New Developments in Employment Law

Update **19-10**

June 4, 2019

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EAC Update

May 2019 Employment Update

By Jim Hart

Please see below for new developments in employment law during May, 2019.

1. Board Upholds Enforcement of Pre-Hire Arbitration Agreement

The alternative dispute resolution landscape continues to evolve for employers with unionized workforces. Anheuser-Busch, LLC, 367 NLRB 123 (May 22, 2019), is the National Labor Relations Board's (NLRB) latest decision on the applicability of employment-related, mandatory arbitration agreements in a union context, after last year's Supreme Court decision in *Epic Systems Corp. v. Lewis*. In *Anheuser-Busch*, a divided three-member panel held that an employer can lawfully seek to enforce a pre-employment arbitration agreement against a former union employee, even though it had not provided the union with notice or an opportunity to bargain over the terms of the arbitration agreement.

Takeaway: For the time being, businesses should take a fresh look at how their arbitration agreements are structured and implemented to ensure that they are effectively covering claims not otherwise covered by a collective bargaining agreement. Additionally, any arbitration agreement rolled out at pre-employment to employees who will be subject to a collective bargaining agreement should probably exclude claims that are subject to a collective bargaining agreement.

2. Ruling Raises Important Considerations for Independent Contractor Background Screening

A federal court's recent decision, *Smith v. Mutual of Omaha Insurance Company, demonstrates the value in reviewing all documents related to the independent contractor background screening process to attempt to solidify potential defenses to expansive class-action claims related to the Fair Credit Report Act (FCRA). The FCRA provides a list of "permissible purposes" for a consumer reporting agency (CRA) to prepare consumer reports for businesses. One of the "permissible purposes" is "employment purposes." In Smith, in response to a claim that there was no violation because the individuals were independent contractors, not employees, the plaintiff claimed that if the company now asserted that his consumer report was not obtained for "employment purposes" via its independent contractor defense, then the company had violated a different section of the FCRA by obtaining a report for some other purpose that it had not certified to.*

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The cautionary tale from the *Smith* case is that employers and CRAs are best served by taking a broad view of potentially relevant documents for independent contractor screening compliance. Tellingly, the Smith court looked to a variety of documents to determine that the position for which Smith had sought to be engaged was a contractor position. The court reviewed the application documents Smith completed, his independent contractor agreement, his background check disclosure and authorization, evidence about discussions regarding the opportunity, and other evidence regarding how the position would function if Smith had obtained it.

Takeaway: As the use of contingent workers and independent contractors continues to rise, the latest decision presents an opportunity to review current forms and processes and to potentially make adjustments *before* a lawsuit arises. Experienced counsel, compliance and human resources personnel familiar with the "360-degree" background screening litigation risks can help to brainstorm an approach and work to identify potentially-relevant documents to review based on the business's specific operations.

If you have any questions regarding this update, please feel free to contact Jim Hart at jhart@littler.com or at (949) 705-3003.