



## EMPLOYER BULLETIN: ARBITRATION OF CIVIL RIGHTS CLAIMS UNDER UNION CONTRACTS

Earlier this year, the U.S. Supreme Court overturned a long history of federal court decisions that refused to compel arbitration of civil rights claims under the grievance and arbitration procedures of union contracts. The case, 14 Penn Plaza v. Pyett, 129 S. Ct. 1456 (2009) was a hotly contested 5-4 decision that may be the focus of future congressional action. The controversy stems from the 1974 Alexander v Gardner-Denver Supreme Court decision that refused to compel union contract arbitration of a Title VII claim and the subsequent lower court cases that applied Gardner-Denver to refuse arbitration of a broad range of civil rights claims.

In Penn Plaza, the union contract contained an explicit nondiscrimination provision that listed several federal, state, and local antidiscrimination laws, including the federal Age Discrimination in Employment Act (ADEA). The plaintiffs were a group of office building contractor employees who claimed that a change in their job duties from security to janitorial work was the result of age discrimination. Initially, the union challenged the job change by filing a grievance that included a claim of age discrimination. The union then withdrew the grievance, leaving the plaintiffs to file a group age discrimination claim with the EEOC. Unable to obtain EEOC relief, the employees filed a suit in federal district court. Of course, the employer asked the District Court to order the matter to arbitration. This request was denied, immediate appeal followed, and the case reached the Supreme Court.

In the 1974 Gardner-Denver decision, the Court disavowed contractual arbitration of civil rights claims out of concerns that employees were somehow waiving their rights under Title VII; that the informal arbitration process was not as well-suited for the resolution of civil rights claims as the judicial fact-finding process; that arbitrators lacked competence to resolve the legal questions involved in civil rights claims; and that unions, with exclusive control over the prosecution of grievances, may not diligently present grievances, respect the individual employee's strategic choices, or worse yet, that unions might subordinate the interests of individuals to the collective interests of other bargaining unit members. The Penn Plaza opinion swept these concerns aside and noted, unhelpfully, that whatever union conflicts of interest that arise in civil rights arbitration could be remedied by an employee suit against the union for its failure to meet the duty of fair representation.

Since 1999, Michigan courts have enforced individual employee agreements to arbitrate future employment civil rights claims arising under Michigan's Elliott-Larsen Civil Rights Act and Persons With Disabilities Civil Rights Act (known as pre-dispute arbitration agreements). However, Michigan courts have imposed a set of rigorous requirements for enforcement of arbitration agreements, which are completely absent in the Penn Plaza decision. For example, Michigan Courts require that agreements for arbitration of civil rights claims not waive any rights or remedies available under a statute, and must provide for the right of representation by counsel, require appointment of a neutral arbitrator, allow for reasonable discovery and resort to subpoena powers, and provide for a fair hearing, including submission of evidence through witness testimony.

Both the immediate and long term effects of the Penn Plaza decision remain unclear. The decision is certainly unpopular with the current parties in power in Washington and may be subjected to legislative tinkering, if not reversal. Also, unless current labor contracts contain explicit antidiscrimination language, the Penn Plaza is of no present help to employers. Inclusion of explicit antidiscrimination clauses in labor contracts will certainly be deemed a mandatory subject of bargaining and will, in many instances, have to await future bargaining for new contracts. Also, some unions do not want anything to do with enforcing civil rights laws and will certainly not welcome another avenue of liability for the alleged mishandling of civil rights grievances or arbitrations. Moreover, some employers remain skeptical of arbitration of civil rights claims under individual employee pre-dispute agreements and that skepticism may extend to arbitration under union contracts.

At this time, both unionized and non-union employers should consider the relative merits of agreements to arbitrate civil rights claims. During hard economic times, civil rights claims increase as employers implement difficult decisions on workforce reductions and facility closures. Decision-making on this issue may vary based on such matters as each employer's prior litigation experience, experience with the arbitration processes, the nature of its workforce, and willingness to accept the fact that arbitration decisions are much more difficult to appeal than trial court decisions or jury verdicts. If you want further information on arbitration of civil rights claims or want to weigh the pros and cons of civil rights arbitration, please contact John T. Below at (313) 259-8597, Matthew S. Derby at (313) 259-8653 or Heather G. Ptasznik (313) 259-8586. For more information about Kotz Sangster, please visit our website at [www.kotzsangster.com](http://www.kotzsangster.com).