Can employers force arbitration of False Claims Act retaliation claims?

By Emily C. Harlan and Grayson Yeargin

To protect themselves against the uncertainty and cost of litigation, many companies include mandatory arbitration clauses in contracts with their employees. These clauses typically require an employee to resolve all disputes arising out of his or her employment through an arbitration process conducted outside of the court system. Arbitration agreements are afforded a strong presumption of favor by courts, particularly when the claims at issue arise under federal law and are subject to the Federal Arbitration Act.

Notwithstanding this presumption, not all claims are arbitrable simply because the parties agreed to arbitrate future disputes. When the arbitration process cannot adequately vindicate a claimant's rights, or when the terms of the arbitration provision are unconscionable, courts can rule that a claim is not arbitrable or find an arbitration clause unenforceable. In the context of the federal False Claims Act, this issue has arisen with respect to whistleblower retaliation claims. Can a company compel arbitration when a former employee brings a retaliation claim against the company under the False Claims Act? The answer, according to courts that have encountered the issue, could go either way, depending in large part on the terms of the contract.

The Eastern District of Virginia considered this question last week in a case involving False Claims Act retaliation claims by two ex-employees of government contractor Academi who worked on a contract with the Department of State. Winston v. Academi Training Center, Inc., No. 1:12-cv-767 (March 13, 2013). The plaintiffs, firearms instructors working in Afghanistan, allege that they were terminated by Academi after reporting to their supervisor that they were aware of fraud in certifications and records being submitted to the State Department. They subsequently brought suit in federal court alleging retaliation under the False Claims Act, 31 U.S.C. § 3730(h), along with other state law tort and contract claims. Academi moved to stay or dismiss the action, relying on arbitration clauses in the employees’ independent contractor agreements.

The court noted the strong presumption in favor of arbitration for federal claims, but noted that arbitrability of the claims depended on whether the arbitration provisions provided a sufficient forum for the plaintiffs to vindicate fully their rights under the False Claims Act. The court also explained
that resolution of this matter turned on whether the terms of the agreement were unconscionable. Focusing on two particular provisions of the agreements, the court held that the clauses did not provide sufficient opportunity for vindication of rights under the False Claims Act, and further that the “substantial substantive unfairness” of the terms made them unconscionable.

The court first singled out the provision in the arbitration agreements that stated that there would be no discovery during the arbitration process, except that the parties would exchange written evidence five days before the arbitration. The court noted that this was not sufficient in the context of False Claims Act claims, which are “often document intensive,” particularly when the case involves alleged falsification of documents.

Second, the court pointed to the provision in the agreements that required the plaintiffs to reimburse the company for all fees and costs associated with the arbitration, regardless of outcome. The court contrasted this fee-shifting provision with the provision of the False Claims Act that awards reasonable fees, expenses, and costs to a successful plaintiff, noting that the Academi agreements limited relief for whistleblowers that Congress had specifically intended in the False Claims Act.

Holding that the False Claims Act claims could not be “shunted” to arbitration for these reasons, and also finding that the “substantial substantive unfairness” of the terms suggested unconscionability—which applied to both the federal and state law claims—the court was left to decide whether to sever the unconscionable terms. The court noted that its other alternative was to declare the clauses unenforceable as a whole and proceed with the litigation in court. Citing federal and state precedent against severing claims, the court ruled the clauses entirely unenforceable. As a result, plaintiffs’ federal claims under the False Claims Act and their state law claims will proceed in court.

As the court’s decision in Winston suggests, the issue of whether retaliation claims made under the False Claims Act can be arbitrated is not black or white. Other courts that have considered this issue under different circumstances have upheld arbitration of whistleblower retaliation claims. See, e.g., Gilchrist v. Inpatient Medical Services, Inc., No. 5:09-cv-02345, 2010 U.S. Dist. LEXIS 86199 (N.D. Ohio Aug. 23, 2010) (rejecting plaintiff’s interpretation of arbitration term as precluding relief otherwise available under False Claims Act); see also United States ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F. 3d 370 (4th Cir. 2008).

The common thread that appears to run through court cases analyzing whether to require arbitration of False Claims Act retaliation claims is whether the terms of the required alternative dispute resolution hinder the rights that the statute seeks to protect. This analysis harkens back to the reasoning of the U.S. Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), in which the Court stated “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum.” The Court identified the “critical question” in this situation as whether any limitation “undermines the rights protected by the statute.” Id. Whether it be through an examination of arbitrability of False Claims Act retaliation claims or enforcement of the specific arbitration clauses in agreements, courts tend to enforce arbitration clauses when they allow a claimant to obtain remedies similar to those allowed in the statute using procedures that do not severely limit the claimant’s ability to discover or prove his or her case. Arbitration provisions that severely limit remedies or procedural protections are the ones that are more likely to be discarded.

The evolving body of caselaw on this subject suggests that companies should proceed with caution when drafting aggressive or boilerplate arbitration clauses. If not careful, a company that uses
arbitration provisions as a sword and not a shield—namely, that overreaches in delineating the terms of the arbitration—could find itself in court notwithstanding its efforts to minimize litigation cost and risk. In some cases, particularly those in which False Claims Act claims could arise, it may make sense for companies and their counsel to consider formulating a separate provision concerning retaliation claims.

The potential ripple effect of a finding of unenforceability is further reason for companies to exercise care in drafting arbitration provisions. As seen in *Winston*, a court may decide that one or two bad terms renders an entire clause unenforceable, thus eliminating the company’s ability to compel arbitration. Employers should take care to weigh the contents of arbitration provisions against the possibility that limitations on remedies or procedures could destroy the entire purpose of the arbitration clause.

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