Legal Update Article

EEOC Rescinds Policy Opposing Mandatory Arbitration of Employment Discrimination Claims

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The Equal Employment Opportunity Commission (EEOC) has rescinded its position that mandatory arbitration agreements that cover employment discrimination claims undermine the enforcement of U.S. anti-discrimination laws. This policy change is consistent with recent U.S. Supreme Court decisions that have endorsed the use of arbitration agreements, including in the employment context.

The EEOC's vote on December 17, 2019, to rescind the policy was 2-1.

1997 Policy Statement

In 1997, the EEOC issued a policy statement called "Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment" (Policy No. 915.000) in which it claimed that mandatory arbitration:

1. Unfairly limits claimants' rights to a jury trial;
2. Is frequently biased against employees; and
3. Undermines public policy and the enforcement of anti-discrimination laws by discouraging employees from filing suits, reducing public accountability, and preventing the development of anti-discrimination jurisprudence.

Current Law

The EEOC's position on the use of arbitration to resolve disputes between employees and employers was out of step with the Federal Arbitration Act (FAA). In recent years, the U.S. Supreme Court repeatedly has held that arbitration agreements requiring employees to resolve discrimination claims in arbitration are enforceable pursuant to the FAA. *See, e.g., Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *AT&T Mobility v. Concepcion,* 563 U.S. 333 (2011).

The Commission directed its staff to no longer rely on the 1997 policy statement in investigations and litigation. The Commission also stated, "Nothing in this rescission should be construed to limit the ability of the Commission or any other party to challenge the enforceability of a particular arbitration agreement."

Jackson Lewis attorneys will continue to monitor developments and are available to answer any questions regarding employment arbitration agreements.