Employer Update

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Update on Arbitration and Class Action Waivers

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Class Action Waivers in Arbitration Agreements

Notwithstanding repeated decisions by the U.S. Supreme Court affirming the validity of class action waivers in arbitration agreements,[1] a recent Circuit split and three pending cert petitions raise the specter of another challenge to such waivers specifically in the employment context. On September 9, 2016, the NLRB, joined by the U.S. Department of Justice, filed a petition for writ of certiorari with the Supreme Court, seeking review of the Fifth Circuit's decision in *Murphy Oil USA, Inc.* v. *N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015). In *Murphy Oil*, the Fifth Circuit held that a mandatory class- and collective-action waiver in an employer's arbitration agreement did not violate the National Labor Relations Act (NLRA) because the use of class action procedures is not a substantive right under the NLRA. The NLRB argued that such waivers violate the NLRA because they deprive employees of their statutory right to engage in "concerted activities" in pursuit of their "mutual aid or protection."

The legal question of whether class-action and collective-action waivers in employment arbitration agreements violate the NLRA or are enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA), has split the federal circuits. The Fifth, Second and Eighth Circuits have rejected the Board's reasoning. But the Seventh and Ninth Circuits have adopted the Board's position. In this article, we analyze recent appellate cases that crystallize the issue and address how employers may take steps to modify their arbitration programs to maximize the likelihood that they continue to pass legal muster.

Concepcion and *D.R. Horton*

In 2011, the U.S. Supreme Court decided *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), the landmark decision that held that state law doctrines that "disfavor arbitration" would be preempted by the Federal Arbitration Act if "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. Although *Concepcion* arose in the context of a consumer's class action challenge to a sales tax charge in a contract with a cell phone provider, the decision was considered by many employment law practitioners to be relevant to the enforceability of individual arbitration provisions in employment agreements, if only because it evinced a strong Supreme Court preference to enforce the "liberal federal policy favoring arbitration." *Id.* at 339.

The NLRB has taken the position that class and collective action waivers in employment agreements are unlawful under federal labor law. *See D.R. Horton, Inc.*, 2012 WL 36274 (N.L.R.B. Jan. 3, 2012). In the Board's view, Sections 7 and 8 of the NLRA[2] prohibit an employer from "requir[ing] employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or their working conditions against the employer in any forum, arbitral or judicial." *Id*. at *1. *D.R. Horton* found *Concepcion* inapplicable because it did not address the NLRA or the employment context.

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Circuit Split

The NLRB has sought ratification of its position in the courts, with mixed success. The Second, Fifth and Eighth Circuits have rejected the Board's reasoning. *See Sutherland* v. *Ernst & Young*, 726 F.3d 290 (2d Cir. 2013); *D.R. Horton, Inc.* v. *N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc.* v. *N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015); *Cellular Sales of Missouri, LLC* v. *N.L.R.B.*, 824 F.3d 772 (8th Cir. 2016). The Seventh and Ninth Circuits, however, have adopted the Board's position. *See Morris* v. *Ernst & Young LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016); *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).

In *Sutherland*, the Second Circuit held that the Fair Labor Standards Act (FLSA) "does not preclude the waiver of collective action claims." 726 F.3d at 296. The Second Circuit reasoned that that FLSA's opt-in requirement for collective actions meant that Congress also gave employees the power to waive their right to participate in collective actions. The Second Circuit also invoked *Concepcion*: "Supreme Court precedents inexorably lead to the conclusion that the waiver of collective action claims is permissible in the FLSA context." *Id*. at 297.

In *Patterson* v. *Raymours Furniture Co.*, Inc., 2016 WL 4598542 (2d. Cir. Sept. 2, 2016) (Summary Order), the Second Circuit held that it was bound by its *Sutherland* decision and summarily affirmed the district court's holding that the employer's class action waiver in its employment agreement was enforceable. Raymours Furniture required that all its employees, as a condition of their employment, participate in the company's Employment Arbitration Program, which required that employees submit all employment and compensation-related claims to arbitration on an individual basis. Plaintiff Patterson had brought a putative class and collective action asserting claims against Raymours under the FLSA and New York Labor Law, arguing that Raymours's "ban on class or collective litigation or arbitration of workplace grievances violated the employees' right under the NLRA 'to engage in . . . concerted activities.'" In *Patterson*, the Second Circuit summarized the state of the law on the question of mandatory class action waivers in employment agreements as follows:

> The National Labor Relations Board has . . . repeatedly concluded that Sections 7 and 8(a)(1) of the NLRA and Sections 2 and 3 of the [Norris-La Guardia Act] foreclose enforcement of arbitration agreements that waive an employee's right to pursue legal claims in any judicial or arbitral forum on a collective basis. The circuit courts, however, are irreconcilably split on the question. The Fifth and Eighth Circuits have reversed the Board's rulings on three separate occasions. The Seventh and Ninth Circuits, on the other hand, have agreed with the Board that clauses precluding employees from bringing, in any forum, a concerted legal claim violate the NLRA, and have further held that such agreements are unenforceable under the FAA.

Id. at *2 (internal citations omitted).

The Fifth Circuit in particular has had a contentious history with the NLRB. In *Murphy Oil*, the court held that Murphy Oil did not commit unfair labor practices by requiring employees to sign an arbitration agreement in which they waived their right to pursue

class and collective actions. The *Murphy Oil* holding was not unexpected. Two years prior, in *D.R. Horton, Inc.* v. *N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013), the Fifth Circuit held "(1) the NLRA does not contain a 'congressional command overriding' the Federal Arbitration Act; and (2) 'use of class action procedures . . . is not a substantive right' under Section 7 of the NLRA." *Murphy Oil*, 808 F.3d at 1016 (*quoting D.R. Horton*, 737 F.3d at 357, 360-62). The Fifth Circuit concluded: "This holding means an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration." *Id*.

The Seventh and Ninth Circuits, by contrast, have held that Supreme Court precedent, including *Concepcion*, does not compel the conclusion that class action waivers must always be enforced. In *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), the Seventh Circuit held that Sections 7 and 8 of the NLRA rendered Epic's arbitration provision unenforceable. Epic required employees to agree to bring any wage-and-hour claims against the company only through individual arbitration and the agreement did not permit collective arbitration or collective action in any other forum. *Id*. at 1151, 1155. Epic has filed a cert petition seeking review of the decision.

The Ninth Circuit has held that an arbitration agreement mandating individual arbitration may be enforceable where the employee had the right to opt out of the agreement without penalty, reasoning that the opt-out meant that the employer did not "interfere with, restrain, or coerce" the employee in violation of the NLRA. *Johnmohammadi* v. *Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014). And in *Morris* v. *Ernst & Young LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), the Ninth Circuit held that the "Board's interpretation of § 7 and § 8 is correct. Section 7's 'mutual aid or protection clause' includes the substantive right to collectively seek to improve working conditions through resort to administrative and judicial forums. Under § 8, an employer may not defeat the right by requiring employees to pursue all work-related legal claims individually." *Id*. at *5 (internal quotations and citations omitted). Ernst & Young has filed a cert petition seeking review of the decision.

In its cert petition, the NLRB highlighted this clear circuit split and framed the question presented as:

> Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in 'concerted activities' in pursuit of their 'mutual aid or protection,' 29 U.S.C. § 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. § 2.

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Implications

The Second Circuit's recent decision in *Patterson* confirms that class and collective action waivers in employment arbitration agreements remain enforceable in New York. In light of the disagreements among the federal courts of appeals on this question, however, national employers or those that operate in multiple jurisdictions may face inconsistent rules depending on where an employee may choose to commence a lawsuit.

Employers may wish to review their arbitration programs to assess whether they comply with the current law in the relevant circuit regarding the enforceability of mandatory individual arbitration provisions. One revision employers may wish to consider is whether to allow employees to opt out of a mandatory arbitration program after a dispute has arisen. This alternative may avoid objections from the NLRB, but necessarily will result in some cases proceeding to litigation in courts with the possibility of class actions. As noted, the Ninth Circuit has indicated that an opt-out arbitration program may satisfy the NLRA.

1. *See, e.g.*, *Am. Exp. Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).
2. Section 7 provides that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8 provides that employers may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." *Id*. at § 158.

Discrimination Protection Under German Employment Law

By Stephan Grauke and Johannes Allmendinger

Introduction

To encourage equal treatment and eliminate discrimination in various forms, the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, "AGG" or the "Act") came into force in August 2006. Though it was very controversial at the time of its enactment, the Act has facilitated a better awareness for the inadmissibility of certain discriminatory practices at the workplace. In the following, on the occasion of the 10th anniversary of the AGG, we provide an introduction to the scope and the key regulations of the Act. Since the AGG has been subject to a number of court decisions in recent years, we will also consider case law relating to employee discrimination.

Scope and Concept of the AGG

The AGG, which implements four European directives into national law, protects individuals who are discriminated against on grounds of race or ethnic origin, gender, religion or secular belief, disability, age or sexual identity (so-called "banned characteristics"). In terms of personal scope, the Act covers not only employees (including leased employees) and apprentices, but also freelancers who, due to their economic dependency, deserve the same level of protection as employees (*arbeitnehmerähnliche Personen*). It also applies to job applicants and individuals whose employment has been terminated. In the case of leased employees, both the lessor and the leasing company must comply with the AGG. Finally, the Act also applies to managing directors and board members, however, only to the extent the conditions for access to employment and promotion are concerned.

As a key principle of the Act, discrimination, i.e., unequal treatment of individuals, is inadmissible unless there is a justification for it (Section 7 AGG). The general circumstances under which different treatment may be permissible are set forth in the Act, and have been further clarified by subsequent court decisions. In particular, different treatment on the grounds of any banned characteristic may be justified in situations where, by reason of the nature or the circumstances of a particular job, such grounds constitute a genuine, determining and proportionate occupational requirement (Section 8 AGG). For example, based on German case law, it may be justified to audition only male actors or actors of a specific age or with a specific ethnic background, if required by the role. Likewise, to protect students' privacy, male applicants may be rejected for a job in a girls' boarding school if the applicable job involves entering students' bedrooms or washing areas during night shifts. On the other hand, there is no occupational requirement to generally exclude women from armed services or from jobs that are physically demanding. Whether churches and certain other communities of faith may generally exclude applicants from other confessions based on religious belief alone remains an open question. While the wording of the relevant AGG provision actually allows for such a difference of treatment based on the self-concept of the concerned community, the relevant EU directive requires that the exclusion of outsiders be (at least also) based on the nature of work. Thereafter, a difference of treatment may be permissible where employees shall act as representatives of the community in the public or where employees engage in the rendition of faith or religious education, whereas

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difference of treatment would be prohibited for jobs which do clearly not require membership in the concerned community, such as a cleaning worker or a facility manager, for instance.

Additional justifications may apply with respect to age discrimination. Based on the AGG, different treatment on the grounds of age is admissible if such treatment is justified by a legitimate aim and if the means of achieving such aim are appropriate and necessary (Section 10 AGG). Subject to the circumstances of the individual case, such differences of treatment may, in particular, include the fixing of a minimum age, professional experience or seniority or the fixing of a maximum age for recruitment based on specific training requirements or the need for a reasonable period of employment before retirement. Similarly, in a restructuring scenario, the employer may agree to a social plan (*Sozialplan*) on higher severance payments for elder employees, thus taking into account that, in practice, employees of a higher age face more difficulties on the job market. On the other hand, it is generally not permissible for an employer to grant less vacation to younger employees than to elder employees (an exception is made for employees approaching retirement age, as such individuals usually require additional times of recovery). In practice, such difference in treatment is not uncommon. Technically, where employees have different vacation entitlements, employers are only on the safe side if all employees are granted the maximum amount of vacation.

Positive Measures

In order to promote groups that typically are or have been subject to discrimination, under the AGG, specific measures can be adopted by employers to both remedy an existing case of discrimination and to prevent potential discrimination. A group of persons being under-represented at a company versus in the population at large generally indicates an existing case of discrimination. As a consequence, for example, a company in which women are under-represented in management may be justified in expressly encouraging, and ultimately preferring, applications by female employees for managerial positions. Thus, by including positive measures, the Act clearly goes beyond simply prohibiting discrimination.

Sanctions in case of Non-Compliance

The AGG includes a set of instruments to enforce compliance with the anti-discrimination legislation. Most importantly, in case of unjustified discrimination, the employer shall generally be obliged to compensate affected employees for all damages arising therefrom (Section 15 para 1 AGG). Also, where the damage does not constitute an economic loss, the employee may demand appropriate compensation (*Schmerzensgeld*). Damage claims are, however, limited to monetary compensation. Based on the AGG, job applicants and employees may not demand the respective job or a promotion as a result of unjustified discrimination.

In particular, affected individuals shall not be obliged to provide full evidence of the fact that a less favorable treatment is actually based on one or more banned characteristics. Instead, it shall be sufficient that facts are established from which it may be *presumed* that there has been discrimination on one of the grounds referred to by the AGG.

In practice, damage claims are particularly common in connection with the rejection of job applications. However, the German Federal Labor Court has not yet decided how long the employer must pay the rejected applicant the respective job's salary if the applicant proves that he or she would have been hired but for discrimination. The opinions in the legal literature range from cutting off the employer's obligation to

pay the rejected applicant the salary on the first possible date on which the applicant could have been dismissed if he or she had been hired, to imposing no outer limit on the time period for which the employer must pay the applicant. If the applicant had not been hired, even without the discriminatory treatment, any compensation for non-pecuniary damage may not exceed the amount of three months of salary. Finally, damage claims must generally be asserted in writing within a period of two months from the time the concerned individual takes note of the discrimination.

Providing Evidence for Discrimination

In line with general principles of German procedural law, individuals affected by discrimination are generally obliged to point out and to provide evidence for the fact that an act of discrimination, as defined by the AGG, has occurred. However, since those affected will not always be in a position to produce conclusive evidence of discrimination, measures have been implemented to assist job applicants and employees. In particular, affected individuals shall not be obliged to provide full evidence of the fact that a less favorable treatment is actually based on one or more banned characteristics. Instead, it shall be sufficient that facts are established from which it may be *presumed* (*Indizwirkung*) that there has been discrimination on one of the grounds referred to by the AGG (e.g., a job advertisement specifically targeted to young applicants). The employer is then obliged to prove that there was no difference of treatment, or that there was a justification for it in the individual case (e.g., in spite of the job advertisement being targeted to young applicants, an older individual was ultimately employed).

Conclusion

Employers, and particularly their recruiters and HR managers, should pay attention to the requirements of the AGG, which generally prohibits any unequal treatment of employees and job applicants on the grounds of race or ethnic origin, gender, religion or secular belief, disability, age or sexual identity. In situations in which employees or applicants are treated differently for a legitimate reason, employers should carefully document their respective decisions to be prepared for any legal proceedings that those affected might initiate. Apart from simply avoiding employee damage claims, prudent employers will also recognize the advantages that come along with a more diverse workforce.

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