MEMO

DATE: **April 13, 2009**

RE: **Collective Bargaining Agreements with Provisions for Arbitrating Discrimination Claims**

In a recent case *14 Penn Plaza LLC v. Pyett*, 556 U.S. ____ (2009) the Supreme Court addressed whether a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act is enforceable.

Over three decades ago in *Alexander v. Gardner-Denver Co.*, 415 U. S. 36 (1974), the Supreme Court held that unions can not contractually waive an individual employee's substantive guarantees against workplace discrimination. More recently, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20 (1991), the Court held that individual employees who waive their right to a federal forum on their own behalf may be compelled to arbitrate employment discrimination claims.

As a result of these two rulings, the Second Circuit had held in *14 Penn Plaza* that, while individuals may waive the right to a judicial forum for federal discrimination claims, the same provision in a collective bargaining agreement was unenforceable.

The facts of *Penn Plaza* are as follows, 14 Penn Plaza LLC ("Penn Plaza") is a member of the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association for the New York City real-estate industry. It owns and operates the New York City office building where, prior to August 2003, respondents worked as night lobby watchmen and in other similar capacities. The agreement between the Union and the RAB is embodied in their Collective Bargaining Agreement (CBA). The CBA required union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures:

> §30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

Due to the addition of security staff at Penn Plaza, some of the union members were reassigned to less desirable positions. The union filed grievances alleging the reassignments violated the CBA's provisions on seniority, equitable overtime and age discrimination in the workplace. The age discrimination claims were withdrawn, and the remaining claims were arbitrated, however during the arbitration the individual union members filed age discrimination claims with the EEOC. The EEOC issued no probable cause determinations and the union members subsequently filed suit.

At the district court and court of appeals level the courts held that Penn Plaza could not compel arbitration of the age discrimination claims under the CBA. The Court of Appeals attempted to reconcile *Gardner-Denver* and *Gilmer* by holding that arbitration provisions in a collective-bargaining agreement, "which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable." As a result, an individual employee would be free to choose compulsory arbitration under *Gilmer*, but a labor union could not collectively bargain for arbitration on behalf of its members.

The Supreme Court reversed the lower courts, holding that a CBA provision that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. The Court held:

> The *Gilmer* Court's interpretation of the ADEA fully applies in the collective-bargaining context. Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative. This Court has required only that an agreement to arbitrate statutory antidiscrimination claims be "explicitly stated" in the collective-bargaining agreement.

Penn Plaza at page 9. The Court distinguished its decision in *Gardner-Denver* by noting the *Gardner-Denver* CBA covered only contractual disputes, not statutory claims. *Penn Plaza*, at page 12. Because the *Penn Plaza* CBA expressly covered statutory claims, the Court held that *Gardner-Denver* did not affect its conclusion. Thus, because the "no discrimination" provision of the CBA was sufficiently explicit and expressly covered statutory and contractual discrimination claims the Supreme Court found the CBA provision enforceable.

Notably, the Supreme Court refused to decide whether a union's failure demand arbitration of an individual employee's claims would constitute a waiver of the provision and allow for the employee to pursue his/her statutory remedies.

What this Means for Employers:

As a result of *Penn Plaza*, union employers should consider collectively bargaining for the right to have statutory discrimination claims resolved in arbitration. Arbitration benefits include: simplicity and streamlining of procedures, quicker resolution, and less cost. A carefully crafted arbitration agreement will allow the parties agree on the procedures for introducing evidence, selection of an experienced neutral arbitrator, and scope of appeal.

Employers, however, will have to weigh the cost of negotiating an agreement covering discrimination claims against the potential monetary savings provided by arbitration of discrimination claims. Lastly, the inclusion of a CBA clause requiring arbitration of discrimination

claims may not guarantee all claims will be arbitrated as the Supreme Court refused to address hypothetical legal issues such as: whether an employee can purse a statutory discrimination claim where the union refuses to submit claim to arbitration. Thus, there are some unresolved legal issues which employers should be aware of when attempting to add such a provision to a new or existing CBA.

It is recommended that all employers discuss these issues with legal counsel prior to negotiating any new or renewal CBA in the future.