Employment & Employee Benefits Luncheon for Investment Managers

Alert

New York City to Ban Employer Inquiries and Reliance on Salary History

April 7, 2017

On April 5, 2017, by a 47-3 vote, the New York City Council passed a bill that bans New York City employers from inquiring about an applicant's "salary history" or relying on a job applicant's "salary history" in determining the applicant's salary, benefits or other compensation. New York City Mayor Bill de Blasio is expected to sign the bill, and the new law will go into effect 180 days after he signs it.

The new law, which applies to New York City employers with four or more employees, is intended to help eliminate pay inequality and amends the New York City Human Rights Law to make it "an unlawful discriminatory practice" for an employer to inquire about an applicant's salary history or conduct any public search to determine the applicant's salary history. In addition, the new law makes it "an unlawful discriminatory practice" for an employer to rely on an applicant's "salary history" in determining the salary or benefits of an applicant during the hiring process. "Salary history" means an "applicant's current or prior wage, benefits or other compensation."

Although the bill restricts employers from inquiring about or relying on salary history, employers are permitted to, "without inquiring about salary history," discuss with the applicant his or her expectations with respect to salary or benefits, "including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer." Further, an employer may lawfully rely on salary history in determining salary and benefits if an applicant "voluntarily and without prompting discloses salary history."

The law does not bar employers from verifying an applicant's background information, but if an employer inadvertently learns salary history information during the verification process, the employer cannot rely on the information. If an applicant has voluntarily disclosed salary history information, the employer is permitted to verify the information provided.

As with other violations of the New York City Human Rights Law, employers found in violation of the new law may be liable for compensatory damages (including front pay and back pay), punitive damages, and attorneys' fees and costs, as well as a civil penalty of up to $250,000 for violations that "are the result of willful, wanton or malicious conduct."

Employers should carefully review their interview and hiring processes as a result of the new law. For example, employment applications should not ask for salary information. Employers should revise their neutral reference policies to not provide salary history information unless specifically requested by an employee. Employers should take steps to ensure that any discussions about salary or benefits are

limited to applicants' expectations, and not to compensation the applicant has received from a prior employer. Further, to ensure an employer does not inadvertently obtain salary history information, employers should ensure that any background checks specifically exclude salary history information.

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Arbitration

Expert Analysis

Is State Law Rule About Power of Attorney Agreements Preempted by the FAA?

By **Samuel Estreicher**

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In *Kindred Nursing Centers Limited Partnership v. Clark*,[1] the U.S. Supreme Court is poised to decide whether the Federal Arbitration Act (FAA), 9 U.S.C. §1 et seq., preempts a state rule that requires a power of attorney agreement to expressly refer to arbitration agreements, rather than contracts generally, before the agent can bind the principal to a predispute arbitration agreement. Section 2 of the FAA makes arbitration agreements "valid, irrevocable, and enforceable" except on "such grounds as exist … for the revocation of any contract."[2] Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts."[3]

Numerous Supreme Court decisions have held that the FAA preempts state law rules that disfavor arbitration agreements or otherwise fail the "same" or "equal footing" principle.

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More than 20 years ago, in *Doctor's Associates v. Casarotto*,[4] the court held that the FAA preempted a state statute that required notice of an arbitration commitment to appear on the first page of a contract. The court explained that the FAA "preclude[s] States from singling out arbitration provisions for suspect status."[5] Just last year, the court reversed a decision of a California court finding an arbitration agreement unenforceable, based on an interpretation it would not have had "in any other context other than arbitration."[6] These decisions are not outliers. The court has not hesitated to strike down state rules that hamper arbitration.[7] Kindred Nursing Centers presents the court with an opportunity either to reinforce that arbitration agreements are to be enforced to the same extent as other agreements or to take a different tack, permitting state courts to make decisions that limit the enforceability of arbitration agreements, perhaps giving special recognition to the nursing home context and the limits of powers of attorney agreements in that context.

Underlying Facts

Kindred Nursing Centers operates nursing homes and rehabilitation centers. Before residents are admitted to Kindred Nursing facilities, they execute power of attorney agreements empowering their attorneys-in-fact with, among other powers, authority to enter into contracts relating to their principals' affairs. When their principals are admitted to a facility,

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the attorneys-in-fact are given agreements (not required as a condition of admission to the facility) that provide that all disputes arising between the principal and the facility are to be resolved through arbitration. Clark and Wellner, attorneys-in-fact for two Kindred Nursing residents, signed the arbitration agreements. After their principals' deaths, Clark and Wellner sued Kindred Nursing in Kentucky state court, alleging state statutory violations and tort claims on behalf of the estates of their principals. The court initially dismissed the cases, based on the arbitration agreement. However, after the Supreme Court of Kentucky held that broad language in a power of attorney agreement did not include the ability to bind the principal to an arbitration agreement in *Ping v. Beverly Enterprises*,[8] the trial court reconsidered its decisions and held that the arbitration agreements were unenforceable. Those decisions were ultimately consolidated on appeal to the Supreme Court of Kentucky. The state high court held that an express grant of authority to the attorney-in-fact is required to bind a principal to an arbitration agreement. The decision was based on the court's view that a principal should not be able to unknowingly waive fundamental constitutional rights, such as the right to a jury trial, which the court referred to as "inviolate," "sacred," and "divine God-given."[9]

The Parties' Arguments

Kindred Nursing argues that the Kentucky supreme court's decision is contrary to numerous U.S. Supreme Court decisions holding that §2 of the FAA preempts state-law rules that do not "place[] arbitration contracts on equal footing with all other contracts."[10] The FAA violation, according to Kindred Nursing, is the requirement that a power of attorney agreement explicitly set forth the attorney-in-fact's power to enter into an arbitration agreement for the arbitration agreement to be enforceable, while not requiring similarly express language for other types of agreements. In addition, the nursing homes contend that affirmance of the Kentucky ruling would open the floodgates for new state-law rules to hinder enforcement of arbitration agreements. In opposition, Clark and Wellner argue that prior FAA preemption cases are distinguishable because the question in this case involves contract formation rather than contract interpretation. Moreover, they argue, the Kentucky court was right to rule that the power to waive fundamental constitutional rights, such as the right to a jury trial, must be "unambiguously expressed in the power of attorney."

Conclusion

At oral argument before the court, some justices appeared doubtful that the decision could be viewed as non-discriminatory against arbitration as such, rather than as part of a set of fundamental decisions that would ordinarily not be included in a general power of attorney agreement even in the nursing home context. Similarly, since the explicit-reference rule was not stated in a statute but came about as a result of a prior state court decision, it may not be clear to all of the justices whether Kentucky has singled out arbitration in violation of the court's equal-footing FAA doctrine. If the court affirms the Kentucky decision, the case could provide an opening for rulings that could render arbitration agreements more difficult to enforce. That result seems unlikely in light of the court's consistent and longstanding pro-arbitration jurisprudence.

1. No. 16-32 (argued Feb. 22, 2017).
2. 9 U.S.C. §2.
3. *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 24 (1991). See also *DIRECTV v. Imburgia*, 136 S. Ct. 463, 468-69 (2015), *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996), *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).
4. 517 U.S. at 687-88.
5. Id. at 687.
6. *Imburgia*, 136 S. Ct. at 469.
7. See *Marmet Health Care Center v. Brown*, 132 S. Ct. 1201 (2012); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), *Perry*, 482 U.S. 483; *Southland v. Keating*, 465 U.S. 1 (1984).
8. 376 S.W.3d 581 (Ky. 2012).
9. See generally *Clark, et. al. v. Kindred Nursing Centers, et al.*, 478 S.W.3d 303 (Ky. 2015).
10. *Imburgia*, 136 S. Ct. at 468-69. See supra note 2.

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Alert

EEOC Issues New Guidance on National Origin Discrimination

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The U.S. Equal Employment Opportunity Commission (the "EEOC") recently issued new guidance on national origin discrimination (the "Guidance"), updating its previous guidance on the topic for the first time since issuing a 2002 compliance manual. The Guidance, coupled with a Q&A and fact sheet for small businesses, addresses uncertainties that have developed in the law.

The Guidance modernizes the definition of national origin discrimination to include treating an employee or job applicant differently because he or she has the physical, cultural or linguistic characteristics of a national origin group. Additionally, while in the past federal courts have failed uniformly to conclude that national origin discrimination includes an individual's perceived ethnicity or national origin, the Guidance affirms the EEOC's current position that treating an employee or job applicant differently because he or she is perceived to have a particular national origin is discrimination.

The Guidance also interprets Title VII to prohibit discrimination because of an individual's association with someone of a particular national origin. For example, it is unlawful to discriminate against an employee or job applicant because he or she has a child with someone of a different ethnicity.

Employers must be careful in implementing "English-only" policies. The EEOC reasons that restrictive language policies implicate national origin discrimination because of the strong nexus between language and ethnic identity. The Guidance also explains when an employment decision may legitimately be based on an individual's accent. For an employer to make an employment decision based on one's accent, the employer must demonstrate that the accent "interferes materially with job performance." To overcome this standard, an employer must show that: "(1) effective spoken communication in English is required to perform job duties; and (2) the individual's accent materially interferes with his or her ability to communicate in spoken English."

The Guidance addresses how national origin discrimination interacts with workplace harassment, offering hypotheticals as to what is and what is not conduct that creates a hostile work environment based on national origin. The Guidance offers "promising practices" for employers to adopt to reduce the risk of Title VII violations based on national origin discrimination. Among the "promising practices," the EEOC recommends that employers:

- Use a variety of recruitment tools to attract a diverse group of applicants;
- Establish written objective criteria for evaluating candidates;

- Establish objective, job-related criteria aimed at identifying conduct that can result in discipline; and
- Clearly communicate to employees through policies, actions and trainings that harassment based on national origin will not be tolerated.

Employers are advised, in light of the increasing emphasis on diversity in the workplace, to consider their responsibilities with respect to national origin discrimination, and examine their materials, policies, trainings and recruitment processes to ensure compliance.

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Alert

SEC Whistleblower Update: New Enforcement Actions for 'Chilling' Language in Severance Agreements

December 22, 2016

The Securities and Exchange Commission ("SEC") continues to actively enforce Rule 21F-17 under the Securities Exchange Act of 1934, which provides that "no person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement ... with respect to such communications."[1] In its most recent actions, the SEC charged companies with violating Rule 21F-17 by including language in severance agreements that specifically prohibited former employees from communicating disparaging information about the company to the SEC and that prohibited former employees from voluntarily communicating with or contacting any governmental agency in connection with a complaint or investigation.

On Dec. 19, 2016, the SEC announced an enforcement action against NeuStar, Inc., a Virginia-based technology company.[2] NeuStar entered into severance agreements with former employees containing a non-disparagement provision which prohibited former employees from engaging "in any communication that disparages, denigrates, maligns or impugns" the company. The language at issue specifically stated that such communications could not be made to "regulators" including the SEC. When the SEC began its investigation, NeuStar, on its own accord, removed the reference to "regulators" including the SEC, and added language specifying that nothing in the agreement prohibited the former employee from "communicating, without notice to or approval by NeuStar, with any federal government agency" about a potential violation of a federal law or regulation. These amendments were apparently sufficient to satisfy the SEC. NeuStar agreed to make reasonable efforts to inform former employees who signed the severance agreements between Aug. 12, 2011 (the date Rule 21F-17 became effective) and the date of the amendments. NeuStar also agreed to pay a civil monetary penalty of $180,000.

On Dec. 20, 2016, the SEC announced a settlement in an enforcement action against SandRidge Energy, Inc., an oil and natural gas exploration and production company headquartered in Oklahoma City.[3] As with NeuStar, SandRidge entered into severance agreements with former employees that contained

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[1] 17 C.F.R. § 240.21F-17(a). The Dodd-Frank Wall Street Reform and Consumer Protection Act added Section 21F to the Securities Exchange Act of 1934. Section 21F provides for monetary awards for whistleblowers who provide original information that leads to a successful SEC enforcement action. In August 2011, the SEC adopted Rule 21F-17.

[2] *See In re NeuStar, Inc.*, Exch. Act Release No. 79593 (Dec. 19, 2016).

[3] *See In re SandRidge Energy, Inc.*, Exch. Act Release No. 79607 (Dec. 20, 2016).

non-disparagement provisions that prohibited former employees from making any disparaging remarks or statements to any "governmental or regulatory agency." In addition, SandRidge's form severance agreement prohibited employees from disclosing confidential or proprietary information to governmental agencies without SandRidge's consent and from assisting or contacting any governmental agency in connection with a complaint or investigation. The SEC determined that these provisions violated Rule 21F-17. In response to the SEC's investigation, SandRidge revised its form agreement and advised former employees that the problematic provisions were no longer in effect. SandRidge also added a provision to its form agreement stating that nothing in the agreement was intended to prohibit employees from reporting violations of law to governmental agencies.

In light of the SEC's actions, employers should review employment and separation agreements, as well as employment and compliance policies and codes of conduct and ensure that they do not contain any contractual or policy provisions that may be interpreted to run afoul of Rule 21F-17, without express carve-outs. Any prohibition or restriction on communications with individuals outside a firm, whether concerning confidential information, disparaging information or general communications with third parties, which does not include a specific carve-out for communications with the SEC without prior notice to the employer, may violate Rule 21F-17.

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