NINTH CIRCUIT RULES COMPULSORY ARBITRATION AGREEMENT INVALID

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In a recent decision, the Ninth Circuit Court of Appeals has ruled that employers cannot require employees to arbitrate discrimination claims brought under Title VII of the Civil Rights Act of 1964 (Title VII) and the California Fair Employment and Housing act (FEHA). In *Duffield v. Robertson Stephens & Co.,* 1998 U.S. App. LEXIS 9284 (9th Cir. 1998), the arbitration agreement at issue applied to all broker dealers who are members of the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE). The agreement required broker-dealer employees to arbitrate all "employment-related" disputes as a condition of employment.

The Ninth Circuit stated that such a compulsory arbitration agreement, offered on a "take it ar leave it" basis, was not consistent with the purpose of Title VII and, in particular, the Civil Rights of Act of 1991, which amended Title VII. The court stated that the purpose of the 1991 amendment was to increase possible remedies available to civil rights plaintiffs and that language which allowed the use of alternative dispute procedures "where appropriate and to the extent authorized by law" was meant to afford "victims of discrimination an *opportunity* to present their claims in an alternative forum, a forum that they find desirable -- not by forcing an unwanted forum upon them." *(Emphasis in original.)*

Because broker-dealers in the securities industry must choose whether to sign an arbitration contract "or seek another profession," the court reasoned that the arbitration agreement at issue in *Duffield* was "compulsory" and therefore unenforceable. The *Duffield* court specifically stated, however, that its ruling did not apply to arbitration agreements entered into after disputes had arisen. Nor would the court's ruling apply to agreements which give prospective employees the choice, at the time of hiring, to arbitrate all future employment-related disputes or to retain their statutory litigation rights. Further, even a compulsory arbitration agreement could apply to tort and contract claims brought under state law other than a state civil rights law.

In view of the *Duffield* decision, employers may wish to review their arbitration policies. Employers preferring to arbitrate all employment disputes, as opposed to only state tort and contract claims, should give employees the opportunity to choose whether to sign an arbitration agreement. In addition, any documentation concerning an arbitration agreement should make clear that the execution of the agreement is not a condition of employment.

Court of Appeal Upholds Repeal of Daily Overtime

In a move that became effective in January of this year, the Industrial Wage Commission (IWC) repealed daily overtime in April of 1997. While many employers and employees applauded the new overtime rules as allowing for more flexible work schedules, the rules were sharply criticized by organized labor. The California AFL-CIO and the California Labor Federation (CLF) responded by filing a lawsuit against the IWC.

In the lawsuit, the AFL-CIO and the CLF argued that the IWC had exceeded the scope of its legal authority because the new rules would render inoperative or moot certain sections of the California Labor Code. The trial court dismissed the case, and the CLF filed an appeal.

In *California Labor Federation v. Industrial Welfare Commission*, 1998 Ca1.App. LEXIS 410, the California Court of Appeal affirmed the trial court's ruling. Specifically, the court held that nothing prevented the IWC from changing its overtime rules by amending its wage orders. Accordingly, absent further review by the California Supreme Court or future legislative action, it appears that the new rules are here to stay. The new rules, which allow employers to pay overtime only for hours worked over 40 in one week, apply to Wage Order 1 (manufacturing), Wage Order 4 (professional, technical, clerical, mechanical and similar occupations), Wage Order 5 (public housekeeping), Wage Order 7 (mercantile) and Wage Order 8 (transportation).