FENWICK & WEST LLP

Weekly Employment Brief

September 9, 2002

Daniel McCoy Contributor 650.858.7897
Patricia Nicely Kopf Co-Editor 650.858.7219
Allen Kato Co-Editor 415.875.2464

EMPLOYEE ARBITRATION AGREEMENTS - Mandatory Arbitration Agreements Held Enforceable

The Ninth Circuit Court of Appeals recently held in *EEOC v. Luce,* Forward that California employers may require employees to sign arbitration agreements as a condition of employment. The case arose out of the employer's withdrawal of an offer of employment to Donald Lagatree because he refused to sign the company's mandatory arbitration agreement. After a California state court dismispsed Mr. Lagatree's private lawsuit, the EEOC took up his claim, alleging that the employer unlawfully retaliated against him for asserting his constitutional right to a jury trial. In allowing the employer to compel applicants to sign an arbitration agreement, the court overruled its 1997 decision in *Duffield v. Robertson Stephens,* where the court held that employees must be allowed to litigate Title VII claims in court. The court concluded that the U.S. Supreme Court's 2001 decision in *Circuit City v. Adams,* upholding arbitration of discrimination claims, made Duffield obsolete.

However, Compelled Arbitration Agreements May Soon Be Unlawful In California

On August 30, 2002, the California Legislature approved a bill that, if signed by Governor Davis, will make unenforceable employee agreements to arbitrate claims against employers brought under the California's Fair Employment and Housing Act. This legislation would overturn the California Supreme Court's 2000 decision in Armendariz v. Foundation Healthcare Services, where the Court upheld mandatory arbitration of FEHA claims. The bill also reflects the Legislature's disfavor with a string of recent federal and state court decisions that have broadened - favorably for employers - the scope of mandatory arbitration of employment disputes. Although it is not clear that Governor Davis will sign this bill, it is clear that the California Legislature will continue to take steps to scale back state and federal court decisions regarding arbitration of employee claims.

Court Upholds Employer's Reduction Of Employee's Stock Options Based On Poor Performance

May an employer partially rescind an employee's stock option grant because of poor performance? A Massachusetts federal district court recently held that it may, even where the plan documents do not expressly permit such action. In *Cochran v. Quest Software,* the plaintiff joined Quest, a publicly held company, as a regional sales manager, and his compensation package included an option to purchase 60,000 shares of company stock. However, throughout plaintiff's first year on the job, his managers observed several performance problems that ultimately led to the rescission by the company of approximately one-third of plaintiff's unvested shares. The plaintiff continued to work for Quest for three months after the rescission, at which time Quest terminated his employment. The plaintiff sued, and claimed that he and Quest entered into a binding contract vis-à-vis his initial option grant, and that Quest breached the contract when it rescinded a portion of plaintiff's shares. The court dismissed the claim, despite the fact that the stock option plan documents did not provide the company with discretion to take such action. Rather, the court held the rescission constituted a valid modification of the contract, based on the plaintiff's awareness of the rescission, and his consent thereto (as evidenced by plaintiff's continued employment after the rescission). Although not controlling in California, this decision suggests possible solutions for Silicon Valley employers who seek flexibility to adjust stock option grants when employees under-perform.

Employee's Leave Of Absence To Care for Healthy Children While Spouse Attended To Gravely Ill Child In Hospital May Constitute FMLA Leave

A Louisiana plaintiff who took time off to care for healthy children will be allowed to pursue his wrongful termination claim for alleged violation of the Family and Medical Leave Act. In *Briones v. Genuine Parts Co.,* the plaintiff's young child became gravely ill, which forced his wife to spend several days at the hospital with the child. As a result, the employee took a leave of absence to care for his other, healthy children at home. When the employee returned from his leave, the employer terminated his employment. The employee sued for wrongful termination, and claimed that he took a protected FMLA leave that entitled him to return to his job upon completion of the leave. The employer argued that the employee was merely "baby-sitting healthy children," and not caring for a family member with a "serious health condition" under the FMLA. The Louisiana federal court rejected the employer's assertion because the FMLA was intended to aid families, like plaintiff's, faced with a crisis involving a gravely ill child. This decision confirms that employers must proceed cautiously with terminations of employees who return from a leave of absence associated with the care (or, in this case, the indirect care) of a family member with a serious health condition.

Update: Legislature Passes Law To Amend ICRA

The California Legislature recently approved legislation to amend the Investigative Consumer Reporting Act ("ICRA") concerning pre-employment screening and employer obligations to notify applicants and employees about an investigation. The legislation must be approved by the Governor to become law. We will report on the changes to ICRA in the near future.