



LATEST CHAPTER IN THE EVOLVING TALE OF EMPLOYMENT LAW AND ARBITRATION AGREEMENTS: CLASS ACTION WAIVERS UPHELD



Howard B. Jackson

"Some employers have required entry into a mandatory arbitration agreement as a condition of employment."

Employment law and arbitration agreements have a contentious history. In simple terms, an arbitration agreement provides that any dispute between the parties to the agreement will be heard by an arbitrator, who is a paid neutral decision maker selected by the parties, versus having a claim heard in court. Employers favor arbitration agreements as a means of limiting the expense, publicity, and the potential of a runaway jury award, whereas the attorneys who represent employees generally prefer court litigation because they hope to hit a home run with a jury. Some employers have

required entry into a mandatory arbitration agreement as a condition of employment. In turn, employees and the attorneys who represent them have challenged such agreements in various ways.

In *Gilmer v. Interstate/Johnson Lane*, employees challenged whether claims under Title VII were subject to mandatory arbitration agreements. In a 1991 decision, the U.S. Supreme Court held that under the Federal Arbitration Act ("FAA"), such agreements were enforceable.

After *Gilmer* many employers implemented arbitration agreements. But some of them went too far. Many federal appellate courts found such agreements unenforceable on grounds that they were contracts of adhesion (i.e., contracts between parties of unequal bargaining power where the party in the superior position presents a one-sided "take it or leave it" arrangement that the other party has little choice but to accept), or for other similar reasons. This outcome is permissible under the FAA because that

statute by its terms provides that arbitration agreements are enforceable except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Accordingly, arbitration agreements can be voided for the same reasons that any other contract may be voided, including as a contract of adhesion or based on similar reasons such as fraud, duress, or other traditional contract doctrines.

The most recent chapter involves interaction between the FAA and the National Labor Relations Act ("NLRA"). Section 7 of the NLRA provides that employees may engage in concerted activity for the purpose of forming, joining or assisting a union, for engaging in collective bargaining, "or other mutual aid or protection." 29 U.S.C. § 157. In a 2012 decision, *D.R. Horton*, the National Labor Relations Board ("Board") ruled that the ability to pursue claims on a class-wide basis was a form of "mutual aid or protection" that employees were entitled to engage in, and thus that arbitration agreements that contained class action waivers were not enforceable.

In *Epic Systems Corp. v. Lewis* and two other companion cases issued on May 21, 2018, the U.S. Supreme Court squarely rejected the Board's position, noting that the FAA directs courts to enforce arbitration agreements as written, unless there are grounds for revocation of the agreement. The employees in these cases did not contend that the agreements were contracts of adhesion, had been procured by fraud or duress, or that there were other traditional grounds for voiding the agreements. Therefore, there were no such grounds for revocation.

In addition, the Supreme Court rejected the notion that the NLRA's provision that employees may engage in concerted activity for "mutual aid or protection" effectively overruled the FAA in the circumstances of class action waivers in arbitration agreements. The opinion noted that when Congress wants to exempt a particular type of dispute from arbitration, it knows how to do so. Several statutes contain such provisions. But the NLRA

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OPPORTUNITIES AND UPDATES FOR EMPLOYERS - THE TENNESSEE DRUG-FREE WORKPLACE ACT



**Mary Celeste
Moffatt**

“Employers electing not to be covered by the Drug-free Workplace Act should ask themselves why not?”

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(3) employee discharge or discipline for a policy violation is deemed with “cause,” thus offering employer protections in such decisions.

The Act requires a written policy, with requisite notices, posting, training and procedures as detailed in the Act and the Regulations. The written policy must contain several specific provisions, such as the types of drug and/or alcohol testing required and must address testing of applicants, employees in safety-sensitive positions, following a workplace accident that results in injury, part of a routine fitness-for-duty medical exam (where required), as a follow-up to a required rehabilitation program, and upon reasonable suspicion.

The definition of “reasonable suspicion,” has recently been amended under the new Regulations to include “an accident which results in injury or property damages exceeding \$5,000 or minimum amount set by US DOT guidelines.” Regulations now also require the observed conduct supporting “reasonable suspicion” testing to be documented within 24 hours and documentation “shall be” given to the employee (no longer “if requested”). According to the amended Regulations, the alcohol level for testing has been lowered to .04 for all positions; there is no longer the .08 for “non-safety sensitive” positions.

The Drug-Free Workplace Act provides a rebuttable presumption in favor of the employer where an injured

employee tests positive for illegal drugs or alcohol (at the prohibited level) or when an injured worker refuses to submit to a post-accident drug or alcohol test. Under this provision, it is presumed that the illegal drug or alcohol “was the proximate cause of the injury” and bluntly stated, this helps employers deny benefits to an injured employee based on the presence of illegal drugs or alcohol.

Anyone who thinks this shift in the burden of proof benefit is “no big deal” may want to review the case of *Crowder v. Morningstar*, 2006 Tenn. LEXIS 809, wherein the Supreme Court of Tennessee affirmed the award of workers’ compensation benefits to an injured employee despite the presence of marijuana in his system. The Court noted “The appellate court’s independent examination of the record revealed *no evidence that the employer had implemented a drugfree workplace*” (emphasis added). Thus, the employer was not entitled to the shift in the burden of proof and the appellate court could not say that the employee’s use of illegal drugs was a proximate cause of the accidental injury. In contrast to the *Crowder* case is the 2016 case of *Austin v. Roach Sawmill & Lumber Co.*, 2016 Tenn. LEXIS 747, where the Supreme Court affirmed the trial court’s *denial of workers’ compensation benefits* based on the drug screen which revealed the employee had taken non-prescribed medications shortly before the accident; in *Austin*, the employer had evidently adopted a policy pursuant to the Drug-Free Workplace and was entitled to the rebuttable presumption.

Finally, the drugs for which a covered employer shall test are now those listed at 49 CFR part 40 (DOT) (rather than the 7-panel listed in the previous Tennessee regulations): currently marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids.

Any testing under the Act by public employers is still “limited to the extent permitted by the Tennessee and Federal Constitutions,” so public employers should consult with counsel prior to implementing workplace drug testing. Other forms of testing, such as random, are not prohibited under the Act, but must be implemented carefully.

Employers covered by the Act should work with counsel to update these policies in light of the recent Amended Regulations. Employers electing not to be covered by the Drug-free Workplace Act should ask themselves why not?

WIMBERLY LAWSON'S AVAKIAN NAMED AS ASSOCIATE DEPUTY SECRETARY OF LABOR



Michael E. Avakian, from our affiliated law firm of Wimberly, Lawson & Avakian in Washington, D.C., has been named as Associate Deputy Secretary of the United States Department of Labor. Mr. Avakian will be at the center of the Department's

policy and management leadership team under recently confirmed Deputy Secretary of Labor Patrick Pizzella and Secretary Alexander Acosta. Mr. Avakian has long been a valued colleague, and we wish him every success in his important new role with the Department of Labor.

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- Sexual Harassment Scenarios
- ADA, FMLA, and Workers' Compensation
- Substance Abuse in the Workplace
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- Investigation Skills
- Avoiding Unionization



KNOW YOUR ATTORNEY JEFFREY G. JONES

JEFFREY G. JONES is the Firm Managing Member of Wimberly Lawson Wright Daves & Jones, PLLC. His practice includes an emphasis on commercial transactions, governmental law and creditors' rights, as well as insurance defense. Jeff received his Bachelor of Science degree in History, graduating magna cum laude in 1984 from Tennessee Technological University, and he received his law degree from the University of Tennessee in 1987. Jeff has an AV Preeminent® Rating - which is the highest possible rating given by Martindale-Hubbell, the leading independent attorney rating entity - and he is also listed in the Best Lawyers of America® in the area of Commercial Litigation. He is a member of the Putnam County Bar Association, Tennessee, and American Bar Association. He is also a member of the Upper Cumberland Trial Lawyers Association, and was a District Representative for the Tennessee Young Lawyers Division of the Tennessee Bar Association. Jeff is currently the County Attorney for Putnam County, Tennessee and a Director for the City of Cookeville Public Building Authority. In the community, Jeff is a Director for the Cookeville-Putnam County Chamber of Commerce and a member of the Cookeville Rotary Club. He is also a member of St. Michael's Episcopal Church and has been active in American Legion Boys State.

does not mention class or collective action procedures, much less clearly state a desire to displace the FAA with respect to class or collective actions. Therefore, said the Court, nothing about the NLRA removed the agreements at issue from enforcement as required under the FAA.

In short, based on *Lewis*, arbitration agreements between employers and employees that contain a class action waiver are permissible. Such agreements will not be found unenforceable because of a class action waiver provision, though they are of course subject to other

requirements for a valid agreement.

This is not the last chapter, however. Legislation that would preclude mandatory arbitration in sex harassment cases has been introduced into Congress. There are also movements in certain states to limit the degree to which employers may force mandatory arbitration of disputes with employees. Clearly, there is more to come in the evolving story of employment law and arbitration agreements. Stay tuned.



TARGET OUT OF RANGE



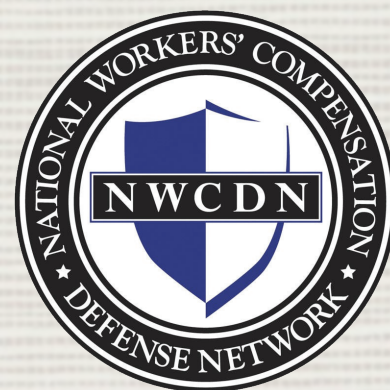
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