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Labor and Employment Client Service Group

To: Our Clients and Friends April 15, 2009

U.S. Supreme Court Expands Mandatory Arbitration of Employment Claims

On April 1, 2009, the U.S. Supreme Court issued a 5-4 decision in *14 Penn Plaza LLC v. Pyett*, __ U.S. __, holding that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate Age Discrimination in Employment Act ("ADEA") claims is enforceable as a matter of federal law. This decision comes as somewhat of a surprise because the Supreme Court has previously suggested (and many lower courts have held) that a union cannot waive an individual's right to a judicial forum for discrimination claims. *Alexander v. Gardner-Denver Co.*, 415 U. S. 36 (1974); *Air Line Pilots Assn., Int'l v. Northwest Airlines, Inc.*, 199 F. 3d 477, 484 (D.C. Cir. 1999). *Pyett* explains that *Gardner-Denver* and its progeny do not control where a collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims. An arbitration provision must, however, be drafted "clearly and unmistakably" to achieve this result.

In an apparent attempt to diminish the impact of the *Pyett* holding, the dissenting Justices took the position that "the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration . . . which is usually the case." Thus, the dissent implies that where such union control exists, *Gardner-Denver*, rather than *Pyett*, requires a finding that an employee's access to a judicial forum on his or her discrimination claims cannot be waived by the arbitration provision of a collective bargaining agreement.

That question fell outside the Court's review in *Pyett* because, while the union itself had declined to pursue the ADEA claims of its members, the union had agreed to permit those members to pursue their ADEA claims on their own in arbitration. Indeed, the dissent's description actually appears to be a time-honored attempt to spin the majority opinion in a way that would support the dissent's preferred outcome in the case. All the majority actually said was that a collective bargaining agreement which appeared to allow the union to prevent its members from "effectively vindicating" their "federal statutory rights in the arbitral forum" would probably not be upheld. Thus, employers are cautioned

against arbitration provisions which would provide the union with unlimited discretion regarding such claims.

Without question, *Pyett* favors the interests of employers by forcing more discrimination claims into the less expensive and, often times, more predictable forum of arbitration. To take full advantage of *Pyett*, employers should arrive at the collective bargaining table with the following two points in mind:

(1) A collective bargaining agreement's language must "clearly and unmistakeably" waive employees' rights to file statutory discrimination suits in court in order to require such claims to be arbitrated rather than litigated. The collective bargaining agreement in *Pyett* met this standard by expressly identifying the ADEA in the agreement's arbitration provision.

(2) To avoid falling into the trap set by the *Pyett* dissent, employers should consider including language in collective bargaining agreement arbitration clauses that ensures an employee has an effective means of vindicating his or her claims even where a union chooses not to pursue the employee's discrimination claim in arbitration. Without such language, a court may follow the logic of the *Pyett* dissent to hold that *Gardner-Denver* requires that the employee's right to a judicial forum has not been waived by the collective bargaining agreement where the union has the sole right to control whether to pursue the employee's claim in arbitration.

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