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Time To Update Your Arbitration Agreements
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A recent decision rendered by the United States Court of Appeals for the Fifth Circuit illustrates why it is important for employers to update their arbitration provisions to reflect the most recent changes in the law. In *Holmes v. Air Liquide USA, L.L.C., et al.*, No. 12-20129 (5th Cir. Nov. 26, 2012), the Fifth Circuit rejected a creative argument made by the plaintiff that certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") invalidate all broadly-worded arbitration provisions. While the plaintiff was unsuccessful, this decision demonstrates why employers must periodically review and update their arbitration agreements.

Background

Subsequent to the termination of her employment, Jamie Holmes ("Holmes") filed a lawsuit in the United States District Court for the Southern District of Texas against her former employer, Air Liquide USA, L.L.C. and Air Liquide Industrial U.S. L.P. (collectively "Air Liquide") alleging claims under the Americans with Disabilities Act, the Texas Commission on Human Rights Act, Title VII of the Civil Rights Act of 1964, and the Family and Medical Leave Act. During her employment, Holmes and Air Liquide had entered into an arbitration agreement, which provided, in pertinent part, that "[a]ll disputes arising out of or relating to the interpretation and application of this ADR Agreement or the employee's employment with Air Liquide or the termination of employment . . . shall be resolved through ADR, including binding arbitration if necessary." In response to Holmes' Complaint, Air Liquide filed a motion to compel arbitration based on the wording of its ADR Agreement. The district court granted the motion and dismissed Holmes' case. Holmes then appealed to the Fifth Circuit.

Fifth Circuit Validates Air Liquide's Arbitration Agreement

In reviewing whether to compel arbitration, the Fifth Circuit analyzed two factors: (1) whether the parties agreed to arbitrate the disputes; and (2) whether any federal statute or policy rendered the claims non-arbitrable. In this case, there was no dispute that the parties entered into a valid and enforceable arbitration agreement. However, Holmes argued that Dodd-Frank rendered her claims "non-arbitrable."

Specifically, Holmes argued that certain provisions of Dodd-Frank rendered the arbitration agreement invalid and unenforceable. In making this argument, she relied upon 7 U.S.C. § 26(n)(2) and 18 U.S.C. § 1514A(e)(2), both of which provide that "[n]o predispute arbitration agreement shall be valid and enforceable, if the agreement requires arbitration of a dispute arising under [Dodd-Frank] . . ."

The Fifth Circuit, however, rejected Holmes' arguments because (1) she failed to bring any Dodd-Frank claims; thus, Dodd-Frank did not apply, and (2) a decision invalidating the arbitration "would lead to the untenable conclusion that the Act wholesale invalidates all broadly-worded arbitration agreements (of which there are many) even when plaintiffs bring wholly unrelated claims." As a result, the Fifth Circuit affirmed the district court's decision in its entirety.

Lessons Learned

- **Employers Need To Be Mindful of Dodd-Frank's Whistleblower Protections**
  Although unsuccessfully utilized by Holmes in this case, Dodd-Frank contains elaborate whistleblower protection for employees who provide information to the U.S. Securities and Exchange Commission ("SEC"). Among other things, Dodd-Frank extends anti-retaliation protections to whistleblowers in actions instituted by the SEC. Specifically, Dodd-Frank provides that "no employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against a whistleblower . . ." 15 U.S.C. §78u-6(h)(1). Moreover, if an action brought by the SEC results in monetary sanctions of at least $1 million, Dodd-Frank provides whistleblowers with recovery of between 10% and 30% of the aggregate award. *See* 15 U.S.C. §78u-6(b)(1).

  As a result, there is a strong financial incentive for whistleblowers to utilize Dodd-Frank. Therefore, employers need to be mindful of Dodd-Frank's whistleblower protections, and of course, employers need to make sure they do not engage in any retaliatory conduct toward employees who bring potential violations of the securities laws to their attention.

- **Time To Review And Update Your Arbitration Agreements**
  Additionally, the Holmes decision demonstrates that former employees are coming up with very inventive ways to try to avoid adhering to arbitration agreements in the context of employment disputes (primarily because of their desire to have juries decide their cases). Employers should narrowly-tailor their arbitration provisions and avoid broadly-worded ones so the provisions are not as susceptible to the validity arguments asserted by the plaintiff in Holmes. Consequently, we recommend that employers review and update their arbitration agreements annually to account for the latest trends in the law.