Massachusetts Ruling Confirms That State Discrimination Claims Can Be Subject to Mandatory Arbitration

In its recent decision, *Warfield v. Beth Israel Deaconess Medical Center*, the Massachusetts Supreme Judicial Court confirmed that state law discrimination claims can be subject to mandatory arbitration under an individual employment agreement. This decision creates important opportunities for Massachusetts employers and for multi-state employers with operations in Massachusetts.

The plaintiff, a Beth Israel anesthesiologist, executed an employment agreement that contained a mandatory arbitration provision shortly after the hospital appointed her as chief of anesthesiology. Warfield subsequently alleged that the chief of surgery, the hospital's president, and the hospital itself discriminated against her on the basis of sex and retaliated against her for reporting such discrimination. Despite an arbitration provision in her employment agreement requiring that "[a]ny claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration," Warfield opted to file a complaint relating to her allegedly discriminatory treatment in Superior Court. The defendants moved to dismiss the claims and compel arbitration in accordance with the terms of the employment agreement. After the Superior Court denied both motions, the defendants appealed to the Supreme Judicial Court.

While recognizing that Massachusetts public policy favors arbitration, the court concluded that there was an equally strong public policy prohibiting workplace discrimination. Balancing these competing interests, the court concluded that parties can agree to arbitrate claims under the Massachusetts discrimination laws (Mass. G.L. c. 151B), but that an employment agreement containing a mandatory arbitration clause is enforceable with respect to such claims only if it "clearly and unmistakably" provides for arbitration of them. The court determined that the mandatory arbitration provision in Warfield's employment agreement did not encompass Chapter 151B discrimination claims, because its language did not explicitly reference those claims.

Left open by the court's decision is whether other statutory claims will be subject to the requirement of clear and unmistakable referencing to fall within the scope of a compulsory arbitration clause. Surprisingly, the court concluded that, since Warfield's discrimination claims could be litigated in court, *all* of her other claims could proceed in a judicial forum as well, even though the common law claims asserted under her contract with the hospital undeniably satisfied the legal standards for mandatory arbitration. This suggests that employers will need to consider listing a broader range of potential statutory claims in their arbitration clauses, lest even clearly arbitrable claims be dragged into court through an employee's assertion of an un-referenced statutory claim.

Although the court did not offer any magic words that would render a mandatory arbitration provision enforceable, it suggested that such a provision must, at a minimum, "state clearly and specifically that such claims are covered by the contract's arbitration clause." It is important for employers to note, however, that the court did *not* focus on other factors which some courts have held to be essential to an enforceable agreement to arbitrate claims under the federal discrimination laws, such as arbitrator neutrality, appropriate scope of discovery, written awards, adequacy of the remedy, and the fair allocation of arbitration costs. It is likely that Massachusetts courts in the future will also examine these factors to determine whether even a "clear and unmistakable" mandatory arbitration clause is enforceable with respect to state law claims.

While there are pluses and minuses to including mandatory arbitration clauses in employment agreements, the Supreme Judicial Court has signaled that Massachusetts employers now have the opportunity to channel discrimination claims into an arbitral forum. (Note, however, that employees will in all events continue to be required to file administrative charges of discrimination with the MCAD, and the MCAD will continue to have jurisdiction to investigate such charges.) Employers who include mandatory arbitration clauses should consider whether it makes sense to revise the language of such clauses going forward to ensure that discrimination claims are clearly and unmistakably committed to the arbitral forum. Employers who do not presently have such clauses should consider whether the ability to direct discrimination claims into arbitration justifies the incorporation of mandatory arbitration clauses into their employment agreements.

To learn more about the implications of this decision and whether a mandatory arbitration clause is right for your workplace, please contact any member of the Ropes & Gray Labor and Employment department or your usual Ropes & Gray advisor.