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Amendment could herald additional arbitration reform

Action prompted by woman's Iraq lawsuit

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Given the potential for sweeping reforms in the future, William E. Hannum III of Andover warned, employers may want to take a hard look at their present practices. "If they have systems in place that rely on [arbitration clauses], they may want to think about where they are going in six, 12 or 18 months."

A recent move by Congress to limit arbitration for companies that contract with the Department of Defense could signal a shifting opinion toward arbitration clauses that have been championed by employers and businesses but have been the bane of plaintiffs.

The amendment, sponsored by newly elected Sen. Al Franken of Minnesota, prohibits defense contractors from forcing employees to arbitrate claims under Title VII, which bans employment discrimination based on race, color, gender or national origin.

Employment lawyers say the new law, which took effect on Feb. 17, covers all employees of Defense Department contractors, regardless of whether the employee's job is tied to a particular defense contract. They say the law also applies to subcontractors, though only to employees whose work is defense related.

Though the law itself may only apply to contractors who receive payments from the 2010 defense appropriations bill, attorneys say the fallout could be far broader.

"If you are a federal contractor or a federal subcontractor with a $1 million contract, you don't want to lose it or get in trouble with the feds for having a contract provision that is a violation of federal law," said William E. Hannum III of Schwartz Hannum in Andover. "But I think that this is also a sign that the Obama administration is leaning strongly in the direction of the plaintiffs' bar. I think the Obama administration is articulating some hostility toward mandatory arbitration of employment claims."

Given the potential for sweeping reforms in the future, Hannum warned, employers may want to take a hard look at their present practices.

"If they have systems in place that rely on [arbitration clauses], they may want to think about where they are going in six, 12 or 18 months," Hannum said.

Legal battle

The amendment was inspired by the case of Jamie Leigh Jones, an employee with Halliburton/KBR in Baghdad. Jones testified before the U.S. Senate that she was drugged and brutally raped by seven of her fellow employees during her first week on the job in 2005. When she tried to sue the company, she was blocked by an arbitration clause in her contract.

Jones has been involved in a lengthy legal battle, arguing that her claims fall outside of the arbitration clause. In September, the 5th U.S. Circuit Court of Appeals ruled in her favor, upholding a federal District Court decision, concluding that the arbitration "provision's scope certainly stops at Jones' bedroom door."

The decision also mapped a vast gray area, saying "the one consensus emerging from this analysis is that it is fact-specific, and concerns an issue about which courts disagree."

Halliburton/KBR has appealed to the U.S. Supreme Court, while Congress moved to ensure that defense contractors cannot force similar cases into arbitration.

For the plaintiffs' bar, Jones case highlights what lawyers say are fatal flaws in arbitration provisions: Employees are asked to waive some rights when they have no way of knowing that they may want to make a future claim. They are also asked to give up those rights at the most sensitive time — usually when seeking or starting a new job.

Ellen J. Zucker of Burn & Levinson in Boston said people in a protected class are put in a particularly sensitive position.

"Someone who is a minority in a particular workforce may have worries as she or he accepts employment, but the last thing that person is going to do is raise their concerns by saying, 'You know, I'll agree to arbitrate most things, but not claims of retaliation or discrimination,'" Zucker said. "A woman walking into a job in a non-traditional field is not going to say, 'I would really like that job as a construction worker, but I will not sign an obligation to arbitrate.'"

Zucker said there is a "change in mood" surrounding arbitration clauses, with the courts increasingly showing some skepticism. In August, the Supreme Judicial Court ruled that a Beth Israel Deaconess Medical Center doctor could sue the hospital for gender-based discrimination and retaliation in Superior Court despite an arbitration clause. Zucker represented the doctor.

The SJC found in *Warfield v. Beth Israel Deaconess Medical Center Inc., et al.* that the arbitration language was too vague. Though it "suggests an intent to arbitrate disputes that might arise from or be connected to the specific terms of the agreement itself; there is no contractual term dealing with discrimination," the court wrote.

Adam R. Satin of the Boston firm Lubin & Meyer was on the losing side of an SJC case in April 2007 in which the court ruled that a son could not file a wrongful-death lawsuit against a nursing home because he had signed a binding arbitration agreement.

Then, as now, Satin argues that courts "shouldn't just paint with a broad brush and say arbitration is per se good. It is not one size fits all."

Some disputes are ripe for arbitration and some are not, Satin added. "There is nothing wrong with pre-dispute arbitration when you have two sophisticated businesses. But when you have a hospital or a nursing home or a big corporation with teams of lawyers structuring these contracts that are presented to regular people at the last minute ... it is just not fair."

Arbitration 'efficient'

But the defense bar argues that the Federal Arbitration Act achieves its goal of steering cases to a less expensive, more efficient way of resolving disputes.

Joseph M. Desmond of Morrison, Mahoney & Miller in Boston said the law already protects people from being forced into arbitration if there has been fraud, duress or unconscionability.

But the eagerness of the plaintiffs' bar to challenge any arbitration clause has undermined the federal act's purpose, Desmond said. "They are challenging these clauses not because there has been fraud, duress or unconscionability, but because of the bigger movement to try to eliminate arbitration in general. In those cases, you end up getting to arbitration and, once you get there, it is a pretty efficient means of resolving cases."

Desmond added that arbitration clauses affect all parties equally; just as a nursing home patient cannot sue the home, the home cannot sue the patient when he fails to pay his bills.

Hannum, the Andover labor and employment lawyer, said that arbitration has not proven to be the panacea that many had hoped. In Massachusetts, the courts and the Massachusetts Commission Against Discrimination have been hostile to mandatory arbitration of employment claims.

"Ten or 15 years ago, arbitration was all the rage, and there weren't going to be any lawsuits anymore. That didn't pan out," he said. "Quite frankly, arbitration isn't any bargain, either."

A study by the Searle Civil Justice Institute of Northwestern University School of Law supports him. It found that, in consumer cases, plaintiffs won 53 percent of the cases they filed and recovered an average of $19,255 while paying little in up-front administrative costs.

Still, the law could be in for an overhaul. The federal Arbitration Fairness Act is pending in committees in both the House and the Senate. It would bar arbitration clauses in consumer disputes and cases involving employees and employers. Many see the passage of the defense contractors' bill as a test case for this broader reform.

"Congress is taking action to limit pre-employment agreements, and I think it is a reflection of real and appropriate concerns that employees should not be forced to give up meaningful statutory rights in order to be employed," Zucker said. "There are so many rights at stake in the workplace, and I think Congress is paying attention to the powerful inequity when an employer essentially forces an employee into arbitration." MLW