



EEOC Scraps Policy That Took Aim At Mandatory Workplace Arbitration

Insights

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The Equal Employment Opportunity Commission today withdrew its 1997 policy statement that had disapproved of the practice of requiring workers to enter into arbitration agreements to resolve workplace discrimination claims and instructed its staff to proceed with claims against employers despite the existence of such agreements. The move, following two decades of Supreme Court decisions supporting the use of arbitration, is yet another recent step taken by federal agencies to restore a natural balance in the area of workplace conflicts. It's not yet known how this policy will impact day-to-day operations at the EEOC, but it could limit the type of enforcement action employers may face if they have enforceable arbitration agreements in place.

Informal Policy Carried Weight

During the Clinton administration, the EEOC began grappling with the increasingly common practice of mandatory workplace arbitration. In July 1997, it issued its "Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment," which took direct aim at the practice in blunt and unforgiving terms.

According to this document, mandatory arbitration was "contrary to the fundamental principles evinced in" the federal civil rights laws, including Title VII, the Equal Pay Act, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). The agency contended that the federal government – through the Department of Justice, the federal court system, and the Commission itself – had the primary responsibility for enforcing these laws, and it was inconsistent with these laws to cede power to a private party like an arbitrator. "The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination," it concluded. "Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws."

Although such policy guidance documents do not count as authoritative law, they are often cited and followed by courts, investigators, state agencies, and attorneys as best practice materials. They also provide a signal as to how the agency will treat a certain situation should it come before the agency for resolution. For these reasons, employers often decide to follow the informal guidance documents to ensure they are in compliance with certain areas of the law.

In the case of the EEOC's arbitration policy, however, it carried more weight than a typical guidance document. That's because, at the conclusion of the policy, the EEOC instructed its staff to proceed with claims processing regardless of whether the charging party had agreed to arbitrate employment disputes. "The Commission will process a charge and bring suit, in appropriate cases, notwithstanding the charging party's agreement to arbitrate," it said. Moreover, the Commission said, it would challenge the legality of specific agreements that mandate binding arbitration of employment discrimination disputes as a condition of employment.

20 Years Of Supreme Court Rulings Sway EEOC To Reverse Course

In the two decades since the EEOC issued this policy, however, the Supreme Court has slowly but surely chipped away at all of the arguments against mandatory arbitration, issuing a series of cases upholding the practice as a valid exercise under the Federal Arbitration Act (FAA). Within a few years of the EEOC issuing the policy, the Supreme Court decided 2001's *Circuit City Stores v. Adams*, which confirmed that employment-related disputes are covered by and favored by the FAA. The past decade alone saw 2011's *AT&T Mobility v. Concepcion* case, which struck down a state law conflicting with the FAA, and the 2018's *Epic Systems* trilogy, which let stand class action waivers in employment arbitration agreements.

And despite some recent resistance to arbitration due to the #MeToo movement and a trend towards transparency in employment practices, employers have overwhelmingly embraced mandatory arbitration and continue to enforce such policies to this day. Reflecting the current state of law and the realities of the modern employment relationship, the EEOC today tossed the policy onto the scrapheap.

The two Republican Commission members, Chair Janet Dhillon and Victoria Lipnic, voted to rescind the policy document, and the lone vote in favor of retaining the policy was cast by Commissioner Charlotte Burrows. She later tweeted: "I'm disappointed that [@USEEOC](#) has voted to rescind its policy on mandatory arbitration as a condition of employment. Forced arbitration is a serious problem in harassment cases, because the secrecy of arbitration lets harassers continue their abuse."

What Does This Mean For Employers?

Today's decision probably changes little in the way that courts will view mandatory arbitration agreements. The 1997 policy document was most likely seen as not much more than a relic from a past era, especially when compared side-by-side with the vast majority of judicial decisions from across the country that have upheld the practice of mandatory pre-dispute arbitration agreements. While some plaintiffs' attorneys challenging the validity of an agreement may have cited to this document for some support, the substance of most serious challenges these days come in the form of attacks on the substantive and procedural conscionability of the specific agreement in question.

Where we could end up seeing some movement as a result of today's action is in the form of the actual Commission's day-to-day activities. Although intake personnel and investigators are no longer instructed to process claims regardless of whether a valid arbitration agreement is in place

longer instructed to process claims regardless of whether a valid arbitration agreement is in place, and Commission litigators are no longer directed to bring suit in federal court notwithstanding a charging party's agreement to arbitrate, we can't expect the EEOC to cease its normal actions simply because a valid arbitration provision exists. After all, the agency seemingly still has every right to pursue litigation it deems in the public interest even if an aggrieved employee is subject to an arbitration provision, as the EEOC would not be a party to such an agreement. Moreover, the EEOC can always broaden the scope of any investigation it undertakes through a Commissioner's Charge or by other procedural means, particularly if it believes there is something systemic or broader in scope that needs to be addressed, and that appears to remain true regardless of the existence of an arbitration agreement.

To the extent that we may see some kind of limitation in an individual case prosecuted by the EEOC, it might be that the Commission may decide that it will only seek injunctive or other equitable relief on behalf of aggrieved workers who are subject to an arbitration provision. The EEOC may conclude that it will not seek compensatory damages on their behalf, since such a remedy would be left for arbitration proceedings. If that turns out to be the case, it may significantly limit the cases that the EEOC would decide to pursue on behalf of individual employees.

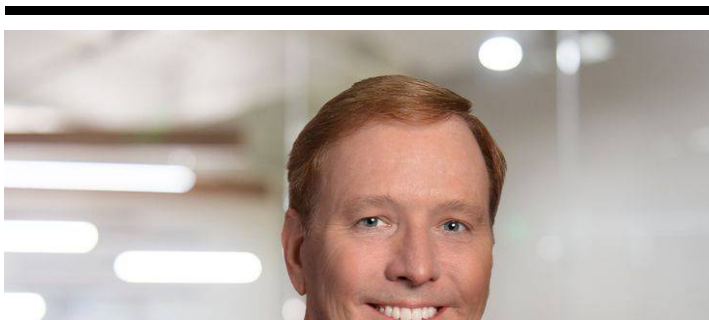
However, at this point, much of this is speculative. The announcement accompanying the rescission did not include specific details about how the agency proceed in light of today's action. Depending on how EEOC personnel are instructed in revised orders that may become known in the coming weeks and months, it may be of significant value for employers called upon to respond to EEOC charges and enforcement activity to raise arbitration agreements as a valid defense.

We expect to learn more about the practical impact of today's decision in the near future, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions about this development, please contact your Fisher Phillips attorney.

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