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Gary D. Eisenstat

Gary D. Eisenstat
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Dallas, Texas
gary.eisenstat@ogletree.com
214.624.1145

Overview

This paper will review recent U.S. Supreme Court decisions regarding arbitration agreements and how they impact work force disputes, including class arbitrations, discuss the current state of the federal judiciary regarding appointments and vacancies, and update the current status of the #MeToo movement, including the continued rise in administrative charges that contain sexual harassment allegations, and EEO-1 pay reporting obligations. It will also discuss the current status of federal judicial opinions regarding the application of Title VII to claims of sexual orientation and gender identity discrimination. It will update proposed regulatory changes from the Department of Labor regarding the Fair Labor Standards Act,[1] and the status of the joint-employment doctrine at the federal level, as well as a new gig worker opinion by the Department of Labor and administrative rules adopted by the Texas Workforce Commission on this topic. It will also discuss the current status of various local paid sick leave ordinances in Austin, San Antonio, and Dallas, including proposed legislation on this topic, and discuss legal issues in the work setting from the legalization of marijuana in various states.

Recent U.S. Supreme Court Decisions—Arbitration Issues

In *Henry Schein, Inc. v. Archer & White Sales, Inc.,*[2] the Court addressed the "gateway" question of who decides whether a dispute is the proper subject of an arbitration agreement—the court or the arbitrator. In this case, the parties' agreement specified that the arbitrator should resolve that gateway question, but one of the parties argued that the basis for applying the arbitration clause was "wholly groundless." The Court rejected the so-called "wholly groundless" exception to the FAA and held that "when the parties' contract delegates the arbitrability question to the arbitrator, the courts must respect the parties' decision as embodied in the contract."

However, only seven days later, in *New Prime Inc. v. Oliveria*,[3] the Court noted an important exception to this gateway question arising under Section 1 of the FAA, which excludes from the FAA "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In light of the Section 1 carve out under the FAA, the Court held, the courts, rather than the arbitrator, should resolve the gateway question of

[1] Fair Labor Standards Act, 29 U.S.C. §§ 201-219.

[2] 139 S.Ct. 524 (2019).

[3] 139 S.Ct. 532 (2019).

the applicability of an arbitration agreement to the parties' dispute under this exemption. The Court also held that Section 1 applied here, even in the face of the parties' dispute over whether the plaintiff was an employee or an independent contractor because the term "contracts of employment" in Section 1 of the FAA means work performed by the worker, regardless of whether the relationship was an employer-employee or master servant arrangement.

Finally, in *Lamps Plus, Inc. v. Varela,*[4] the Court held that, unless the parties' arbitration agreement specifically provides for class arbitration, courts may not infer from an ambiguous arbitration agreement that the parties had consented to arbitration on a class basis. It therefore now appears that, unless the parties specifically and expressly provide for or permit some form of class arbitration in their agreements, that procedural tool is unavailable in the arbitration setting.

Federal Judiciary Vacancy Update

The federal judiciary's webpage (www.uscourts.gov) reports that, as of April 15, 2019, 148 judicial vacancies exist: eight within the courts of appeal, 125 at the district court level, and fifteen vacancies in "other" federal courts. Currently, there are 64 pending nominations, five in the appellate courts, 53 at the district court level, and 6 for other federal court positions. Given recent Senate judicial confirmations, the current administration has now made over 100 judicial appointments, including a total of 2 Supreme Court positions, 37 appellate court vacancies, and over 58 district court openings.

#MeToo

While the EEOC now reports that the total number of charges filed in the last fiscal year dropped by 8,000 from last year (a twelve-year low), the number of charges that contained allegations of sexual harassment increased fourteen percent over the prior year to about 7,600—an increase of about 900 more such charges.

Currently, five states currently mandate some form of annual sexual harassment training, including California, Connecticut, Delaware, Minnesota, and New York (including New York City).

[4] No. 17-988, 2019 WL 1780275 (2019).

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