

April 10, 2001

EMPLOYMENT ALERT!

Re: *Circuit City* and Employee Agreements to Arbitrate

In *Circuit City Stores, Inc. v. Adams* (March 21, 2001), the U.S. Supreme Court ruled that individual employee agreements to arbitrate employment disputes can be enforced under the Federal Arbitration Act (FAA). The only exception is for seamen, railroad employees, and other transportation workers.

Circuit City paves the way for employers to include arbitration agreements in job applications, contracts, offer letters and any other form of pre-employment agreements, and means that these agreements will likely be enforceable under the FAA. Employers need to be aware, however, of limits on the scope and enforceability of arbitration agreements even after the *Circuit City* decision.

1. What kinds of claims can be arbitrated?

The arbitration agreement itself will determine the types of disputes that can be resolved through arbitration. To be effective, arbitration agreements should describe with specificity the types of employment disputes to be arbitrated. The purpose of such a description is to insure that employees have notice of the types of claims that will be subject to mandatory arbitration. A court will give effect to broad language, as long as the employee's waiver of statutorily protected rights to litigate is "clear and unmistakable."

a. Title VII claims excepted?

Circuit City does not overrule the Ninth Circuit decision that Title VII cases are not subject to arbitration agreements signed before a dispute arises. *Duffield v. Robertson Stevens & Co.*, 144 F.3d 1182 (9th Cir 1998). The Ninth Circuit decision is based on the Civil Rights Act of 1991 rather than the FAA and thus is not affected by the *Circuit City* decision.

b. State law discrimination claims v. federal law discrimination claims.

The majority opinion in *Circuit City* specifically declined to reconsider the Supreme Court's earlier ruling that statutory discrimination claims were arbitrable. See, *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Thus, claims of discrimination remain arbitrable at both the federal and state levels (except for Title VII claims in the Ninth Circuit).

Circuit City also does not affect an earlier U.S. Supreme Court decision that the FAA applies in state courts and preempts state anti-arbitration laws which attempt to regulate in a manner contrary to the FAA. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Federal statutory claims are arbitrable as long as the federal statute itself does not preclude arbitration. Since the FAA specifically preempts all state laws which are hostile to arbitration, state law discrimination claims generally are arbitrable even if the state law attempts to preclude arbitration.

The one exception to this rule is California. California courts may examine state anti-discrimination statutes to determine whether an arbitration agreement is consistent with the California Arbitration Act (CAA). *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000). The CAA gives the California legislature the power to create prohibitions to arbitration under certain circumstances. Where, however, the legislature has not chosen to do so, arbitration of state law claims may be required.

c. Collective Bargaining Agreements v. Individual Agreements.

In 1974, the Supreme Court ruled that Title VII rights cannot be bargained away in a collective bargaining agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The *Circuit City* decision does not change this rule of law. If a collective bargaining agreement includes a promise by the employer not to discriminate, employees may be able to grieve and arbitrate claims of employment discrimination, and then file the same claims in court after the employee exhausts the arbitration process. For this reason, we recommend that employers take anti-discrimination promises out of collective bargaining agreements.

d. Equal Employment Opportunity Commission (EEOC).

An arbitration agreement between an employer and employee cannot waive the EEOC's power to bring lawsuits to enforce federal civil rights laws. Thus, even when an employee has waived his/her right to sue in court, the EEOC may bring suit on the same claim on the employee's behalf. It is not clear, however, what remedies the EEOC may obtain in this circumstance. The Ninth Circuit has not had the opportunity to decide this question. The U.S. Supreme Court has granted certiorari to decide whether the EEOC can recover damages and obtain other relief on behalf of an employee who signed an agreement to arbitrate. *EEOC v. Waffle House, Inc.* cert granted 03/26/2001. We will report on the outcome of this case in a subsequent Employment Alert.

2. Requirements of an Enforceable Arbitration Agreement

The FAA states that arbitration agreements will not be enforced if “such grounds exist at law or in equity for the revocation of any contract.” In other words, a court will examine an arbitration agreement to insure that it meets all state law requirements for enforcing a contract. In the case of an arbitration agreement, the most likely challenge is unconscionability.

An arbitration agreement is unconscionable if it is unfair. Examples of unconscionable agreements are those that require the employee to pay all or part of the cost of mandatory arbitration; that are too one-sided, for example, agreements that require the employee to arbitrate disputes or limit remedies, but allow the employer to sue in court for all available remedies; that allow arbitrators to be selected only by the employer; or that allow for unfair surprise.

To insure that an arbitration agreement is enforceable, we recommend:

- Clear notice: An arbitration agreement should spell out the types of disputes subject to mandatory arbitration, and should require that both the employee’s and the employer’s employment-related disputes be subject to arbitration;
- Adequate consideration: An arbitration agreement, like any contract, must be supported by consideration. Adequate consideration may be the employer’s agreement to have its claims subject to arbitration, or the employer’s agreement to hire the employee who signs the agreement. If an employer wants to require a current employee to sign an arbitration agreement, the employer must provide adequate consideration, such as a promotion, or financial remuneration.
- Fair process: The arbitration process should provide for a mutual selection of an arbitrator, usually by alternately striking names on a list; a provision for some discovery to avoid unfair surprise; the ability for employer and employee to present evidence and testimony and to cross-examine; and a written arbitration decision.
- Fees and expenses: Employers who make arbitration mandatory cannot require employees to pay a share of the costs of arbitration. Of course, if the

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employee chooses to be represented by a lawyer or incur similar expenses in the course of arbitration, he/she is responsible for those costs.

Employers must take care that the arbitration process they require is fair in order to insure that it will be upheld. Taking steps like selecting arbitrators through a service like the American Arbitration Association or other recognized service can help insure this.

Various courts have held that an employer need not hire an employee who refuses to sign an arbitration agreement.

RECOMMENDATIONS

In response to the *Circuit City* decision, we recommend that you take the following action:

1. Rethink your decision to use, or not use, an arbitration clause in applications, offer letters, employment contracts or other pre-employment agreements. Review your current arbitration agreement. Are there situations that you would prefer not to arbitrate, or do you want your agreement to be more all-encompassing? Are you willing to submit your employment related disputes to arbitration?
2. If you wish to add an arbitration agreement to your existing employee manual, this can only be accomplished by consideration. This means that if you wish to add such an agreement to the rules affecting current employees, this can only be done if you give them something, most likely financial remuneration, in exchange for their agreement to submit disputes to arbitration.
3. Does your arbitration policy establish fair procedures? Does it provide for the selection of an unbiased arbitrator, some limited discovery, and the presentation of evidence?
4. When using arbitrators, take care to select an unbiased and experienced arbitrator. We can help you screen arbitrators to learn about their "track records" and reputations.