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# CUT AND PASTE POST
## AUGUST, 2019

I couldn't find any legislative news that I thought would be of general interest that I haven't already seen in SHRM emails, so here are a couple HR-related court cases with some interesting twists.

## Montana Supreme Court Upholds Arbitration Agreement

Adam Bucy worked for Edward Jones (EJ) for over 15 years. During this time, he signed 2 arbitration agreements. These agreements were required by FINRA (the Financial Industry Regulatory Authority) and EJ. In *Bucy v. Edward Jones*, Bucy asked to be relieved of his duty to arbitrate employment issues.

The essential elements of a valid and enforceable contract are: (1) "identifiable parties capable of contracting"; (2) mutual consent of the parties; (3) "a lawful object"; and (4) mutual consideration. See 28-2-102, MCA.

Among other things, Bucy claimed that the arbitration agreements failed to meet these 4 tests, and that the actions EJ (allegedly) took to blackball him from employment after he left the company occurred outside the arbitration agreement. The District Court found that the post-termination claims were not covered by the arbitration agreement and denied EJ's motion to compel arbitration of these claims. EJ appealed.

The Supreme Court reviewed whether the agreements included the essential contract elements described above, and also considered whether any protections provided by the Montana Constitution or law are subordinate to a federally mandated arbitration agreement. In its July 30th decision, the Court found as follows:

> *The arbitration agreement in Bucy's 2003 employment agreement was not illusory, lacking in mutuality, or unreasonably one-sided or oppressive due to Edward Jones' retention of a limited right to seek injunctive relief. The 1998 and 2003 arbitration agreements were not illegal, void, violative of public policy, or otherwise unenforceable due to lack of an explicit explanation and waiver of Montana constitutional rights. Nor were they equitably unenforceable as unconscionable. We hold that Bucy's claims were and are mandatorily arbitrable pursuant to FINRA Rule 13200(a) and within the scope of the arbitration agreements in his 1998 Form U4 application and 2003 employment agreement.*

You can search for the case here.

## Joint Employers and Discrimination

Green Acre Farms and Valley Fruit Orchards (the Growers) are fruit growers in the State of Washington. In 2003, the Growers experienced labor shortages and entered into agreements with Global Horizons, Inc., (Global) a labor contractor, to obtain temporary workers for their orchards. With the Growers' approval, Global recruited workers from Thailand and brought them to the United States under the H-2A guest worker program, which allows agricultural employers to hire foreign workers for temporary and seasonal work.

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Based on the information in the case, the working conditions and facilities that the Thai employees were exposed to were awful. If work was scarce, migrants from Mexico received first priority assignments. Because Global failed to provide adequate food, the Thai workers resorted to hunting for food, and transportation was unsafe. Global also took steps to keep the Thai workers 'in check', including confiscating the workers' passports and employing guards to monitor the workers so that they could not physically escape from the orchards.

In 2006, two of the Thai workers filed charges of discrimination with the EEOC. The EEOC conducted an investigation from 2006 to 2010 and found reasonable cause to believe that the charges were true. After conciliation efforts failed, the EEOC filed an action on behalf of the Thai workers. Specifically, the EEOC asserted four claims for relief under Title VII of the Civil Rights Act of 1964: (1) disparate treatment based on race or national origin; (2) hostile work environment and constructive discharge; (3) retaliation; and (4) related pattern-or-practice claims. 42 U.S.C. §§ 2000e-2(a), 2000e-3(a).

Global was financially insolvent by the time the EEOC brought suit, so the case focused solely on the liability of the Growers.

The Eastern Washington District Court that heard the case made a distinction between orchard-related matters and non-orchard related matters (facilities, transportation, food, etc.) It granted summary judgment in favor of the Growers for all non-orchard related matters, finding that:

- The Growers and Global were not joint employers under the law; and
- Global, not the Growers, was responsible for the non-orchard related matters (facilities, food, etc.);

The EEOC appealed on behalf of the workers. After reviewing the case, a 9th Circuit panel reversed all of the District Court's findings regarding the non-orchard related matters. In its decision, the panel said, "*The court erred by dismissing the EEOC's disparate treatment claim (and the related pattern-or-practice claim) on the ground that the Growers were not joint employers of the Thai workers as to non-orchard-related matters*", and held that the District Court should have applied the 'common agency test' for determining joint employer status under Title VII.

The 9th Circuit Court also held that at least one of the Growers allegedly knew or should have known about the discrimination and had 'ultimate control over [even non-orchard related matters] and thus could have taken corrective action to stop the discrimination." The case was remanded to the District Court, with instructions to "*…grant the EEOC leave to amend its complaint with respect to [the Growers'] liability as to non-orchard-related matters. The court should then reconsider the disparate treatment claim (and the related pattern-or-practice claim) in light of the EEOC's allegations regarding both orchard-related and non-orchard-related matters.*" The 9th Circuit also required the lower Court to allow the EEOC to conduct discovery of the Grower's liability in this case.

***Professional Pointer***: If you contract with others to provide personnel, make sure you understand the risks and liability you face, make sure your contracts clearly address these risks and liabilities, ***and*** monitor how well the contractor treats the employees!

## ACA Affordability Adjustment

The Affordable Care Act's employer shared responsibility provision – often called the employer mandate or "play or pay" – requires large employers (those with more than 50 FTE's) to offer health coverage to their full-time employees or face a potential penalty. These employers can avoid the risk of any play or pay penalties by offering all full-time employees at least one group health plan option that meets two standards: it provides minimum value and it is affordable.

If you're a "Large Employer", you need to know that, on July 22, 2019, the IRS announced that the affordability percentage under the ACA's play or pay rules is set at 9.78 percent for 2020 plan year.