

SMITH O'CALLAGHAN & WHITE

33 NORTH LASALLE STREET

SUITE 3800

CHICAGO, ILLINOIS 60602

TELEPHONE
(312) 419-1000

FACSIMILE
(312) 419-1007

WEBSITE
www.socw.com

Congress Considers Restricting Arbitration of Discrimination Claims in Response to Recent U. S. Supreme Court Decision

Several influential members of Congress are urging the passage of the Arbitration Fairness Act, H.R. 1020, which would restrict the use of private arbitration to resolve employment discrimination claims. The current push in Congress is in response to the U. S. Supreme Court's recent decision in April, 2009, giving the green light to private arbitration of employment discrimination claims in the collective bargaining context. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009).^{*} While the proposed Arbitration Fairness Act, as introduced, contains a broader restriction on the use of private arbitration for all employment disputes of any kind, it is the portion of the proposed Act dealing with arbitration of employment discrimination claims that stands the most realistic chance of possible passage.

In summary, the proposed Arbitration Fairness Act would limit the scope of the Federal Arbitration Act of 1925 ("FAA"), a significant and long-standing federal law broadly allowing courts to defer to arbitration, as follows:

1. Pre-dispute arbitration agreements that require arbitration of an employment dispute, a consumer dispute or a franchise dispute would not be enforceable;
2. Pre-dispute arbitration agreements that require arbitration of a dispute arising under any statute intended to protect civil rights would not be enforceable;
3. The validity or enforceability of an arbitration agreement would be determined by a court, under federal law, not an arbitrator, regardless of whether the arbitration agreement is challenged specifically or in conjunction with terms of the contract containing the agreement; and
4. Arbitration clauses in collective bargaining agreements would be exempt from this Act.

The proposed law contains other provisions, but these are the most significant provisions that would apply to private employers. The Arbitration Fairness Act was previously proposed in the 2007 and 2008 legislative years, even before the U. S. Supreme Court's decision in 14 Penn Plaza. Recently, the Act has gained momentum, as advocates raise concerns that employees

^{*} See, our May, 2009 Client Alert: "U. S. Supreme Court Rules in Favor of Mandatory Arbitration of Discrimination Claims under Collective Bargaining Agreements," at our website www.socw.com, for further details about the U. S. Supreme Court's decision in 14 Penn Plaza.

may be disadvantaged in arbitration of employment disputes and, in particular, arbitration of employment discrimination cases under the federal discrimination and civil rights laws, which historically have been heard in the Federal Courts.

Although it is still pending in Congress, employers should be aware of the proposed Arbitration Fairness Act. Passage of the Act would significantly restrict arbitration of employment discrimination claims. Although business and employer groups will vigorously seek to stop passage or limit the scope of the proposed law, it stands a realistic chance of being passed and signed by President Obama in some limited form that will impact employment litigation.

Significantly, the proposed Act illustrates the different viewpoints of the U. S. Supreme Court, Congress and the Federal Courts regarding how employment discrimination claims should be handled and adjudicated. Employers in evaluating cases, assessing risks and taking appropriate measures should be aware of these viewpoints:

- With its recent 2009 decision in 14 Penn Plaza, the U. S. Supreme Court has now forcefully endorsed arbitration of employment discrimination claims after many years of ambiguous and even contradictory opinions on the issue, dating back to the 1980's.
- Many influential members of Congress are of the strong belief that employment discrimination claims should be heard in the courts, particularly in the Federal Courts, to ensure fairness and access.
- Many judges in the Federal Courts are of the view that their dockets are too clogged with routine discrimination cases. They believe that arbitration is an appropriate method for resolution of such cases, preserving court resources for more significant discrimination cases, such as multi-plaintiff lawsuits or cases involving novel legal issues.

Currently, there are several other federal legislative proposals that would impact employers, including the Paycheck Fairness Act (broadening the Equal Pay Act), the Alert Laid Off Employees in a Reasonable Time Act (expanding the WARN Act), and the Employee Free Choice Act (eliminating secret-ballot elections and supporting union organizing efforts). We previously covered the Employee Free Choice Act, the most important of these proposals, in our January, 2009 Client Alert. See, "Employee Free Choice Act: President-Elect Obama's Most Significant Possible Change to Labor and Employment Laws in 2009," January 2, 2009, at www.socw.com.

Smith O'Callaghan & White
www.socw.com

Terry J. Smith
Mary Aileen O'Callaghan
Laura A. White

terry.smith@socw.com
maoc@socw.com
laura.white@socw.com

June 5, 2009

This is an update provided for informational purposes to our clients and friends.
©2009 Smith O'Callaghan & White