmation gives the EEOC a Republican majority. The EEOC still has two vacant Commissioner positions.

There must be three Commissioners for the EEOC to have a quorum. Accordingly, the EEOC will lose the quorum if Commissioner Burrows, whose term is set to expire on July 1, 2019, is not extended. With a quorum, the EEOC can now conduct official business, such as issuing guidance on critical areas such as the status of the pay data component of the new EEO-1 forms and the status of the EEOC's position with respect to LGBT discrimination.

EEO1– Report

Under President Obama's administration, the EEOC required employers to include compensation information by race, sex, and ethnicity with their annual EEO-1 report. In 2017, the Office of Management and Budget ("OMB") stayed the requirement, meaning employers were not required to report compensation data.

On March 4, 2019, in *National Women's Law Center v. OMB*, No. 1:17-cv-2458 (D.D.C. March 4, 2019), a federal district court found the stay was not legally justified, compelling the EEOC to collect compensation data. On April 25, 2019, the court directed the EEOC to collect two years of Component 2 pay and hours data from covered employers by September 30, 2019, giving the EEOC the option to collect Component 2 data for 2017 and 2018 or 2019 and 2020. Earlier this month, the EEOC announced that it will collect Component 2 data for 2017 and 2018 by the deadline. On May 3, 2019, the Department of Justice appealed *National Women's Law Center* . However, the appeal does not stay the reporting requirement.

EEO-1 filers should continue to use the currently open EEO-1 portal to submit Component 1 data from 2018 by May 31, 2019. The EEOC expects to begin collecting EEO-1 Component 2 data for calendar years 2017 and 2018 in mid-July, 2019, and will notify filers of the precise date the survey will open as soon as it is available.

LGBT In The Law

The U.S. Supreme Court announced it will decide whether Title VII covers sexual orientation and transgender status discrimination during the High Court's next term. Together, Zarda v. Altitude Express, Inc., *Bostock v. Clayton County*, and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* raise the question whether sex discrimination under the law contemplates sexual orientation and transgender status.

In other LGBT news, the House passed the Equality Act, which would amend Title VII to cover sexual orientation and gender identity as protected classes. The Equality Act must pass the Senate and obtain presidential approval to become law.

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