U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

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MEMORANDUM FOR REGIONAL SOLICITORS
ASSOCIATE SOLICITORS

FROM: EUGENE SCALIA
Solicitor of Labor

SUBJECT: Consideration of Employment Arbitration Agreements

The Supreme Court's decision earlier this year in *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), affirms the government's ability to proceed with litigation on behalf of individual employees even when the employees have agreed to arbitrate employment disputes with their employer. *Waffle House* is a welcome affirmation of the government's litigation authority and its unique role in enforcing the law. The Department must balance this authority, however, with what the Supreme Court has called our "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24 (1983).

Arbitration has a rich history of resolving employment disputes. It has been a principal means of resolving disputes in unionized workplaces for decades. In recent years, it has caught on rapidly in non-union companies. The courts have promoted a variety of forms of alternative dispute resolution for more than a decade, binding arbitration among them. Arbitration offers "simplicity, informality, and expeditio[us] resolution of disputes," the Supreme Court has said. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Court "ha[s] been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991)). The Report of the Dunlop Commission on the Future of Worker-Management Relations spoke at length about the value of arbitration, and stated that "development of private arbitration alternatives for workplace disputes must be encouraged. High-quality alternatives to litigation hold the promise of expanding access to public law rights for lower-wage workers. Private arbitration may also allow even the most contentious disputes to be resolved in a manner which permits the complaining employee to raise the dispute without permanently fracturing the employee's working relationship with the employer." COMM'N ON THE FUTURE OF WORKER-MANAGEMENT

RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, REPORT AND RECOMMENDATIONS 30 (1994).

Although government agencies are justifiably wary of mandatory arbitration of statutory claims in some instances, there is a tradition of federal employment agencies deferring to arbitration in appropriate circumstances. The National Labor Relations Board has highly-developed principles of deferral under its *Spielberg* doctrine – providing for deferral to arbitral awards that already have been rendered and have resolved the facts in a manner determinative of the pending Board charge – and the related *Collyer* doctrine, which provides for deferral to arbitration machinery pending the arbitration's outcome, which may then be reviewed under the *Spielberg* standard. *See* 1 THE DEVELOPING LABOR LAW 1376 *ff.* (Patrick Hardin et al. eds., 4th ed. 2002). The Department of Labor and the Solicitor's Office also have a history of deferring to arbitration on occasion. For instance, OSHA regulations under section 11(c) of the OSH Act and the Surface Transportation Assistance Act (STAA) provide for deferral to arbitration under circumstances similar to those considered by the NLRB. 29 C.F.R. § 1977.18; 29 C.F.R. § 1978.112 (2000).

This memorandum is intended to put in more concrete form principles to be considered by attorneys in the Office of the Solicitor in deciding whether to litigate a matter that is subject to an arbitration agreement. Most of the factors apply equally to disputes that (i) already have been arbitrated and (ii) have not yet been arbitrated but are subject to an arbitration process that one or both of the parties is prepared to initiate. (Factors that apply only pre- or post-arbitration are identified accordingly.) Many of the factors are based on the American Arbitration Association's "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship," which has been endorsed by the American Bar Association.

Under this memorandum, deferral should be considered not only when the arbitration agreement covers the same statutory claim that would be brought by the Department, but also when arbitration of a different legal claim is substantially likely to resolve the factual dispute in a way that would dispose of the statutory claim. For example, if an arbitrator determines that a complainant was terminated for legitimate performance reasons and not because of national origin, that award may also resolve the complainant's whistleblower claim, if other pertinent factors are satisfied. Deferral will be most appropriate in matters involving individual claims for relief in the form of back pay and reinstatement: matters under section 11(c) of the OSH Act, for example, STAA, other whistleblower statutes, the Family and Medical Leave Act (FMLA), and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). The Department's wage-hour cases, by contrast, typically involve numerous employees and as consequence may have been the subject of time-consuming investigations and may be unwieldy for private parties to arbitrate; in those cases, moreover, court-ordered prospective compliance with the law often is an important Departmental objective. Accordingly, deferral to arbitration often will not be appropriate in wage-hour matters. It should also be noted that in programs where the Department is able to seek immediate provisional relief – such as through temporary reinstatement under the Mine Safety and Health Act – that relief should be sought (where the facts warrant) even if it is decided to defer to arbitration on the ultimate merits. Deferral is not appropriate in matters, such as those involving OSHA standards, where relief is not primarily in the form of an award to a putative employee.

Department investigators should be encouraged to inquire at the early stages of investigations whether alleged violations falling within the parameters identified above are covered by an agreement to arbitrate or are related to an arbitration award. When the presence of an arbitration agreement or award is brought to their attention, Department investigators should consult with the Office of the Solicitor to determine how to proceed in light of the considerations set forth below.

The factors listed below are not intended to be exhaustive and no particular item is intended to be determinative. Furthermore, the policy set forth in this memorandum is separate and apart from the Department's own alternative dispute resolution (ADR) program.

FACTORS TO BE CONSIDERED BY DEPARTMENT OF LABOR LAWYERS IN DECIDING WHETHER TO DEFER TO ARBITRATION

- **Special Departmental Considerations**
  - Is it a matter that calls for immediate injunctive relief (*e.g.*, hot goods), or one in which prospective equitable relief obtained by the Department will be particularly important? Is it likely that the violative conduct will recur absent Department intervention?
  - Was the misconduct willful or egregious?
  - Does the dispute involve a general policy or practice of the employer?
  - Does the dispute involve a legal issue the Department has made a priority of emphasizing or clarifying? Is the case one that might establish an important legal precedent?
  - Has the employer previously refused to arbitrate the dispute?

- **Presence of an Agreement to Arbitrate**
  - Does the agreement to arbitrate appear valid and enforceable under applicable state law and the Federal Arbitration Act?
    - Did the employer explain the key provisions of the agreement orally or in writing?
    - Was the employee informed that by signing the agreement he waived the right to trial by jury?
    - Did the employer give the employee time to consider the agreement before signing it?
    - Did the employer inform the employee that he might want to discuss the agreement with an attorney before signing it?
    - Note: When the arbitration agreement is part of a collective bargaining agreement, these factors should be presumed satisfied. However, the collective bargaining agreement must clearly and unmistakably indicate that the claim is subject to arbitration, or there must be other clear evidence that the union and employer regard the claim as arbitrable.

- **Cost of Arbitration (Pre-Arbitration)**
  - In light of arbitration expenses, is the arbitral forum in this particular case accessible financially? (Consideration should be given to the approximate amount of arbitration fees and costs, the extent to which fees and costs would be paid by the employer, and the estimated cost differential for the claimant between arbitration and private litigation.)
  - Does the arbitrator have authority to provide for reimbursement of attorneys fees, in whole or in part, in accordance with applicable law or in the interests of justice, as part of the remedy?

- **Arbitrator Qualification**
  - Does the arbitrator (or pool of available arbitrators) have an appropriate background, including experience in overseeing hearings, knowledge of the pertinent legal issues, and an understanding of employment relations?
  - Is the arbitrator associated with a reputable arbitration or mediation service, particularly one with established rules of procedure?
  - Is the pool of available arbitrators created in a nondiscriminatory manner, such that it can be expected the parties' positions will be considered fairly?
  - Does the arbitrator have a duty to inform the parties of any relationship that might reasonably create or be perceived as creating a conflict of interest?

- **Arbitrator Selection**
  - Is the employee (or an employee representative) afforded a meaningful role in selecting the arbitrator? (An example of a meaningful role is the following: Upon the request of the parties, a designated agency selects a pool composed of an odd number of arbitrators; the parties alternate in striking names from the list until a single arbitrator is remaining.)

- **Representation for Employee**
  - May the employee be represented by counsel in the arbitration?

- **Access to Information**
  - Is there provision for reasonable mutual discovery (*e.g.*, pre-hearing disclosures, depositions) consistent with the expedited nature of the arbitration?
  - Does the employee have access to the information reasonably relevant to the arbitration?

- **Authority of the Arbitrator Regarding Procedural Matters**
  - Does the arbitrator have authority regarding the time and place of the hearing, the issuance of subpoenas, evidentiary matters, and the authority to issue an award resolving the dispute?
  - **Timing** – Does the arbitration agreement set a limitations period shorter than that granted the employee by statute?
  - **Collective action** – Is any right the employee has to proceed through a collective action (such as under the FLSA) preserved?
  - **Venue** – Is the employee required to travel a great distance to arbitrate the claim?

- **Authority of the Arbitrator Regarding Substantive Matters**
  - Is the arbitrator provided the authority to award whatever relief would be available in a judicial forum?

- **Timing of Arbitration (Pre-Arbitration)**
  - Is the defendant prepared to arbitrate without delay? Special consideration should be given if the defendant agrees to an accelerated arbitration schedule that enables the claimant to obtain a decision within a far shorter period than available in the courts – six to nine months, for instance – without the loss of discovery opportunities identified above.
  - Does the defendant waive any argument that arbitration is untimely?
  - If the Department agrees to defer to the arbitration process, will the parties sign a tolling agreement? (The Department may wish to review the award post-arbitration to ensure that it is consistent with the law, as indicated below.)

- **Thoroughness of Judgment (Post-Arbitration)**
  - Does the arbitration agreement provide for (or the employer consent to) a written arbitration decision setting out not only the award but also the essential findings of fact and conclusions of law on which it is based?

- **Review of Award (Post-Arbitration)**
  - If deference is sought to an arbitration award, is the award palpably wrong or clearly inconsistent with the applicable statutes?