www.laboremploymentlaw.org

the Checkoff

The Florida Bar
Vol. LXI, No. 2
FEBRUARY 2022

A PUBLICATION OF THE FLORIDA BAR LABOR & EMPLOYMENT LAW SECTION

IN THIS ISSUE

Managing Arbitration in Light of *Managed Care*

By Chris Shulman, Tampa

Background

As any member of the Labor and Employment Law Section is undoubtedly aware, courts continue to enforce predispute arbitration agreements in employment cases, compelling arbitration not just of contractual and common law employment claims, but also statutory discrimination and wage claims (including, e.g., Title VII, ADEA, ADA, FLSA, and the rest of the "alphabet soup" of federal and state employment laws).[1] With this trend, the employment arbitration process resembles the employment litigation process more and more,[2] with parties seeking arbitral authorization of the whole panoply of discovery mechanisms available to litigants in court. One such mechanism often employed in litigation (and now in arbitration) is the use of subpoenas for nonparty discovery. Given the fact that many arbitration proceedings have moved online since the advent of the COVID-19 pandemic (using Zoom or one of the other platforms),[3] the ability to compel

See "Managing Arbitration," page 12

Movie Set Shooting Highlights Importance of Workplace Safety

By Shannon Kelly, Winter Park

The tragic shooting that took place recently on the *Rust* movie set[1] again places a spotlight on workplace safety—not only on film sets, but in workplaces generally. It also highlights the devastating consequences of failing to make workplace safety a priority. In 2020, the United States reported a total of 2.7 million workplace injuries and illnesses.[2] In 2019, the most recent year for which statistics are available, 5,333 workers died as a result of a work-related injury.[3]

So how should businesses respond to concerns regarding workplace safety? Generally, such concerns can and should be addressed in a workplace safety plan. Development of a workplace safety plan begins with a commitment by management to address safety threats to the work environment by carrying out a worksite analysis to assess potential hazards. The nature of the potential threats present in the workplace will vary depending upon the industry and the location of the worksite. Once a workplace safety plan is developed, it is important that employees are trained on

See "Movie Set Shooting," page 14

appearance by videoconference becomes an issue.

Managed Care

In 2019, the Eleventh Circuit, in *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*,[4] ruled that under the Federal Arbitration Act (FAA),[5] arbitrator subpoenas that purport to require non-party discovery—whether subpoenas for depositions (duces tecum or not) or for production without deposition—are not enforceable;[6] neither are arbitrator subpoenas purporting to compel a witness to attend a proceeding by videoconference.[7]

The *Managed Care* court reached this conclusion by analyzing the language of the FAA, noting specifically that "Section 7 of the FAA allows an arbitrator to 'summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him [or her] . . . any book, record, document, or paper which may be deemed material as evidence in the case.'"[8] Noting that in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,[9] the Third Circuit (in an opinion authored by then-Judge Alito) found that Section 7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time,"[10] the Eleventh Circuit sided with the Second, Third, Fourth, and Ninth Circuits to conclude that an arbitrator may not issue subpoenas for "pre-hearing depositions and discovery from non-parties."[11] Likewise, quoting the text of FAA Section 7 with emphasis, the court held that an arbitrator's ability to "compel the *attendance* of [a person] *before* said arbitrator" necessarily requires the person to appear at a location in the arbitrator's physical presence.[12] Consequently, subpoenas purporting to compel appearance by videoconference—not in the physical presence of the arbitrator—cannot be enforced under the FAA.[13]

Options and Considerations

So, what to do?

First, try a discovery hearing. Both *Managed Care* and *Hay Group* suggest the possibility of an arbitrator convening a discovery hearing to which a non-party might be validly subpoenaed to appear (in person, in the arbitrator's presence) and either give testimony, present documents, or both.[14] So, the parties might ask the arbitrator to convene an in-person discovery hearing at which non-parties would be required to appear and testify to authenticate records and allow them to be copied. Presumably, arbitral subpoenas for such a hearing, properly served, would be enforceable.[15] One assumes that the party at whose instance the arbitral discovery hearing subpoena issued might be able to provide the subpoenaed party with the option simply to produce the requested documents voluntarily as an alternative to having to appear before the arbitrator.

Second, have the arbitration conducted pursuant to state arbitration law, not the FAA. *Managed Care*'s limitations on arbitral subpoenas necessarily apply only if the arbitration is subject to the FAA. If the Revised Florida Arbitration Code (RFAC), Chapter 682, Florida Statutes, applies, then the arbitrator has the authority to issue enforceable pre-hearing discovery subpoenas to non-parties. The RFAC provides, in relevant part:

> **682.08 Witnesses, subpoenas, depositions.—**
>
> (1) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.
>
> (2) In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to, or a witness in, an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.
>
> (3) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.
>
> (4) If an arbitrator permits discovery under subsection (3), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state. . . .

Regarding the prohibition on videoconference appearance, the RFAC does not have the same language found in FAA Section 7 ("compel the attendance of [a person] before said arbitrator "). Thus, the statutory basis for disallowing videoconference hearings does not apply. Indeed, the RFAC provides, in relevant part, that the arbitrator "may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding."[16] Consequently, arbitration hearings under the RFAC could occur by Zoom or the like, if the arbitrator agrees.

Likewise, at a minimum, arbitrators under the RFAC have the ability to order discovery ***proceedings*** and therefore may issue enforceable subpoenas to non-parties to attend such discovery proceedings. Clearly, *Hay Group*/*Managed Care* in-person discovery hearings are authorized under the RFAC, specifically section

682.08(4). However, the RFAC also draws a distinction between subpoenas for a ***hearing*** (section 682.08(1)) and subpoenas for attendance and production at a discovery ***proceeding*** (section 682.08(4)). The use of different terms implies different meanings. The use of "proceeding" rather than "hearing" for discovery seems to suggest that for the former, the arbitrator need not be present or decide anything. Moreover, section 682.08(2) speaks to the arbitrator's ability to determine the conditions under which a deposition may occur, and section 682.08(3) empowers the arbitrator to order discovery in a flexible manner, "taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." Thus, section 682.08 seems to authorize, if ordered by the arbitrator, non-party depositions (video or in person, duces tecum or otherwise) as well as non-party production.

In summary, by invoking arbitration under the RFAC instead of the FAA, parties may gain (preserve?) the ability to take traditional non-party prehearing discovery in employment arbitration.[17]

Third, is this a labor case? The Taft-Hartley Act (LMRA)[18] may also offer a basis for requesting a prehearing discovery subpoena, at least in the labor arbitration context. While traditional prehearing discovery is rare in the labor-management grievance arbitration milieu, at least one court has held that labor arbitrator-issued subpoenas for non-party discovery production of documents is allowed.[19]

Conclusion

As arbitration continues to be a regular means of resolving employment disputes, counsel should consider how best to get at information held by non-parties. Simply having the arbitrator compel the non-parties' attendance at the final evidentiary hearing on the merits is clearly allowed under the FAA, but doing so may prevent adequate preparation for that hearing. So, in light of *Managed Care*, counsel should either ask the arbitrator to conduct discovery hearings along the way or get the opposing party to agree to have the arbitration conducted pursuant to the Revised Florida Arbitration Code. Since arbitrators typically charge for hearings by the day, I suspect it would be cheaper for the parties to choose the latter.


C. SHULMAN

***Chris Shulman** is an attorney, mediator, arbitrator, and PERC Special Magistrate based out of Tampa, who has conducted approximately 3700 mediations and 1800+ arbitrations (or similar decision-making processes)—a majority of which involved labor or employment issues. He also trains mediators and arbitrators.*

Endnotes

1 *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (ADEA claims arbitrable); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (Title VII claims subject to arbitration, but EEOC not bound to arbitrate enforcement action—even one seeking individual employee relief—since not a party to arbitration clause); *Epic Sys. Corp. v. Lewis*, 485 U.S. __, 138 S. Ct. 1612 (2018) (FLSA claims arbitrable notwithstanding waiver of collective actions); *see also*, Chris Shulman, *Waivers of Collective Actions in Employment Arbitration: The Supreme Court Makes an Epic Decision*, The Checkoff, Vol. LVIII No. 1, at 1 (Oct. 2018).

2 For better or worse.

3 In this writer's opinion, this is generally a good thing. *See, e.g.*, Chris Shulman, *Video Arbitration of Labor or Employment Issues: How to Have Meaningful Arbitration Proceedings in the Era of COVID-19 and Social Distancing*, Florida Bar Labor and Employment Section Special Issue: Practicing in a Pandemic (May 2020).

4 939 F.3d 1145 (11th Cir. 2019) [hereinafter *Managed Care*].

5 9 U.S.C. §§ 1–16.

6 *Managed Care*, 939 F.3d at 1160–61.

7 *Id.* The court also approved nationwide scope for service of arbitrator-issued subpoenas that are subject to the Federal Arbitration Act. *Id.* at 1157–58.

8 *Id.* at 1159.

9 360 F.3d 404 (3d Cir. 2004) [hereinafter *Hay Group*].

10 *Managed Care*, 939 F.3d at 1159 (quotation marks omitted) (quoting *Hay Group*, 360 F.3d at 407).

11 *Id.* at 1159–1160. The court expressly declined to follow the Eighth Circuit, which has allowed such discovery. *Id.* at 1160.

12 *Id.* at 1160.

13 *Id.* As of this writing, there are no reported cases by the Eleventh Circuit or Florida state courts that have questioned the videoconference subpoena ban, even despite COVID. A pre-COVID decision out of the Southern District of Florida acknowledges the seeming absurdity and clear inconvenience of the limited reading of Section 7 but states that, nonetheless, the rule later adopted by the Eleventh Circuit is what the plain text of Section 7 requires. *Kennedy v. Am. Express Travel Related Servs. Co., Inc.*, 646 F. Supp. 2d 1342, 1345–46 (S.D. Fla. 2009) (thorough explanation of interplay of FAA § 7 and Fed. R. Civ. P. 45).

14 *Managed Care*, 939 F.3d at 1161 (quoting *Hay Group*, 360 F.3d at 409).

15 To maximize chances of judicial enforcement, it might be advisable that such a hearing actually be the commencement of the evidentiary hearing itself, which would then be continued to a date to be set (after discovery was closed, for example) for completion.

16 Fla. Stat. § 682.06(1).

17 While the FAA applies to agreements to arbitrate involving interstate commerce, the Supreme Court has noted "[t]he FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476–78 (1989). Thus, parties may agree that their dispute should be subject to the RFAC instead of the FAA (assuming the RFAC otherwise applies), since the FAA does not preempt state law. It seems evident that the choice of which arbitration law should apply may be made at the agreement's pre-dispute inception; however, given that arbitration is entirely a creature of the parties' agreement, I should think parties could make the RFAC applicable even post-dispute, but I could find no case directly addressing such a choice.

18 Section 301, 29 U.S.C. § 185.

19 *American Federation of Television & Radio Artists (AFTRA) v. WJBK*-TV, 164 F.3d 1004, 1009 (6th Cir. 1999) ("[U]nder [LMRA] § 301, a labor arbitrator is authorized to issue a subpoena duces tecum to compel a third party to produce records he [or she] deems material to the case either before or at an arbitration hearing."). This opinion's applicability within the Eleventh Circuit—even as persuasive authority—is somewhat in question, since the Sixth Circuit, while ruling that LMRA § 301 empowered labor arbitrator non-party production subpoenas, clearly rests on FAA § 7. *Id.* at 1009. The waters get even murkier if the arbitration agreement entails a statutory discrimination claim of an employee covered by a collective bargaining agreement (CBA) that prohibits discrimination and that provides that "[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 252 (2009). Does the LMRA § 301 provide for prehearing non-party discovery subpoenas there? Does the FAA?