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Management Alert

Newly Adopted "Freelance Isn't Free" Rules Rife with Preemption Issues Under FAA

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Seyfarth Synopsis: *Regulatory rules issued in connection with New York City's Freelance Isn't Free Act seek to prohibit arbitration of claims under the Act and class action waivers in contracts covered by the law. U.S. Supreme Court precedent strongly suggests this rule is preempted by the Federal Arbitration Act.*

Earlier this month, the New York City Department of Consumer Affairs ("DCA") issued Rules implementing the Freelance Isn't Free Act. Among other notable provisions, the Rules prohibit arbitration and the use of class action waivers in contracts governed by the Act.

As noted in our previous alerts (available here and here), the Freelance Isn't Free Act, which took effect on May 15, 2017, grants various protections for freelancers in New York City.

Key Provisions in the Rules

Coverage

The Rules make clear that a "freelance worker is entitled to the protections of the [Act] regardless of immigration status." The Rules also expand the definition of retaliation to include "any adverse action relating to perceived immigration status or work authorization."

Adverse Action

The definition of "adverse action" under the law for purposes of retaliation was expanded beyond the act or action by a hiring party, to include any action by a hiring party, its actual or apparent agent, or any other person acting directly or indirectly on behalf of a hiring party.

Further, the anti-retaliation provisions extend to a hiring party that takes any action reasonably likely to deter a freelance worker from exercising or attempting to exercise any right under the Act, regardless of whether that hiring person previously has been a party to a contract with the freelance worker, or was the subject of a complaint by the freelance worker.

Contract Value

The Rules also clarify that for purposes of determining whether a contract falls under the scope of the Act, its value includes the "reasonable value of all or actual anticipated services, costs for supplies and any other expenses under the contract."

When determining civil penalties, the value of the underlying contract "shall include the reasonable value of all services performed and/or anticipated, and reasonable costs for supplies and any other expenses reasonably incurred by the freelancer worker."

Prohibition Against Arbitration?

The Rules provide that any contract entered into by a hiring party and a freelance worker may not include any waiver or limitation of rights under the Act. The FAQs issued by the DCA seemingly interpret this language to prohibit contractual language that waives a freelancer worker's rights to participate in a lawsuit.

The Rules go on to prohibit class action waivers, by deeming void any contractual language that "waives or limits a freelance workers' right to participate in or receive money or any other relief from any class, collective or representative proceeding."

It is unclear how these Rules, separately or in the aggregate, can survive preemption under the Federal Arbitration Act ("FAA"). In 2011, the Supreme Court held that a California rule that operated to preclude enforcement of class action waivers in consumer arbitration agreements was preempted by the FAA. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). The Court held that when a "state law prohibits outright the arbitration of a particular type of claim, . . . [t]he conflicting rule is displaced by the FAA." The Court unequivocally stated that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Notably, in *Concepcion*, the Court did not have the opportunity to consider a rule that outright prohibited arbitration, as the Rules issued by the DCA do.

The Rules also declare as void any contractual provision that seeks to limit "any other procedural right normally afforded to a party in a civil or administrative action," including such rights under the New York Civil Practice Law and Rules and the Federal Rules of Civil Procedure. This provision is likely aimed at contractual provisions which curtail the availability or scope of discovery in arbitration or the availability of jury trials. These provisions may be subject to FAA preemption as well, although the outcome of such a legal challenge is not as clear.

Conclusion

As of this writing, the Rules are slated to take effect on July 24, 2017. Employers who hire freelance workers or independent contractors in New York City should take steps to implement the Rules by the effective date. With respect to the arbitration provisions of the Rules, employers that wish to include arbitration clauses and class action waivers should consult with counsel to discuss their legal options.

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