Kentucky Becomes First State To Prohibit Mandatory Arbitration As A Condition of Employment

Insights
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The Kentucky Supreme Court just outlawed mandatory arbitration agreements that require applicants or employees to sign if they want to be hired or remain employed, making the Bluegrass State the first in the nation to do so. The ruling in *Northern Kentucky Area Development Dist. v. Snyder* will send shockwaves through the state and cause many employers to immediately change a very common business practice—but will the decision stand? What do employers need to know about this decision and what do they need to do about it?

Former Employee Files Whistleblower Claim—But Where Will It Be Litigated?
Danielle Snyder worked for the Florence-based Northern Kentucky Area Development District (NKADD) as an administrative purchasing agent, and, as such, had direct involvement in many of the agency's business transactions. NKADD administers social programs in an eight-county area of the state and receives federal funds for various social programs. Snyder believed that she uncovered fraud in the agency; after NKADD terminated her employment, she filed suit under the state's whistleblower act.

The agency immediately filed a motion requesting that the matter be transferred to private arbitration because of a mandatory arbitration agreement Snyder signed while employed there. The relevant language of the agreement made clear that, "as a condition of employment with the District, you will be required to sign the attached arbitration agreement." Further, the agreement says: "You may revoke your acceptance of the agreement by communicating your rejection in writing to the District within five days after you sign it. However, because the agreement is a condition of employment, your employment and/or consideration for employment will end via resignation or withdrawal from the process."

But the trial court and the state court of appeals both denied NKADD's motion, and the case worked its way up to the highest court in the state. In a decision issued on September 27 but just published on October 2, the Kentucky Supreme Court agreed with the lower courts and struck down the arbitration agreement.

Kentucky Supreme Court: State Statute Prohibits Such Agreements
The court first cited to a 1994 statute that reads:

Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

That statute (KRS 336.700), the court said, means that employers in the state do not have the power to compel, as a condition of employment, any employee to agree to arbitrate any claim, right, or benefit they may have against that employer.

NKADD argued that this state statute should be overruled —or preempted—by the Federal Arbitration Act (FAA), a federal statute that broadly protects arbitration agreements from attacks such as these. The court, however, was not swayed by this argument. It said that it did not read the state statute "as evidencing hostility to arbitration agreements." Instead, the court said, it "simply prevents [employers] from *conditioning employment* on the employee's agreement to arbitration."

This was the key difference in the court's eyes; the statute does not single out arbitration agreements—which would violate the federal FAA—but instead prohibits employers from firing workers or failing to hire them on the condition they waive all existing rights they would otherwise have against the employer. In that way, the court said, it is not an attack on arbitration agreements, but instead intended to prohibit employers from basing employment decisions on whether the employee is willing to sign an arbitration agreement. The court noted that other kinds of agreements would also be considered null and void under the statute's language—such as "an agreement whereby the employee waives the ability to file a whistleblower claim against the employer, or an agreement that limits the amount of damages the employee can recover against the employer"—which proves that the statute should not be preempted by the FAA.

Will This Decision Stand?

The court's reasoning might seem to reflect a distinction without a difference for Kentucky employers, because, as of today, its decision ostensibly bars you from entering into or enforcing mandatory arbitration agreements that condition future or continued employment upon acceptance. Is there any hope for a quick fix to overturn this decision?

There are several possible avenues for relief for employers. The first is an appeal to the U.S. Supreme Court (SCOTUS), which has been aggressive in enforcing arbitration agreements of all stripes in recent years. It is quite possible that a business-friendly SCOTUS would uphold the power of the FAA to preempt state statutes such as these, freeing Kentucky employers to once again enforce these kinds of mandatory arbitration agreements. However, the Supreme Court has no obligation to accept this case for review, and, even if it did, a final ruling would not be handed down until at least mid-2019—if not much later.

The second is a legislative fix by the Kentucky General Assembly. However, the state legislature does not convene until January, and the 2019 session is only scheduled to last for 30 days. Whether the

not convene until January, and the 2019 session is only scheduled to last for 30 days. Whether the General Assembly can develop and pass a statute to remedy this situation remains uncertain. The good news is that Republicans control both legislative chambers (which is not expected to change during next month's midterm elections) and hold the governor's office (Governor Bevin will not stand for reelection until 2019), and they have worked together to pass several pro-business initiatives such as Right to Work. If a solution to this problem is going to coming out of Frankfort, the right people are in place to pass it.

What Should Kentucky Employers Do?
Unless and until a solution presents itself, this decision is the law in Kentucky and you need to follow the ruling or risk having your arbitration agreements struck down by a state court. But you have several possible options at your disposal if you would still like to take advantage of arbitration to the extent possible.

First, you can remove any conditional language from your offer letters and agreements and emphasize the mutual benefits that arbitration brings to both sides (reduced costs, increased efficiency, etc.), hoping for the best should your agreement face a legal challenge. In such cases, your agreement will still need to have sufficient consideration in order for you to have the best chance of having it considered valid.

Second, you could develop an "opt-out" plan, which would mandate arbitration unless the employee affirmatively opts out of the agreement (with no strings attached or penalties to them should they decide to reject arbitration). In such a case, it would be hard for an employee to argue that employment is conditioned upon the signing of any arbitration agreement since they have the right to dictate the process.

Your final option isn't very attractive but it is the safest route: simply remove any reference to arbitration from offer letters or agreements altogether.

Conclusion
We will analyze the situation and keep you updated with any developments. If you need your arbitration agreements reviewed in light of this significant decision, contact any member of our Louisville office or your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific state court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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