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# LABOR UPDATE

*Recent Developments in Labor and Employment Law*

## EEOC CONTINUES TO WAGE WAR AGAINST MANDATORY AND BINDING ARBITRATION OF DISCRIMINATION CLAIMS

Mandatory and binding arbitration has been used by employers for decades as a method of avoiding traditional litigation of employment related claims. The process requires employees to arbitrate their claims and prohibits suing the employer in state or federal court. Since 1988, the Equal Employment Opportunities Commission has battled to invalidate arbitration clauses in cases of workplace discrimination. Although it has enjoyed little success, this summer the EEOC reaffirmed its position in a policy statement opposing arbitration.

Proponents of mandatory arbitration are quick to sing its praises, particularly for dealing with discrimination claims. Through bypassing the traditional EEOC/federal court process, arbitration is faster, the litigation costs are considerably lower than a federal law suit, and hundreds, if not thousands, of cases are kept out of the growing EEOC backlog, recently estimated at over 65,000 cases. In addition, the employers have the ability to tailor the arbitration procedure to fit their business and personnel needs.

The EEOC, on the other hand, sees mandatory arbitration as wrongfully depriving discrimination victims of their right of access to the courts. This effect, in turn, prevents the courts from fulfilling their duties as enforcers of the civil rights laws. Moreover, arbitrators are not bound to follow the law, as judges are. The EEOC also believes that employers have gone too far in designing arbitration procedures to their own advantage. The Commission is not alone in this respect. The NAACP and the National Organization for Women have voiced similar concerns.

For years, the courts have been split regarding the enforceability of arbitration agreements. As a result, employers have been slow to embrace them. However, the federal courts are finally beginning to settle this issue, and the popularity of binding arbitration clauses is growing.

A majority of the federal appellate courts has now issued rulings supporting the

enforcement of private (non-union) arbitration clauses. An employer, the courts reason, has every right to condition employment upon the execution of an arbitration agreement. So long as the individual voluntarily agrees that any disagreements arising from the employment relationship will be subject to mandatory and binding arbitration, that choice is binding.

The same is not true, however, where the arbitration clause is part of a collective bargaining agreement. This past October, the U.S. Supreme Court let stand a ruling by the appellate court in Chicago that a union contract's arbitration provision can never nullify an individual worker's right to sue over an employer's alleged discrimination. The reasoning underlying this decision was that the union, not the employee, actually bargained for the labor contract. In addition, most collective bargaining agreements leave arbitration to the sole discretion of the union. If the union chooses not to arbitrate, the employee is left without a remedy. An employee, according to the Court, cannot unwittingly and unintentionally relinquish his or her right to bring a discrimination claim to court merely by virtue of his/her union membership. *Tractor Supply Co. v. Pryner,* (7th Cir. 1997)

However, unless the U.S. Supreme Court steps in and overturns numerous appellate courts, private binding arbitration agreements will continue to be enforceable. Employers with predominantly non-union workforces may want to consider whether binding arbitration may offer a faster and more cost effective alternative to federal litigation.

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## COURT CREATES NEW STANDARDS ON REPORTING SEXUAL HARASSMENT

The federal court of appeals in Chicago recently addressed the question of when a corporation is deemed to have notice of sexual harassment. The issue arose after a production worker was sexually harassed by her foreman. Although she reported his conduct numerous times to a department head over a three year period, nothing was done. Finally, the employee told her personnel director, who took action to halt the alleged harassment.

Prior to trial on the issue of whether the corporation was liable for failing to stop the harassment more quickly, a district court judge dismissed the plaintiff's claim. The judge found that the corporation did not have notice of the harassment because the department head did not occupy a high enough position in the corporate hierarchy. The court reasoned that the company could not be liable for sexual harassment of which it was unaware.

However, the appellate court reversed the trial court and reinstated the case. The court identified two questions which must be answered in determining whether notice to a supervisory or management employee can be imputed to an entire corporation. First, did the employee receiving the complaint have the authority to terminate the harassment? Second, could the plaintiff reasonably expect the employee to refer the complaint "up the ladder" to an employee authorized to act on it? If the answer to either of these questions was "yes", then notice of sexual harassment to the employee

constituted notice to the company. In this case, the employer's policies offered four authorized channels for lodging a sexual harassment complaint, one of which was reporting it to the department head. Based on this fact, the court held that the department head's knowledge of the sexual harassment claims constituted notice to the company and required the company to act. *Young v. Bayer Corp.,* (7th Cir. 1997)

This case exemplifies the growing number of circumstances where otherwise careful employers can be trapped by poorly drafted harassment policies and inadequately trained supervisors. One way for avoiding this fate is for management to appoint a primary manager or "point person" to collect and act on harassment complaints. Otherwise, in the words of the court, "if the company fails to establish a clearly marked, accessible, and adequate channel for complaints, judicial inquiry will have to turn on who in the company the complainant reasonably believed was authorized to receive and forward a complaint of harassment". Essentially, a company without a clearly defined and carefully drafted sexual harassment policy may be exposed to litigation based on the "belief" of an employee that she has made a "complaint".

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## NLRB ISSUES NEW RULE ON UNION ACCESS TO CONFIDENTIAL CUSTOMER INFORMATION

Under the National Labor Relations Act, employers are obligated to provide relevant information requested by a union while processing an employee grievance. However, a problem arises where the union seeks confidential customer information from the employer. The National Labor Relations Board recently addressed this dilemma.

A telephone customer with an unpublished/unlisted number dialed directory assistance and received what she believed was sub-standard service. After complaining to GTE, her telephone service provider, GTE investigated the incident and terminated the employee. During the ensuing grievance process, the union repeatedly requested the identity, phone number and address of the complaining customer so that she could be interviewed. GTE refused to provide this information, relying on its contractual obligations to the customer and the California utilities code, which made disclosure of such information unlawful. After both parties proceeded to the end of the grievance process, it was agreed that GTE would initiate a conference call with the customer and the union, thereby allowing the union to interview the customer without revealing confidential information.

Even though the situation was resolved, the NLRB's General Counsel pursued an unfair labor practice complaint against GTE alleging that the customer's information was relevant and necessary to the processing of the grievance. Therefore, GTE was obligated to provide it to the union, its statutory and contractual obligations to the customer notwithstanding.

The NLRB found the information relevant to the Union's investigation and processing of the grievance. However, the NLRB also ruled that GTE had a contractual obligation with the customer to keep the information confidential. In the face of these two conflicting interests, the Board held that the union and the employer must bargain to reach an accommodation. In this case, the compromise, a "blind" interview with the customer, served both the union's need for information and

GTE's confidentiality obligations. *GTE California* (324 NLRB No. 78, 1997)

This case illustrates a dangerous situation where the union can potentially gain access to otherwise confidential customer information. Allowing the union to interview a complaining customer can not only interfere with the employer's ability to effectively discipline employees, but it may also jeopardize the business relationship with the customer. Therefore, requests for confidential customer information must be handled delicately.

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**BITS AND PIECES**

A New York City judge was recently suspended after comments he made about a female legal intern. According to court papers, Judge Salvador Collazo was removed from the bench after allegedly passing a note to an attorney commenting on the intern's breasts. Shortly after the note was passed, the intern noted that the room was hot. At this, the judge suggested that she remove her jacket. After the intern responded that she had nothing on under the jacket, Collazo stated "Why don't you take it off anyway". The decision to permanently remove the judge has been stayed pending the outcome of his appeal.

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The EEOC recently hired a Chicago-based firm to conduct "testing" for hiring bias. "Testing", a procedure long used in housing and mortgage discrimination, involves using two individuals of different races to "apply" for a position. One candidate, generally the minority, is substantially better qualified. The agency then looks for instances where the non-minority with inferior qualifications is hired. Although this procedure has been useful in ferreting out mortgage discrimination, many employers believe it will be problematic because of the subjective nuances that play into hiring decisions.

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**QUOTABLE**

When a man keeps hollering, "It's the principle of the thing", he's talking about the money.

*Kin Hubbard*

Under current law, it is a crime for a private citizen to lie to a government official, but not for the government to lie to the people.

*Donald M. Fraser*

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of the Law Offices of Donald F. Peters Jr. Written entirely by this office, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed nor as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.

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