

Kentucky Supreme Court Holds Employers May Not Require Arbitration Agreements as a Condition of Employment

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On September 27, 2018, the Kentucky Supreme Court issued its opinion in *Northern Kentucky Area Development District v. Snyder*, No. 2017-SC-000277-DG, and held that Kentucky employers *may not* require employees to sign arbitration agreements as a condition of their employment.

In reaching its conclusion, the Court relied upon KRS 336.700(2), which states:

[n]otwithstanding any provision of the Kentucky Revised Statutes to the contrary, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, *arbitrate*, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

(Emphasis added.)

The case involved Northern Kentucky Area Development District (NKADD), a state agency created by Kentucky state statute, that required employee Danielle Snyder to sign an arbitration agreement that stated:

As a condition of employment with the District, you will be required to sign the attached arbitration agreement ... You may revoke your acceptance of the agreement by communicating your rejection in writing to the District within five days after you sign it. However, because the agreement is a condition of employment, your employment and/or consideration for employment will end via resignation or withdrawal from the process.

When Snyder later sued NKADD for employment-related claims, NKADD moved to enforce the arbitration agreement. The trial court and court of appeals both found the agreement unenforceable. The Kentucky Supreme Court granted discretionary review to consider whether the Federal Arbitration Act (FAA) preempts Kentucky Revised Statutes 336.700(2)'s bar on employers requiring employees to sign arbitration agreements as a condition of employment.

The Court held the FAA does not preempt KRS 336.700(2). It reasoned that although "[t]he FAA [] preempted any state rule discriminating on its face against arbitration—for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim,'" KRS 336.700 does not "actually attack, single out, or specifically discriminate against arbitration agreements," but merely prohibits employers from conditioning employment on an agreement to arbitrate.

The Court held that KRS 336.700(2) prevents the conditioning of employment on "an employee's agreement to waive or otherwise diminish 'any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled...[.]'" which could also include the agreement to waive the right to file certain types of suits against an employer. For these reasons, the Court concluded that the FAA does not preempt the Kentucky statute. In so deciding, the Kentucky Supreme Court effectively invalidated all arbitration agreements Kentucky employees were required to sign as a condition of their employment.

The Kentucky Supreme Court's opinion appears to be at odds with recent U.S. Supreme Court rulings on FAA preemption of state laws that treat arbitration agreements differently than other contracts, *see, e.g., Kindred Nursing Centers Lmt'd P'ship v. Clark*, 137 S. Ct. 368 (2016), but it is the law of Kentucky, for now. Other precedent from federal courts in Kentucky suggests that if the U.S. Supreme Court weighs in on this matter, it might decide differently. *See Mable A. Johnson v. Career Systems Developments/DJI Joint Venture, et al.*, No. 4:09-cv-76 (W.D. Ky. 2010) (holding the FAA preempts KRS 336.700(2)).

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Kentucky employers would be well-served to review their employment agreements. They may consider, for example, offering employees an opportunity to opt out of arbitration agreements such that they are not a condition of employment. Employers also may offer other incentives to employees to encourage them to agree to arbitrate disputes. In any case, employers in Kentucky and across the United States should continue to monitor the law in this area as they implement and enforce arbitration agreements.

Jackson Lewis attorneys are available to answer any questions employers may have regarding arbitration agreements and to discuss the implications of the Kentucky Supreme Court's opinion and the rapidly evolving legal landscape.

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