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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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SUPREME COURT EXPLAINS LIMITS TO ARBITRATION EXCEPTIONS TO COURT LITIGATION

A majority of employees in the U.S. are now covered by individual arbitration agreements prohibiting them from bringing lawsuits in court and also prohibiting the bringing of class or collective actions. There has been a slow but steady increase in the use of such individual arbitration agreements, as employers believe they are quicker, cheaper, more private, with the limitation of class actions in them another big plus. Such employers believe the best way to avoid a "runaway jury" is not to have a jury at all, but leave the legal employment issues up to an arbitrator.

A few months ago, Congress passed a law limiting mandatory arbitration agreements as to allegations of sexual harassment or assault. The U.S. Supreme Court recently clarified a second limitation on such arbitration agreements. The Federal Arbitration Act, a vehicle used for most arbitration agreements, has an exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." On June 6, 2022, the Supreme Court ruled that the exemption applies to specific classes of workers, and that employees who frequently load and unload cargo on and off airplanes that travel in interstate commerce belong to a class of workers engaged in foreign or interstate commerce to which the exemption applies, and therefore such workers are not subject to the provisions of the Federal Arbitration Act. On the other hand, the Court rejected an argument that the provision exempts virtually all employees of major transportation providers. *Southwest Airlines Co. v. Saxon*, No. 21-309 (2022).

Editor's Note: The transportation worker exemption is a narrow exception to the general principle that allows employers to make it a condition of employment that workers agree to mandatory arbitration of workplace disputes. Complicated issues will still remain as to whether Uber drivers and certain other categories of workers are subject to this exemption from the Federal Arbitration Act. Even if the Federal Arbitration Act is not applicable, however, employers may be able to use similar concepts under their state arbitration laws to enforce individual arbitration agreements. Wimberly & Lawson would be pleased to provide sample arbitration agreements or advice in whether such agreements should be used.

UNION ORGANIZING EFFORTS ACROSS THE COUNTRY CONTINUE TO DRAW ATTENTION

Recent Gallup polls indicate that the public has a favorable opinion of unions with a near record high of 68%, and with the "great resignation," and workers demanding their rights, union organizing across the country is drawing attention. For those employers thinking they are beset with employment litigation, consider the fact that the National Labor Relations Board (NLRB) has more than 170 open cases accusing one employer, Starbucks, of anti-union threats, retaliation, surveillance and other labor law violations. The NLRB has found merit in about 50 of those cases, leading

to eight complaints filed against the company. The NLRB has gone to court to get injunctions asking the court to order the reinstatement of terminated workers in two cases, based on allegedly retaliatory firings.

In addition, nearly 300 election petitions for individual Starbucks stores have been filed with the NLRB. The union has won 87% of the 113 elections held as of the end of May. Workers at seven Starbucks stores went out on strike in May. Managers recruited replacement workers to help run the stores while pro-union employees picketed outside the stores, telling the public not to buys Starbucks coffee.

The filing of petitions at individual stores rather than in a broader district is an example of the "micro-unit" elections the current Administration allows. The idea is that unions can single out a group of workers most likely to unionize without bringing in a broader group who might be more inclined to dilute the union support.

The union victory at the Amazon warehouse in Staten Island last month gave the union movement further encouragement. On the other hand, the union lost a nearby second election at Amazon. Further, there was a re-run union election at Amazon's Bessemer, Alabama warehouse, following the set aside of an earlier election that the union lost two to one. The election was set aside because Amazon set up a mail dropbox for ballots in plain view from the warehouse, which the NLRB deemed coercive. In the second election in late March, the union was trailing by a little over 100 votes, as challenged ballots that have not been resolved were sufficient to affect the ultimate election results. It should be noted that turnout was down in the second election, from 55% in 2021 to 39% for the second election. Mail balloting results in a much lower turnout than balloting in the employers' facilities, where the turnout is over 90%. The NLRB does not seem to worry too much about this form of "voter suppression."

The Starbucks situation is interesting because it provides a $15.00 minimum pay and excellent benefits. The President of Starbucks, Howard Schultz, wrote a book in 1977 which included a portion discussing how he correctly predicted Starbucks' few unionized stores would vote to end their union affiliation after he became CEO, because workers believed in him. "If they have faith in me and my motives, they wouldn't need a union," he wrote. Schultz recently came out of retirement and has again become the spokesperson for the company. Some Starbucks workers still believe the company looks out for them better than a union contract would. This result has been dramatized since after many of the union election wins, Starbucks rolled out 5% raises for non-union employees and stated: "We do not have the same freedom to make these improvements at locations that have a union," due to the NLRB rules concerning union bargaining. Schultz has indicated that collective bargaining wasn't the answer. "We can't ignore what is happening in the country as it relates to companies throughout the country being assaulted, in many ways, by the threat of unionization." After declaring that he wasn't anti-union, just pro-Starbucks, he added: "We didn't get here by having a union."

It should be noted that none of the stores have yet to negotiate a union contract.

Workers have been trained by union organizers to anticipate the company's arguments against unionization, and to prepare workers to expect them. They are trying to approach new hires to unionize, and in anti-union meetings, to ask uncomfortable questions.

In the union campaigns, Starbucks appears to rely heavily on small group meetings, and "one-on-one" conversations with managers. Unions also have the support of volunteers from various unions and community groups to run phone banking operations.

In June, an election was to take place at the first Apple store to hold a union election, in Atlanta. Like in other recent organizing situations, the union there filed an unfair labor practice charge claiming that" "captive audience" meetings set up by management were unlawful. Ex-union lawyer Jennifer Abruzzo, the Biden Administration NLRB General Council, is bringing complaints in an attempt to outlaw mandatory anti-union meetings. Apple's retail head told employees that the effort could slow workplace progress and that third-party labor groups don't share the company's commitment to employees. "It is your right to join a union - and it is equally your right not to join a union," which was said in a video to employees. "And if you're already faced with that decision, I want to encourage you to consult a wide range of people and sources to make sure you understand what it could mean to work at Apple under a collective bargaining agreement." She further commented that: "I don't know if we could have moved this quickly under a collective bargaining agreement as it could limit our ability to make immediate, widespread changes to improve your experience. Because the union would bring its own legally mandated rules that would determine how we work through issues, it could make it harder for us to act swiftly to address things that you raise." The union ultimately withdrew the election vote which had been set for June 2.

10 THINGS THAT MIGHT MAKE YOUR COMPANY AN ATTRACTIVE TARGET TO A PLAINTIFF'S LAWYER

Wimberly & Lawson attorneys Kathleen Jennings, Paul Oliver, and Jim Wimberly conducted a webinar on June 2, 2022 dealing with the above subject. The following outline was prepared dealing with the subject matter highlights:

1. No written policies or procedures.
2. No documentation of discipline or counseling.
3. Lack of training of managers and supervisors.
4. No effective internal complaint procedures.
5. Failing to properly investigate employee complaints.
6. Lack of due process in termination decisions.
7. Condoning of offensive words or conduct in the workplace.
8. Lack of diversity.
9. Misclassification of employees, whether viewed as independent contractors or exempt.
10. Poor procedures for recording of work time for determination of overtime.

EMPLOYER WINS LAWSUIT OVER BACKGROUND CHECKS EVEN THOUGH IT FAILED TO SHOW APPLICANT COPY OF THE REPORT

The Fair Credit Reporting Act (FCRA) places a number of obligations on employers who use third-party background or credit check companies to check past records of applicants or employees. The FCRA gives a person a right to sue for violations, but a recent case dealt with a "bare procedural violation" of the FCRA which did not cause any harm to the plaintiff from the technical violation. The plaintiff's job application did not disclose any felony convictions in the application process, but the background report from a third-party revealed the applicant had such convictions. The plaintiff claimed a violation of the FCRA because the defendant employer failed to show her a copy of the report before withdrawing its job offer, which is a technical violation of the FCRA. The company insisted, however, that it would not have given her the job even if it had given her a copy of the report prior to withdrawing its job offer. The court dismissed the suit, finding that the procedural violation of the FCRA would not cause an injury sufficient to confer standing on the plaintiff. *Schumacher v. SC Data Ctr., Inc.*, No. 19-3266 (C.A. 8, 4/4/22).

Editor's Note: The theory behind the requirement is that after being given a copy of the third-party report, the applicant has the opportunity to dispute inaccurate information in the report. The employer in this particular case was very fortunate, because different circuit courts have different views of the effect of an employer's technical FCRA violation. The FCRA requirements are specific and technical and thousands of FCRA cases are filed against employers each year. Some of the technical requirements include, but are not limited to, using legally-approved forms to meet the FCRA disclosure requirements and the updated Consumer Summary of Rights Form, that became effective September 21, 2018. Consider cases such as *Robertson v. Allied Sols., LLC*, 902 F.3d 690 (C.A. 7, 2018), where the appeals court affirmed the dismissal of an applicant's claim that the disclosure on the authorization form contained extraneous information in violation of the FCRA, but at the same time held that she could pursue claims that she was not given a copy of her consumer report before the employer took adverse action against her. Consider also that in 2019, Wal-Mart lost a federal court ruling in a case alleging faulty disclosure and notice violations in a class of approximately 5 million individuals. See *Petre v. Wal-Mart Stores, Inc.*, 2019 U.S. Dist. Lexis 11590 (C.D. Cal. 2019).

Related but different obligations exist on employers that use third party information to investigate current employees if the third party provides information on which the employer actually takes adverse action. One of the more recent cases also involves additional issues resulting from online applications, particularly in creating "stand alone" disclosure forms, and use of the "I Agree" button.

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