



Does/Should Your Company Have an Effective Arbitration Agreement?

10.23.2017

Whether your company should have an arbitration agreement will depend on a multitude of factors and is something to be carefully evaluated and discussed with counsel to make an informed decision. And, if your company already has an arbitration agreement, have you recently had it reviewed to ensure that it is legally compliant and accomplishing what you want? A recent decision by the Ninth Circuit underscores this point as well as several cases currently pending before the United States Supreme Court (SCOTUS).

NINTH CIRCUIT

In *United States and State of Nevada ex rel. Welch v. My Left Foot Children's Therapy, LLC*, the Ninth Circuit recently held that an arbitration agreement between an employee and her former employer was not broad enough to cover the employee's whistleblower claims under the False Claims Act (FCA). This opinion raised questions as to whether FCA claims can be subject to arbitration agreements to which the government is not a party given that the FCA is the federal government's primary litigation tool against individuals and companies (typically federal contractors) in combating fraud against the government.

In analyzing the arbitration agreement, the Ninth Circuit explained that the FCA claims did not fall within its scope because the FCA claims were neither claims that the parties (employer/employee) had against the other; rather, the FCA claims belonged to the government. The Ninth Circuit reasoned that although the FCA grants a whistleblower (like the employee) the right to bring a claim on the government's behalf, ultimately, the underlying fraud claims that are being asserted belong to the government.

Notably, the Ninth Circuit noted in dicta that the parties could have drafted a broader agreement that would have covered any lawsuits brought or filed by the employee whatsoever . . . including those brought on behalf of another party." Although it remains to be seen if such an arbitration provision would be upheld in the context of an FCA action, the Ninth Circuit did not foreclose that possibility underscoring the importance of carefully drafted arbitration agreements.

SCOTUS

On October 2, 2017, SCOTUS heard arguments in three matters - *Epic Systems Corp. v. Lewis, Ernst & Young LLP v. Morris*, and *NLRB v. Murphy Oil USA, Inc.* - which address whether arbitration clauses in the employment context result in enforceable waivers of a worker's right to bring or participate in a class action. These arguments underscore the split among the federal circuit courts of appeals regarding whether class actions can be waived pre-dispute/pre-litigation.

The National Labor Relations Board's (NLRB) position is that class action waivers in arbitration agreements violate the National Labor Relations Act. The NLRB claims that such waivers interfere with an employee's statutory right to concerted activity (both union and non-union employees). The Fifth Circuit Court of Appeals and the Second Circuit Court of Appeals have rejected the NLRB's position. On the other hand, the Seventh Circuit Court of Appeals and the Ninth Circuit Court of Appeals have agreed with the NLRB and held class action waivers are impermissible in arbitration agreements.

Although a ruling by SCOTUS is not likely until early 2018, you should still be considering whether to implement an arbitration agreement or modify your existing one.

How Nossaman Can Help

Nossaman provides client-focused, high caliber, legal services that exceed our clients' expectations while staying within their budgets. Our employment attorneys provide litigation, counseling, advice, and training services to private and public companies and public entities throughout California, as well as meeting their out-of-state-needs. The scope of our representation runs the full gamut from prosecuting misappropriation of trade secrets to defending wrongful termination claims and wage and hour class actions. We have also been on the front line of e-discovery, privacy rights, cybersecurity, data breach, and workplace violence. We stay on top of emerging employment issues and are well prepared to counsel our clients on how to address and control related issues.