Arbitration Of Employment Claims And Recent Important Decisions

June 17, 2013 • Legal Updates & Insights

Today, it is not uncommon for employers to require their employees to sign an arbitration agreement as a condition of commencing or continuing employment. Many of these agreements mandate that any dispute or claim arising between the employee and employer will be resolved through arbitration on an *individual* basis. For employers, these agreements provide a benefit of prohibiting class and collective actions. Many have opined that this can result in *de facto* immunity for claims that may be of relatively small value, where the only practical manner in which an individual can seek vindication of such rights is through class and/or collective action.

Recently, courts have looked at the enforceability of these agreements, and most particularly, whether provisions requiring employees to waive their right to class claims is enforceable. In June 2013, the U.S. Supreme Court decided American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), an antitrust case concerning class action waivers contained in arbitration agreements. Reminding courts that they should "rigorously enforce arbitration agreements," the Supreme Court held that such class action waivers do not prevent individuals from vindicating their federal rights. Specifically, the Court held that even though the cost to pursue recovery on an individual basis might be extremely onerous, that alone is insufficient to declare an arbitration agreement unenforceable, absent a clear Congressional command that such claims cannot be subject to class waiver. Individuals have the right to seek vindication of their rights under federal law, the Supreme Court stated, but not necessarily the right to do so in a cost efficient manner.

While the Amex case concerned antitrust claims, the Second Circuit has since adopted the Supreme Court's reasoning in the employment context as well. In Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2013), an employee brought a putative class action seeking overtime compensation. The company moved to compel arbitration on an individual basis in accordance with their arbitration policy. Before the Supreme Court had decided Amex, the district court denied the company's attempt to compel individual arbitration on the basis that the cost-to-recovery ratio would likely bar individuals from being able to vindicate their rights. However, the Second Circuit reversed the district court based in large part on Amex. Indeed, quoting Amex, the Second Circuit stated: "[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."

The practical effect of Amex and Sutherland is that mandatory arbitration agreements containing class action waivers are likely to become more common in the workplace. Employers can feel emboldened that such agreements will be enforceable. However, each arbitration agreement must be looked at individually to determine whether it is enforceable.

For information, both employees and employers can contact Wigdor LLP at (212) 257-6800.

David E. Gottlieb
Partner
WIGDOR LLP
85 Fifth Avenue, New York, NY 10003
T: (212) 257-6800 | F: (212) 257-6845
dgottlieb@wigdorlaw.com
wigdorlaw.com
Marie T. Hastreiter
Associate
WIGDOR LLP
85 Fifth Avenue, New York, NY 10003
T: (212) 257-6800 | F: (212) 257-6845
wigdorlaw.com