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## Will Mandatory Arbitration Clauses In Employment Agreements Soon Be Outlawed?

It was starting to feel like arbitration agreements were all the rage.

Less than a month ago, the United States Supreme Court held in *14 Penn Plaza LLC v. Pyett* that an employer and union may agree on a collective bargaining agreement provision that specifically requires union members to arbitrate certain types of federal discrimination claims -- precluding employees from pursuing such claims against their employer in federal court.

Before that, in *Gilmer v. Inter-state/Johnson Lane Corp.*, the Supreme Court upheld an individual employment contract through which an employee and his employer agreed, as a condition of employment, that all of the employee's employment claims against the employer must be arbitrated.

Now, however, amidst concerns that employees lack the bargaining power, especially in a down economy, to avoid agreeing to mandatory arbitration of employment claims as a condition of employment, many are now pressuring Congress to pass legislation overruling *Gilmer*, but not *Pyett*.

Several employees' rights groups, including organized labor, recent co-authored a letter to the House Subcommittee on Commercial and Administrative Law requesting that legislation be pursued that "would end the predatory practice of forcing non-union employees, consumers and franchise owners to sign away their rights to legal protections and access to the courts..."

Add to that a study from the Employee Rights Advocacy Institute For Law & Policy which shows that 59% of Americans oppose forced arbitration clauses in the fine print of employment and consumer contracts.

And now Congress is taking notice.

Recently, Senator Russell Feingold (Wis-D) introduced the Arbitration Fairness Act of 2009 (AFA). In order to encourage "the development of public law for civil rights and consumer rights," the AFA would amend the Federal Arbitration Act to make pre-dispute, mandatory arbitration clauses in employment, consumer, and franchise agreements unenforceable. However, this legislation would not disturb the Supreme Court's recent decision in *Pyett*; a collective bargaining agreement may continue to provide for the mandatory arbitration of certain federal claims.

Several groups, including the United States Chamber of Commerce oppose the AFA, claiming it would disrupt current commercial arbitration practices, increase litigation, and severely damage an alternative dispute resolution system that consumers and businesses have relied on for decades. In further support, the Chamber cites a 2008 survey in which 71% of likely voters opposed efforts by Congress to remove arbitration agreements from consumer contracts, and 82% preferred arbitration to litigation as a means to settle a serious dispute with a company.

Senator Feingold sponsored a prior version of the AFA in 2007. That bill never made it to a vote in either the House or Senate. Like the previous version of the bill, the 2009 version of the AFA only has 7 co-sponsors in the Senate. (In contrast, the Employee Free Choice Act of 2009 has 39 co-sponsors).

However, should the current version of the AFA become law, it would have a profound effect not only on the way companies do business going forward, but also on the potentially millions of arbitration agreements that presently exist.

This is definitely a hot employment issue to keep an eye on.

*This information above first appeared on The Legal Intelligencer Blog. You can view this information online at <http://thelegalintelligencer.typepad.com/tli/eric-b-meyer/>*