

New Kentucky Law: Employers May Make Arbitration Mandatory as Condition of Employment or Continued Employment

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March 26, 2019

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The right of Kentucky employers to require arbitration as a condition of employment and continued employment has been restored by Senate Bill 7, signed by Governor Matt Bevin on March 25, 2019. The new law also provides certain safeguards for employees.

Senate Bill 7 nullifies the Kentucky Supreme Court's 2018 decision in *Northern Kentucky Area Dev. Dist. v. Snyder*, No. 2017-SC-000277-DG, holding that while Kentucky employers may enter into voluntary arbitration agreements with their employees, under KRS 336.700, they may not require employees to sign arbitration agreements as a condition of their initial or continued employment. Senate Bill 7 will become effective June 26, 2019, 90 days from March 28, 2019 (the end of the legislative session). It will apply both prospectively and retroactively. However, the new law does not apply to arbitration provisions contained in collective bargaining agreements and in contracts between insurers and reinsurers.

Key Rights Restored to Employers

Senate Bill 7, which amends KRS 336.700, provides that employers may take the following actions:

- Require an employee or person seeking employment to execute an agreement for arbitration, mediation, or other form of alternative dispute resolution as a condition or precondition of employment;
- Require a former employee to waive an existing claim as a condition or precondition of rehire as part of a settlement of pending litigation or other legal or administrative proceeding;
- Require an employee or person seeking employment to execute an agreement to "reasonably reduce" the statute of limitations for filing a claim against the employer, provided that the applicable federal or state law does not preempt and prohibit such a shortening of the statute of limitations, and provided that the agreement does not reduce the statute of limitations by more than 50 percent; and
- Require an employee or person seeking employment to consent to a background check or similar type of personal report in conformance with state and/or federal law that requires consent of the individual prior to an employer's receipt or use of the report.

Key Protections Given to Employees

To ensure that employees have the opportunity to effectively vindicate their rights through arbitration, Senate Bill 7 confirms and, in some instances, gives new rights to employees. Arbitration agreements under amended KRS 336.700 must provide employees the following rights:

- A reasonable location for the arbitration;
- Mutuality of obligation sufficient to support the agreement;
- Ensure fairness to the parties to the agreement, which includes providing a fair process to select an impartial arbitrator, and equitably and lawfully allocate arbitration costs between the parties;
- Ensure that the parties have at least one channel for pursuit of a legal claim, either by requiring the claim be arbitrated individually or otherwise; and
- Empower the arbitrator to award all types of relief for the particular type of claim that would be available in a court, including punitive damages as provided by law.

Additional Safeguards

Senate Bill 7 also provides a hodgepodge of other important features. For instance, arbitrators must disqualify themselves if they have a conflict of interest (as defined by the statute on judicial disqualification, KRS 26A.015).

Two other provisions in Senate Bill 7 are significant for Kentucky employers. The first provides that if the mandatory arbitration agreement fails to specify the rules and protocols that will govern the arbitration process, then the arbitrator will use Kentucky Rules of Civil Procedure. This is important because if an employer wants to retain the opportunity to file a dispositive motion in the arbitration proceeding, Kentucky's standard for granting summary judgment under the Kentucky Rules of Civil Procedure can be particularly challenging.

The second states that any shortened statute of limitations provided in a previously signed arbitration agreement that reduces the statute of limitations beyond that permitted under Senate Bill 7 "shall be stricken" and will not operate to invalidate the entire agreement. This, too, is important since most arbitration agreements say that if any portion of the arbitration agreement is invalidated, the court will modify that portion so that it conforms with the law.

Next Steps

Significant employer rights are back in Kentucky, but with some important changes. Employers will need to review and update all of their employment agreements to ensure compliance with Senate Bill 7. For additional guidance on this issue, please contact Jackson Lewis.

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