

Employment Law Notes

January 2005

ARBITRATION

Washington Supreme Court Issues Significant Rulings on Arbitration Agreements

In a pair of rulings, the Washington Supreme Court endorsed the use of pre-dispute arbitration agreements in employment cases, and provided guidance to employers on how to avoid having their agreements invalidated. The cases are Zuver v. Airtouch Communications, Inc. and Adler v. Fred Lind Manor, both decided December 23, 2004; available on www.dehnlaw.com.

The Ruling

The State Supreme Court's endorsement of the arbitration process in employment claims resolved a split among the the Washington courts of appeal. It firmly rejects the position accepted by some state courts that employees have a non-waiveable right to have courts rather than arbitrators decide claims arising under state statutes like the Law Against Discrimination.

The Court also gave important guidance to employers about how their actions might cause an otherwise valid arbitration agreement to become unenforceable:

- The arbitration agreement must be clearly labeled and not buried in fine print.
- The employee should be given the option to take time to consider the agreement before signing; a week is sufficient.

- Employers must be willing to answer questions about the agreement before the employee signs.
- The employer must not threaten to fire an existing employee who refuses to sign.

On this last point, note that job applicants and existing employees are treated differently. The Court approved making a job offer conditional on signing an arbitration agreement. As for existing employees, it is probably permissible to deny a promotion to an employee who refuses to sign, and it is always permissible to offer a cash bonus in trade for signing.

The Court discussed some clauses that are "unconscionable." (For a discussion of such clauses, see the October 2004 issue of this newsletter.) When an arbitration agreement contains those forbidden clauses, courts must choose whether to simply disregard them and enforce the rest, or invalidate the whole agreement. The Court endorsed the use of a so-called severability clause in which the parties agree to enforce the remainder. If there is no severability clause, the Court said the remainder will be enforced unless the employer "engages in an 'insidious pattern' of seeking to tip the scales in its favor in employment disputes by inserting numerous unconscionable provisions."

Somewhat surprisingly, the Court upheld a clause providing that if a party goes to court instead of commencing arbitration, the other party can recover attorney fees if it successfully obtains a stay of the court proceedings and forces arbitration. ✍

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