Labor & Employment Issues
In Focus
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For Clients and Friends
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SCOTUS UPENDS ARBITRATION SPLIT WITH STEELY DOUBLE-EDGED SWORD

In a unanimous decision, the U.S. Supreme Court ("SCOTUS") at once strengthened and diminished employment arbitration. In an opinion authored by Justice Kagan, SCOTUS held that, applying standard contract principles, an employer with an employee arbitration agreement who instead engages in litigation for several months waives and cannot later claim a right to proceed in the arbitration forum. *Morgan v. Sundance Inc*., U.S. No. 21-328 (May 23, 2022).

Employee Robyn Morgan filed a nationwide collective action complaint alleging federal overtime claims against her employer Sundance, a Taco Bell franchise, in federal court. Sundance engaged in litigation settlement efforts for nearly 8 months before asking the court to compel arbitration as prescribed in its standard employee agreement. Relying on the federal policy favoring arbitration, the Federal Arbitration Act (the "FAA"), and the absence of any "prejudice" to plaintiff, the Eighth Circuit Court of Appeals granted the motion, but SCOTUS reversed.

An agreement to arbitrate is a contract, explained Justice Kagan, subject to the usual principles of contract law, without a pro-arbitration gloss beyond the express terms prescribed by the FAA, she wrote. Justice Kagan traced the Eighth Circuit rule back to a "decades-old Second Circuit decision" which, declaring "an overriding federal policy favoring arbitration" would not infer a waiver absent prejudice. However, cautioned Justice Kagan, "a federal court addressing waiver does not generally ask about prejudice" but rather about the party's "relinquishment or abandonment of a known right." FAA policy, she stated, "is about treating arbitration contracts like all others, not about fostering arbitration" and the courts are not authorized "to invent special arbitration-preferring procedural rules." Accordingly, held SCOTUS, a party that participates in court litigation without invoking its contract right to arbitration, may waive that right even absent any prejudice to the other party. SCOTUS remanded the case to the Circuit Court for further proceedings in accordance with contract law.

The decision itself is expressly and narrowly limited to waiver, but its ramifications may run more broadly. First, the decision resolves a split in the Circuit Courts with eight other Circuits following the Second and Eighth Circuit rule, and only two disagreeing. Second, the decision was sought and praised by both the plaintiffs' bar and the American Arbitration Association as a check on an employer's power to exploit arbitration as a tactic. Employers may not test the waters in court but then retreat to arbitration if the court is not to their favor. On the other hand, the decision also checks arbitration as well, limiting arbitration to contract principles without policy favoritism, at least on questions of initiation

of arbitration, but perhaps for more. Finally, it is unclear what, if any, effect the decision will have on labor arbitration under the Labor Management Relations Act, which, even more that the FAA, enjoys a presumption of arbitrability and expansive deference for the resulting award. As this decision plays out and develops in the courts, one thing is clear – a party seeking arbitration should so move at first opportunity and strictly follow its arbitration agreement so as to preserve its rights, whether employee, employer or union.

HONORING MENTAL HEALTH AWARENESS MONTH – DOL ISSUES GUIDANCE FOR JOB-PROTECTED LEAVE TO TREAT SERIOUS MENTAL HEALTH CONDITIONS UNDER FMLA

On May 25, 2022, the U.S. Department of Labor's Wage and Hour Division ("WHD"), which enforces the Family and Medical Leave Act ("FMLA"), published updated guidance for workers on their rights to take job protected leave to treat mental health conditions and employers' obligations for FMLA compliance. Specifically, WHD issued Fact Sheet # 28O: Mental Health Conditions and the FMLA, release number 22-945-NAT ("Guidance"), and Frequently Asked Questions on the FMLA's mental health provisions ("FAQs").

FMLA generally provides 12 work weeks of unpaid leave each year for eligible employees to treat their own serious health condition or to care for a spouse, child, or parent because of a serious health condition. According to the Guidance, mental health conditions are considered serious under the FMLA if they require: 1) inpatient care (such as an overnight hospital stay or treatment center) or 2) continuing treatment by a health care provider. WHD identified that the "continuous treatment" qualification of certain chronic conditions, for example, anxiety, depression, dissociative disorders, addiction, or eating disorders, occurs when they cause occasional periods when an individual is incapacitated and requires treatment by a health care provider at least twice a year. Additionally, it includes conditions that necessitate a single appointment with a health care provider, including a psychiatrist, clinical psychologist, or clinical social worker, and follow-up care (e.g., prescription medication, outpatient rehabilitation counseling, or behavioral therapy).

Eligible employees who unexpectedly cannot work due to a mental health condition and visit a psycho-analytic professional monthly are entitled to the same protections as an employee who visits a doctor monthly during his/her shift to manage symptoms, though the FMLA's notice provisions may apply differently where the need for the leave is foreseeable and such notice is practicable. This likewise applies to employees who take leave to care for a spouse, child, or parent who cannot work or perform other regular daily activities because of a serious mental health condition. Caregiver leave includes providing psychological comfort and reassurance that would benefit a family member with a serious mental health condition who may be in addiction recovery or suffering an anxiety or depressive attack. Though the FMLA generally does not apply to adult children, the

Guidance provides a qualifying example where the mental health conditions rendered the child incapable of self-care, and the leave was to help the child with day-to-day needs such as travel to work or school, cleaning, cooking, and shopping.

The Guidance also included a separate section for current or former military member caregiver leave. This includes, for example, an injury or illness that manifests after the covered individual became a veteran, such as when the solider develops post-traumatic stress disorder, a traumatic brain injury, or depression that occurs well after an event occurred. More information about military caregiver leave under the FMLA, including the definition of a serious injury or illness for a covered service member, and certification requirements, are covered by additional guidance - Fact Sheets #28M(a) and #28M(b).

According to data from the 2020 National Survey on Drug Use and Health which was reviewed by the U.S. National Institute of Health, the WHD press release concerning the Guidance recognized that nearly one in five U.S. adults – or about 52.9 million people in 2020 – live with a mental illness, and that only about half receive the help needed. WHD reiterated its intent to ensure that obtaining job-protected leave is not an additional hurdle to overcome when eligible employees seek the mental health support they need for themselves or their family members. The timing of this is especially important since May is recognized as National Mental Health Awareness month.

AMAZON ON THE OTHER SIDE OF A PRIME DELIVERY - NLRB REGIONAL DIRECTOR SUGGESTS SETTLING UNFAIR LABOR PRACTICES OR FACE A LABOR COMPLAINT

The National Labor Relations Board ("NLRB" or "Board"), by Kathy Drew King, the Regional Director for Region 29 located in Brooklyn ("RD"), announced on May 6, 2022, that it found merit to allegations brought by the Amazon Labor Union ("ALU") that Amazon.com Inc., violated the National Labor Relations Act of 1935 ("NLRA" or "Act"), in connection with the successful organizing campaign that occurred at one of its Staten Island fulfillment centers. NLRB spokesperson Kayla Blado stated that unless Amazon settles the Unfair Labor Practice ("ULP") charges, the Board will issue a complaint, in what could lead to new legal precedent.

The RD determined that, in connection with the recent ALU election, Amazon held mandatory "captive audience" meetings at the fulfillment center where it threatened workers who voted for a union to use minimum wage pay as the starting point for contract negotiations. Amazon also delivered intimidating messages to workers that it might take years to get an actual union contract, or never get one, and that while contract discussions were ongoing, Amazon could not improve already questionable working conditions for employees. The RD also found merit to the claim that, when an employee used Amazon's "Voice of the Associate" board at the fulfillment center to advocate for a paid Juneteenth holiday, Amazon retaliated by prohibiting that worker from posting there again. In a

statement issued by Amazon spokesperson Kelly Nantel, she said, among other things, that "[m]andatory meetings have been legal for over 70 years and were commonly held by employers."

Board precedent pertaining to the legality of captive audience meetings, which employers claim gives them the ability to educate employees about the views of management on unionization, dates to the 1940s. However, on April 7, 2022, Jennifer A. Abruzzo, the NLRB General Counsel ("GC"), issued a memorandum stating her intent to request the Board to reconsider and overturn this rule, notwithstanding the plain wording of Section 8(c) of the Act ("Memorandum"). The GC asserts that such mandatory meetings are inconsistent with employees' statutory rights to engage in concerted, protected activity and such meetings chill said rights. Additionally, she argues that employers typically threaten employees to attend these mandatory meetings, and if compelled, as the Supreme Court has made clear, threats fall outside the scope of employers' statutory and constitutional free-speech protections. Rather, as the Memorandum indicates, the GC is urging the Board to require employers to make it abundantly clear to employees that attendance at these meetings is truly voluntary.

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