NEW ENGLAND LEGAL FOUNDATION

ADVANCE SHEET

**March 2019**

**THE MASSACHUSETTS SUPREME JUDICIAL COURT AGREED WITH NELF THAT AN AWARD OF "BACK PAY" UNDER THE WORKER ADJUSTMENT AND RELOCATION NOTIFICATION ACT, 20 U.S.C. § 2101 *ET AL.*, DUE TO AN EMPLOYER'S FAILURE TO GIVE EMPLOYEES 60 DAYS' NOTICE BEFORE CLOSING OPERATIONS, DOES NOT CONSTITUTE "WAGES EARNED" AND, THEREFORE, IS NOT RECOVERABLE UNDER THE MASSACHUSETTS WAGE ACT**

*Calixto and another v. Coughlin, et al.* (Massachusetts Supreme Judicial Court)

At issue in this case was an unsatisfied judgment of approximately $2 million in back pay that a class of plaintiffs had obtained in federal court against their former employer for violating the notice requirement of the federal WARN Act before shutting down. Unable to recover the judgment from their now-defunct employer, the plaintiffs sued their employer's former executive officers personally for *treble* that amount under the Massachusetts Wage Act. NELF filed an amicus brief in support of the defendants, arguing principally that the plaintiffs could not recover under the Wage Act because, simply put, an award of "back pay" under the WARN Act does not compensate employees for "wages earned." As NELF pointed out, back pay is a traditional remedy to compensate an employee for the wages the employee *would have earne*d if the employer had not violated the law, here by failing to provide the employee with 60 days' notice. Because, however, the Wage Act permits recovery only of the wages that an employee has *actually earned*, NELF argued that the Court should affirm the Superior Court's dismissal of the plaintiffs' complaint. In its brief, NELF also argued that a decision equating "back pay" under the WARN Act with "wages earned" under the Wage Act would eviscerate the WARN Act's "faltering company" defense. Under that defense, a financially troubled company can avoid liability by showing that it was "actively seeking capital or business" to salvage the company and the company believed, "reasonably and in good faith," that giving timely notice of a plant closing would have jeopardized those business opportunities. NELF also noted that allowing the plaintiffs to sue their employer's former executives was inconsistent with the WARN Act, which does *not* impose personal liability on a company's officers. NELF argued that this was arguably a deliberate choice by Congress to allow executive officers to exercise their business judgment and take the necessary steps to protect a financially troubled company and its workforce, without having to fear incurring personal liability for their efforts.

In a major victory for Massachusetts employers, the SJC agreed with NELF, and held that an award of back pay under the WARN Act is not for "wages earned" and, therefore, the plaintiffs had not valid cause of action under the Wage Act.

**THE UNITED STATES SUPREME COURT AGREED WITH NELF THAT THE FEDERAL ARBITRATION ACT DOES NOT PERMIT A COURT TO DISREGARD THE PARTIES' AGREEMENT TO DELEGATE THRESHOLD DISPUTES OVER ARBITRABILITY TO THE ARBITRATOR, EVEN IF THE COURT THINKS THAT SUCH A DISPUTE IS "WHOLLY GROUNDLESS."**

*Henry Schein, Inc. et al. v. Archer and White Sales, Inc.* (United States Supreme Court)

The parties in this case had a pre-dispute arbitration agreement, which stated that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . . .) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [ (AAA) ]." AAA Rule 7(a), in turn, provides that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement." (Emphasis added.) Notwishtanding this agreement, Archer and White Sales, Inc. sued Henry Schein, Inc. in federal court under the anti-trust laws, seeking both damages and injunctive relief. Predictably, Schein moved to compel arbitration under the parties' agreement, to which Archer responded on the ground that because its complaint sought injunctive relief, as well as damages, it was not arbitrable. Despite the clear language of the arbitration provision and the AAA rules, the Fifth Circuit refused to compel arbitration over the question of arbitrability. The Court took the position that, even assuming the agreement *did* clearly and unmistakably delegate the arbitrabiity issue to the arbitrator, the court nonetheless had the discretion to decline to enforce the agreement if it concluded that the dispute was "wholly groundless." The court so concluded and refused to enforce the arbitration agreement on that basis, allowing Archer to proceed with its antitrust claims in federal court.

NELF filed an amicus brief in support of Schein, arguing that, where the parties have so provided, the FAA requires a court to enforce a valid agreement to arbitrate threshold disputes concerning the arbitrability of claims. NELF argued that the FAA simply does not permit a court to usurp the arbitrator's contractually delegated power to decide threshold questions of arbitrability, such as under the Fifth Circuit's "wholly groundless" standard.

In another major victory for NELF, the Supreme Court agreed unanimously that the Federal Arbitration Act requires a court to enforce the parties' agreement to delegate to the arbitrator any threshold dispute over arbitrability, here the scope of the arbitration agreement. Thus the Court forcefully reaffirmed the well-established principles that, while questions of arbitrability presumptively belong in court, parties may nonetheless assign those preliminary questions to the arbitrator, "so long as the delegation is clear and unmistakable." *Id*., 561 U.S. at 79. And, the Court affirmed, the parties decision in this regard *must* be enforced.

**HOWEVER, IN ANOTHER IMPORTANT ARBITRATION DECISION, THE SUPREME COURT DISAGREED WITH NELF AND HELD THAT THE FEDERAL ARBITRATION ACT'S EXEMPTION FOR "*CONTRACTS OF EMPLOYMENT* OF SEAMEN, RAILROAD EMPLOYEES OR ANY OTHER CLASS OF WORKERS ENGAGED IN FOREIGN OR INTERSTATE COMMERCE" EXEMPTS NOT ONLY EMPLOYEES, BUT ALSO INDEPENDENT CONTRACTORS IN THOSE AREAS FROM THE FAA.**

*New Prime, Inc. v. Oliveira* (United States Supreme Court)

In a unanimous decision issued January 15, 2019, the Supreme Court rejected NELF's position in this case and concluded that the Federal Arbitration Act exempts all transportation worker contracts, whether they establish an employee-employee or independent contractor relationship.

The FAA exempts "*contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). At issue was the meaning of "contracts of employment." (In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001**)**, the Court had held that the exemption applied only to interstate transportation workers, not to all workers generally. In that case, however, the Court was not asked to interpret the "contract of employment" language that is now in dispute.) This case mattered to NELF and its supporters because a broad interpretation of "contracts of employment" would mean that no interstate transportation carrier could ever enforce its arbitration agreements and class action waivers against any of its contract workforce under the FAA, be they employees or independent contractors.

The First Circuit in this case concluded that the term "contract of employment" was sufficiently broad at the time of the FAA's enactment, in 1925, to embrace any contract to perform work, regardless of the legal status of the worker. And the Supreme Court essentially agreed, reinforcing its general rule that statutory language should be interpreted in its historical context, to give full effect to congressional intent. Accordingly, bothe courts held held that the FAA exempts the Independent Contractor Operating Agreement that the plaintiff, truck driver Dominic Oliveira, had signed with New Prime, Inc. ("Prime"), the operator of an interstate trucking company. That agreement specified the terms of Oliveira's independent contractor relationship with Prime. It also required Oliveira to arbitrate all work-related disputes on an individual basis.

In its amicus brief, NELF had argued that the phrase "contracts of employment" should be interpreted in its immediate context, under the rule of *noscitur a sociis* ("it is known from its associates"). The phrase modifies "seamen" and "railroad employees," two prominent classes of transportation employees. This indicated, NELF argued, that "contracts of employment" must establish an employer-employee relationship. This meaning is confirmed by applying the related rule of *ejusdem generis* ("of the same kind"), to the residual phrase "any other class of workers," which immediately follows seamen and railroad employees in the exemption. In *Circuit City*, the Court applied *ejusdem generis* to narrow the meaning of that residual phrase "any other class of workers" to other transportation workers only, because the phrase followed specific examples of transportation workers. Here, application of *ejusdem generis* takes the analysis one step

further, by limiting the same residual phrase to other transportation workers who are employees, because seamen and railway employees are specific examples of transportation workers who are employees. These rules of statutory construction serve the overarching purpose of the FAA. The exemption is embedded in a statute whose purpose is to ensure the judicial enforcement of arbitration agreements according to their terms. This broad statutory purpose counsels in favor of enforcing, not exempting, arbitration agreements under the FAA.

In its brief, NELF also offered a plausible historical explanation for this exemption. The FAA's exemption for the employment contracts of seamen and railroad employees was apparently intended to leave undisturbed those employees' statutory right, under the Jones Act and the Federal Employers' Liability Act (FELA), respectively, to sue their employer in court for work-related injuries. The FELA and the Jones Act granted those transportation employees a liberalized tort remedy, due to their particularly hazardous working conditions and the inadequacy of state tort law to compensate them for their injuries. Since independent contractors are not covered by the FELA or the Jones Act, Congress would have had no reason to exempt them from the FAA's scope.

The Court essentially rejected those arguments. First, the Court concluded that seamen and railroad employees apparently included all kinds of workers under those and other related federal statutes and regulatory decisions when the FAA was enacted in 1925. The Court also noted that Congress chose the word "worker" in the catch-all phrase "any other class of workers," as opposed to "employees" or "servants." As the Court explained: "That word choice may not mean everything, but it does supply further evidence still that Congress used the term 'contracts of employment' in a broad sense to capture any contract for the performance of work by workers."