Updates
November 21, 2019

Washington Court of Appeals Strikes Down Employer's Arbitration Agreement

In *Burnett v. Pagliacci Pizza, Inc.*, 442 P.3d 1267 (Wash. Ct. App. 2019), the Washington Court of Appeals held that the manner in which an employer communicates its arbitration agreement is crucial for determining whether it is valid and enforceable. Employers should carefully review their arbitration agreements to ensure they are compliant with the court's new decision.

Employer's Mandatory Arbitration Agreement

The facts in *Burnett* involve a former delivery driver, Steven Burnett, who sought to bring a class-based wage-and-hour claim against Pagliacci Pizza for failing to provide drivers with required rest and meal periods and failing to pay accurate wages. After Burnett sued Pagliacci, Pagliacci moved to compel arbitration based on the policy in its employee handbook.

Specifically, Pagliacci's mandatory arbitration agreement was located in its employee handbook titled the "Little Book of Answers" (Little Book). Burnett received the Little Book along with various other policies during his orientation, including an "Employee Relationship Agreement" (ERA), which incorporated the mandatory arbitration agreement found in the Little Book. Burnett was instructed to sign the ERA so that he could begin working for the employer that day, but was told to read the Little Book at home. Although the ERA directed employees to "learn and comply with the rules and policies outlined in our Little Book," it did not explicitly mention arbitration.

Pagliacci's mandatory arbitration agreement provided that an employee must first submit his or her dispute "to resolution in accordance with the F.A.I.R. Policy," and if not resolved, "you then submit the dispute to binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act." *Id*. at 1269. The F.A.I.R. Policy referred to in the agreement requires that before commencing arbitration, an employee must first "report the matter and all details" to his or her supervisor, and if the employee is unsatisfied with the resolution, the employee may initiate non-binding conciliation. Burnett ignored the mandatory arbitration agreement and brought his claims directly in Washington state court. Pagliacci then moved to compel arbitration, which Burnett, wanting to proceed in court, opposed.

Washington Court of Appeal's Decision

Burnett opposed Pagliacci's motion to compel arbitration because, he argued, the mandatory arbitration agreement was both procedurally and substantively unconscionable.

First, the Washington Court of Appeals explained that to determine whether an agreement is procedurally unconscionable, courts examine whether the party claiming unconscionability lacked meaningful choice based on: "(1) the manner in which the contract was entered, (2) whether the party claiming procedural unconscionability had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print." *Id*. at 1272.

Here, the court determined Pagliacci's mandatory arbitration agreement was a "contract of adhesion" because it was "a standard form printed contract that [the employee] was required to sign to begin employment, *i.e.*, on a 'take it or leave it' basis." *Id.* Specifically, the court found the employee did not have a "reasonable opportunity" to understand the terms contained in the Little Book before he signed the ERA because he was instructed told to read the Little Book at home, but was told to sign the ERA to begin work. *Id*. at 1273. Additionally, the court found the mandatory arbitration agreement was "buried in a booklet" because it appeared on page 18 of a 23-page document and because it appeared "in the same font size and with the same formatting as surrounding sections." *Id*. As a result, the court determined the mandatory arbitration agreement was procedurally unconscionable and therefore was unenforceable.

Second, Burnett argued the mandatory arbitration agreement was substantively unconscionable because it required only employees (and not the employer) to submit claims to arbitration and because the F.A.I.R. Policy provisions requiring an employee to report to their supervisor and then proceed to conciliation before arbitration were overly harsh. The court agreed, and although it found that the agreement was not substantively unconscionable solely because its arbitration requirement was not mutual, overall the provisions requiring the employee report to his or her supervisor and then proceed to conciliation before arbitration rendered the agreement substantively unconscionable. Accordingly, the court found Pagliacci's mandatory arbitration agreement was substantively unconscionable and declined to grant the motion to compel arbitration.

Washington Supreme Court Will Have Final Say

On November 6, 2019, the Washington Supreme Court granted the employer's petition for review. *See Burnett v. Pagliacci Pizza, Inc*., No. 97429-2, 2019 WL 5800127, at *1 (Wash. Nov. 6, 2019). This means the supreme court will soon clarify the standards for mandatory arbitration agreements entered into between employers and employees in Washington state. Stay tuned for an update in a later article regarding what the Washington Supreme Court ultimately decides.

Takeaway for Employers

Bottom line, employers should draft mandatory arbitration agreements to be as clear as possible and should permit employees a reasonable opportunity to review the agreements before they are required to sign. Employers should not "bury" mandatory arbitration agreements in their employee handbooks—rather, the agreements should be presented in a clear manner that permits an employee to have a meaningful choice regarding whether the enter the agreement. The best practice is to have the arbitration agreement in a stand-alone document signed by the employee. Finally, although the Washington Court of Appeals decision is the law in Washington for now, the Washington Supreme Court will have final say regarding the standards for mandatory arbitration agreements entered between employers and employees soon. Accordingly, all employers should pay close attention to the supreme court's impending decision.

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