



LEGAL ALERT

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The Future of Employment Arbitration

By Gerard Morales and Joe Kroeger

For years, many non-union employers have entered into alternative dispute resolution (ADR) agreements with their employees that require, in essence, that disputes that may arise during the employment relationship be resolved through arbitration, rather than through the judicial process. ADR agreements seek to avoid the delays and significant legal expenses inherent in the judicial process. Recent developments regarding the enforceability of ADR agreements will affect employers and employees both union and non-union.

On April 1, 2009, the Supreme Court held¹ that provisions in a collective bargaining agreement (CBA) which *clearly and unmistakably* require that employment discrimination claims be resolved through arbitration are enforceable with respect to all employees covered by the CBA. However, while the Supreme Court reaffirmed the enforceability of CBA provisions that require the resolution of employment discrimination disputes through arbitration, Congress is considering a bill that would drastically limit the enforceability of non-union ADR agreements.

¹ *14 Penn Plaza LLC v. Byett*, ___ U.S. ___, 129 S.Ct. 1456. The case involved a claim of discrimination under the Age Discrimination in Employment Act (ADEA).



The Arbitration Fairness Act of 2009 (AFA), H.R. 1020, was introduced in the House of Representatives on February 12, 2009. Section 2(b) of this Act provides:

- (b) No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute. . .

The AFA expressly exempt CBAs from its application.

It seems clear, therefore, that if the AFA becomes law, while employees covered by CBAs

may be required to submit their employment discrimination claims to binding arbitration, employees who are not covered by CBAs, but who have entered into ADR (arbitration) agreements with their employers, may not be able to enforce those agreements.

Employers should follow these developments closely as they will have a significant impact on the resolution of employment discrimination claims. If you have any questions on the subject of this article or would like more information, please contact the authors or another Snell & Wilmer attorney at 602.382.6000.



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