A Timely Analysis of Legal Developments

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The Massachusetts Supreme Judicial Court recently held that state law discrimination claims may be subject to arbitration, provided that the arbitration provision clearly and unmistakably demonstrates the parties' intent to arbitrate such claims.

New Massachusetts Decision Finds that General Arbitration Provisions Do Not Cover Discrimination Claims

By Christopher B. Kaczmarek and Amy E. Mendenhall

The Massachusetts Supreme Judicial Court recently answered the long-standing question of whether parties may enter into contracts that provide for the arbitration of future claims under Massachusetts' antidiscrimination statute, known as Chapter 151B. In *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, the court held that claims under Chapter 151B are arbitrable. Significantly, however, the court also held that agreements to arbitrate such claims must be stated in "clear and unmistakable terms" in order to be enforceable. In the absence of such "clear and unmistakable terms," Massachusetts courts will not compel the arbitration of claims arising under Chapter 151B.

Factual Background

The plaintiff in *Warfield* signed an employment agreement providing that "[a]ny claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration." The agreement did not contain any reference to employment discrimination or Chapter 151B. Several years after signing the agreement, plaintiff filed a complaint in the Massachusetts Superior Court alleging claims of gender discrimination, retaliation, defamation, and tortious interference with advantageous or contractual relations. The employer moved to dismiss the Superior Court case and to compel arbitration of all the pending claims. After the Superior Court denied the employer's motion to compel arbitration, the employer sought direct appellate review by the Supreme Judicial Court.

The Supreme Judicial Court, over the dissent of one justice, affirmed the trial court's decision to deny the employer's motion to compel arbitration. In reaching this conclusion, the court made two important pronouncements.

Statutory Discrimination Claims Are Arbitrable

First, the court held that agreements to arbitrate claims arising under Chapter 151B may be valid and enforceable. This was an open issue prior to *Warfield*. Indeed, many trial

court judges previously had refused to compel the arbitration of claims under Chapter 151B. For its part, the Massachusetts Commission Against Discrimination consistently refused to recognize pre-dispute arbitration agreements on the grounds that such agreements are contrary to public policy. Thus, the *Warfield* decision is welcome news for employers.

Arbitration Provisions Must Be Clear and Unmistakable

On the other hand, the Supreme Judicial Court also held that an employment contract containing an agreement by the employee to limit or waive any of the rights or remedies conferred by Chapter 151B is enforceable only if such an agreement is stated in clear and unmistakable terms. Interpreting the agreement before it, the court found that the reference to all disputes "arising out of or in connection with [the employment agreement] or its negotiations" did not clearly express such an intent. Accordingly, the court denied the employer's motion to compel arbitration of the Chapter 151B claims. Because the employee's common law claims were based upon largely the same alleged conduct as her Chapter 151B claims, the court held that the common law claims also should be resolved in court, as opposed to in arbitration.

Implications for Massachusetts Employers

The *Warfield* decision has significant implications for employers with employees in Massachusetts.

First, *Warfield* suggests that employers who wish to enter into enforceable agreements to arbitrate claims of employment discrimination should err on the side of specificity. Arbitration provisions should clearly and specifically state that the parties intend to arbitrate all future claims of employment discrimination and retaliation, including claims arising under Chapter 151B and other state and federal laws.

Second, the language of the *Warfield* decision also suggests that employers who wish to obtain a valid release of Chapter 151B claims should specifically refer to such claims in the text of the release.

Although Warfield provides useful guidance, employers in Massachusetts should take note that there is a robust and ever-changing body of case law at the federal level regarding arbitration. Accordingly, Massachusetts employers should consult with experienced employment counsel for further discussion regarding the arbitrability of employment-related claims and the possible need to revise existing arbitration agreements in light of *Warfield*.

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