THOITS LAW

THOITS, LOVE, HERSHBERGER & McLEAN

First Wednesday

by Jeffrey A. Snyder and Erin L. McDermit

A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

July 6, 2011
Issue No. 97

Jeff and Erin are lawyers with Thoits, Love, Hershberger and McLean, specializing in employment law and related litigation.

They can be reached at:
(650) 327-4200 – Phone
(650) 325-5572 – Fax
jsnyder@thoits.com
emcdermit@thoits.com

Employment Law Group:
Jeffrey A. Snyder
Erin L. McDermit
Anne E. Senti-Willis
Stephen C. Gerrish

Time to Reconsider the Class Action Waiver in Employment Arbitration Agreements

For employers that don't want to be sued in a class action for overtime wages, discrimination or other mass employee claims, an arbitration agreement with a class action waiver for employees might be just the ticket. While the *Wal-Mart Stores, Inc. v. Dukes* case grabbed the headlines, another recent decision from the United States Supreme Court may prove more important for California employers trying to avoid class action lawsuits.

In *AT&T Mobility LLC v. Concepcion*, the high court held that federal arbitration law, specifically the Federal Arbitration Act ("FAA"), preempts California's rule invalidating class action waivers in most consumer contracts and, by reasonable extension of the Court's language, to employment contracts as well.

As background, *Wal-Mart Stores* is the case in which the high court recently prevented the largest proposed class in history from going forward. This would have been a class of over 1.5 million female workers suing for gender discrimination because Wal-Mart allegedly had a corporate policy favoring promotions of men over women. The Court ruled the case could not proceed as a class action in its current form for several reasons, including that promotion decisions were made on a local basis and there was no company-wide policy to discriminate. The Court did not, however, strike down all class actions. In fact, many of the Wal-Mart plaintiffs are expected to proceed with their court claims in some form.

About two months before *Wal-Mart Stores*, the Court decided the *AT&T Mobility* case, also in favor of the defense ("pro-business") side. This case involved a proposed class action of AT&T consumers asserting claims of fraud and false advertising because AT&T collected sales tax on the retail value of a cell phone after advertising that it was "free." The phone service agreements contained arbitration clauses requiring any disputes between AT&T and the customer to be filed in arbitration as opposed to court. Within the arbitration clause was a "class action waiver" that prohibited customers from bringing any claim as a class action or other representative proceeding. After a number of plaintiffs filed their lawsuit, the issue for the high court was whether AT&T could compel arbitration and avoid having a class action proceed through the courts. The Court held the clause enforceable, meaning no class action lawsuit could be asserted by this large group of plaintiffs. The advantage to AT&T was that many smaller plaintiffs might be dissuaded from proceeding alone, and plaintiffs' lawyers would not take these cases on an individual basis because they were of small dollar value. (Certain minimum protections were built into AT&T's agreements, and these pro-consumer provisions should be considered by a company seeking to bolster its own agreement.)

©2011 Thoits, Love, Hershberger & McLean

The importance of the *AT&T Mobility* case to California employers is that it provides good authority to draft a "class action waiver" into employee handbooks and arbitration agreements so that employees are compelled to bring their claims to arbitration, alone, and not as a representative for any other party. If drafted properly, it has a much better chance of standing up under the *AT&T Mobility* case, which rejected California doctrine that found many such waivers unenforceable. Including such a clause in employment agreements or handbooks could be well worth the effort considering the huge cost and potential downside risk of class action litigation.

Some important features when drafting a class action waiver include: a statement that the FAA is the governing law, waiver of both class and representative capacity actions (Business & Professions Code section 17200, for example), separate initials confirming the arbitration agreement, appropriate type face so that the clause is not lost among boilerplate, and other *Armendariz* protections.

Armendariz v. Foundation Health Psychcare Services, Inc. is the case that, in 2000, established California's minimum protections for enforceability of an employer's arbitration clause. While the *AT&T Mobility* case might evolve to chip away at the various *Armendariz* requirements, such as cost-shifting and sufficient discovery, it is still risky to ignore the *Armendariz* requirements.

The bottom line is that *AT&T Mobility* made a strong statement supporting the preeminence of FAA over conflicting state law that might otherwise interfere with the parties' rights to have arbitration enforced according to the terms of agreement. If employers are inclined to favor the use of arbitration agreements, they should also consider a well-drafted class action waiver.

✻ ✻ ✻

- If you are not receiving this newsletter directly, please send us your e-mail address and we will add you to the First Wednesday Distribution List.
- If you would like this newsletter redirected to others within or outside your organization, please send us their e-mail addresses.
- First Wednesday is a publication of general applicability and not specific to any set of facts. Thus, it should not be relied upon for any specific case or matter without further discussion. No attorney-client relationship is formed as a result of your reading or replying to this newsletter, which is not intended to provide legal advice on any specific matter, but rather to provide insight into current developments and issues.
- Internal Revenue Service Circular 230 Disclosure**.** Please note that any discussion of or advice regarding United States tax matters contained herein (including any attachments hereto) does not meet the requirements necessary to be a "covered opinion" as defined in Internal Revenue Service Circular 230, and therefore, is not intended or written to be relied upon or used and cannot be relied upon or used for the purpose of avoiding federal tax penalties that may be imposed or for the purpose of promoting, marketing, or recommending any tax-related matters or advice to another party.

JEFFREY A. SNYDER
ERIN L. McDERMIT
Thoits, Love, Hershberger & McLean
285 Hamilton Avenue, Suite 300
Palo Alto, California 94301
Telephone: (650) 327-4200
Facsimile: (650) 325-5572
E-mail: jsnyder@thoits.com
emcdermit@thoits.com

©2011 Thoits, Love, Hershberger & McLean