Don't "Waive" Goodbye to Your Right to Enforce Arbitration Agreements: Supreme Court Concludes Prejudice Showing is Not Required to Establish Waiver

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A well written arbitration agreement can save employers a substantial sum in legal expense and damage exposure. Like any other contract, employers can enforce them against employees. However, federal appellate courts have disagreed on whether arbitration agreements receive special waiver analysis due to the strong federal policy favoring arbitration. In nine circuits, an employee trying to avoid arbitration by arguing the employer waived the right to enforce the arbitration agreement had to prove they would suffer "prejudice" if the arbitration agreement were enforced. That burden of proof generally benefited employers, as it created a hurdle for plaintiff-employees.

Just days ago, the United States Supreme Court weighed in and removed the prejudice-showing requirement, making it much easier for a plaintiff-employee to avoid arbitration. The Court noted that the requirement to prove prejudice that developed in the context of enforcing arbitration agreements was unique. To show a waiver of the right to enforce other contracts doesn't require proof of prejudice. Though some appellate courts based the prejudice requirement on the Federal Arbitration Act's strong policy favoring arbitration, the Supreme Court concluded that the Act's policy was not to make arbitration agreements *more* enforceable than any other contract. This decision does not address how a state's law might affect waiver considerations. Instead, the Court made clear federal courts cannot, "using the terminology waiver," "create arbitration-specific variants of federal procedural rules . . . based on the [Act]." According to the Supreme Court, waiver is the "intentional relinquishment or abandonment of a known right." This definition creates the only considerations when analyzing waiver of any agreements.

So, what does this new perspective mean for employers?

- A new approach. Oftentimes, employers would first file a motion to dismiss the litigation, and only if that motion was denied, seek to enforce the arbitration agreement. This Supreme Court decision may necessitate a change in this general practice. Caution now requires consideration of foregoing the motion to dismiss to enforce arbitration immediately. Any acts inconsistent with the enforcement of the arbitration agreement could amount to a waiver of the right to enforce it. A safer bet would be tomove to compel arbitration first.

- Be diligent. Ensure that all information necessary to prove the existence of a valid arbitration contract is readily available to your legal advisors, and that your legal advisors are well apprised of this fact when litigation occurs.

- **Consider anti-waiver provisions.** One potential solution would be to include an anti-waiver provision in your arbitration agreement. Certain state laws may impact such waivers, so further advice of legal counsel is suggested.

GableGotwals' Employment & Labor team has substantial experience drafting and enforcing arbitration agreements, as well as representing employers in arbitration cases. We will continue to monitor these developments and any and all related litigation. Please contact any member of the team for further assistance.

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