EEOC REVERSES 22-YEAR-OLD POLICY ON BINDING ARBITRATION OF DISCRIMINATION DISPUTES

This week, the Equal Employment Opportunity Commission ("EEOC") rescinded a nearly 22-year-old policy opposing mandatory arbitration agreements in employment discrimination disputes imposed as a condition of employment.

THE 1997 POLICY

In 1997, the EEOC took the position that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced" in the nation's employment discrimination laws. According to the statement, mandatory arbitration of employment disputes privatized enforcement of federal employment discrimination laws, thereby undermining public enforcement of the laws, and limited the judiciary's ability to set valuable legal precedent that is necessary for deterring discrimination and making victims whole.[1]

Although the policy statement acknowledged that employers may not lawfully deprive individuals of their statutory right to file employment discrimination charges with the EEOC, it reasoned that employees who are bound by mandatory arbitration agreements may nonetheless be unaware of their ability to do so. This supposedly had a chilling effect on the EEOC's ability to investigate unlawful conduct.

Due to these concerns, EEOC field officers were instructed to "closely scrutinize each charge involving arbitration agreements to determine whether the agreement was secured under coercive circumstances (e.g., as a condition of employment)."[2] The EEOC intended to continue challenging the legality of specific agreements that mandated binding arbitration of employment discrimination disputes as a condition of employment.

THE DECISION TO OVERTURN THE POLICY

The recent decision to overturn the 1997 policy relied heavily on a series of Supreme Court decisions that were inconsistent with the former policy's stance on arbitration agreements. According to a press release on the EEOC's website, "Since [the policy's] issuance, the Supreme Court has ruled that agreements to arbitrate employment-related disputes are enforceable under the Federal Arbitration Act (FAA) for disputes between employers and employees. *Circuit City Stores v. Adams*, 532 U.S. 105 (2001). In other arbitration-related cases it has decided since 1997, the Court rejected concerns with using the arbitral forum - both within and outside the context of employment discrimination claims. Those decisions conflict with the 1997 Policy Statement."[3]

As such, the policy is now effectively rescinded and should not be relied upon by EEOC staff in investigations or litigation.

PRACTICAL TAKEAWAYS

- An EEOC investigation is still available to employees seeking to enforce equal employment opportunity rights even if the worker has signed an arbitration agreement.
- As noted by the EEOC in its press release, the rescission of the policy statement should not be interpreted as limiting the ability of the EEOC, or any other party, to challenge the enforceability of an arbitration agreement.
- Despite the EEOC's favorable new stance, cultural and social trends, including the "#MeToo" movement, have led to a strengthening pushback against employers who have a hiring practice of utilizing mandatory arbitration agreements. Consequently, several states have passed or are legislating the prohibition of mandatory arbitration of certain employment-related disputes. While the states' limitations on arbitration may be preempted by the Federal Arbitration Act, the law is still unsettled.

If you have any questions or would like additional information, please contact:

- Saniya Khare at (248) 457-7852 or skhare@hallrender.com;
- Jon Rabin at (248) 457-7835 or jrabin@hallrender.com; or

- Your regular Hall Render attorney.

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[references]

[1] https://aboutblaw.com/NBG

[2] https://aboutblaw.com/NBG

[3] https://www1.eeoc.gov//eeoc/newsroom/wysk/recission_mandatory_arbitration.cfm?renderforprint=1

[/references]