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State's Arbitration Laws Likely to Face Legislative Scrutiny in 2011

The 2011 state legislative session may still be almost a year away, but momentum appears to be building for a review of the state's arbitration laws. During a recent public hearing of the House Judiciary and Civil Jurisprudence Committee, lawmakers heard from angry San Antonio homeowners who testified that mandatory arbitration clauses in their home purchase contracts were preventing them from suing the home builder for the effects of a collapsed retaining wall built without a permit.

The hearing was the result of an interim charge given to the committee by House Speaker Joe Straus "to study and make recommendations on the use of arbitration in Texas and the effect such practices have on state jurisprudence." In the months between legislative sessions, House and Senate committees commonly consider and make recommendations on various issues likely to be addressed during the next regular session.

While the homeowners' testimony focuses on the use of arbitration in consumer transactions, it could provide the impetus for a broader review of the use of arbitration by businesses in other arrangements, including employment claims. An increase in the use of arbitration in recent years has drawn the ire of some within the state's attorney community who see the trend as an economic cost to their business, but legislative efforts attempting to curtail the use of arbitration have faltered.

In recent state legislative sessions, proposals aimed at limiting nonsubscribers' use of arbitration have been introduced. The proposals have not advanced, and legislators have indicated that the use of arbitration in employment contracts are not a target of the current scrutiny. However, the growing interest in a review of the state's arbitration laws have some concerned that it could provide an opening for such proposals to gain the traction they have lacked in past sessions.

Should such a movement gain steam, statistics continue to reinforce the benefits to both employees and employers for the use of arbitration by employers. According to data on the use of arbitration in California, employment claims take between 650 to 720 days to resolve in court,

compared to 104 days when arbitration is used. The research also indicated the median cost of resolving employment disputes by arbitration is \$870.¹ According to a 2003 report that compared the difference in monetary awards resulting from litigation and arbitration, the median amount for resolution through the court was \$95,554, compared to \$100,000 from arbitration.²

According to WorkCompCentral, State Representative Todd Hunter (R-Corpus Christi), chair of the House Judiciary and Civil Jurisprudence Committee, indicated that the panel will make specific recommendations on changes to the state's arbitration laws before the Legislature convenes for its next regular session in January of 2011.

- 1- *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure California Dispute Resolution Institute, August 2004 and Examining the Work of State Courts, (1999-2000) National Center for State Courts*
- 2- *Employment Arbitration: What Does the Data Show? The National Workrights Institute article reviewed on workrights.org site on November 15, 2004*

Alliance Representatives Meet with Sunset Commission Staff

Over the course of the next several months and through the legislative session that begins in January 2011, both the Texas Department of Insurance and the Division of Workers' Compensation (DWC) will undergo a process known as "sunset review". This periodic review of state agencies allows the legislature to determine whether an agency is fulfilling its mission and should be continued, abolished, or reorganized.

The Sunset Advisory Commission and its staff will review 28 state agencies and has adopted its public hearing schedule that will begin in April 2010 and conclude in January 2011. The commission is comprised of 12 members that are appointed by the Lieutenant Governor and Speaker of the House. Five members of the Texas Senate, five members of the Texas House of Representatives, and two public members serve on the commission.

Alliance Chairman Margaret Greenshield of James Avery Craftsman and the Alliance lobby team of Richard Evans and Will Yarnell recently met with staff members of the Texas Sunset Advisory Commission to provide background on the nonsubscription process and on legislative issues that nonsubscribers have confronted in recent sessions regarding data collection, arbitration, and "anti-discrimination" lawsuits. Abel Martinez of H-E-B Grocery, a major Texas nonsubscribing employer and strong supporter of the Alliance also participated in the meeting.

The group also briefed the staff on the DWC's efforts to improve compliance of nonsubscribing employers with Labor Code requirements to file DWC-5 and DWC-7 forms. The Alliance has been supportive of efforts to educate employers about the need to file these required forms and has suggested methods to improve compliance by allowing for the electronic filing of the DWC-5.

As part of its preparations for the Sunset review process and the 2011 legislative session, the Alliance is planning additional meetings with legislative members of the Sunset Commission and will be preparing a response to the Sunset staff report once it is released.

Federal Health Care Reform in Overtime

In an effort to generate bipartisan support, President Barack Obama has unveiled the latest attempt at national health care reform and invited Republicans and Democrats to a joint summit to discuss the proposal and other options. The president's new plan, estimated to cost \$950 billion over 10 years, is based on a bill passed earlier by the U.S. Senate and does not include a public option to compete with private insurers. The president's version, however, would give the federal government authority to block premium rate hikes by private insurers.

Both houses of Congress have passed massive healthcare bills, but passage of a unified plan appeared less likely when Massachusetts voters elected Republican Scott Brown to replace the late Democrat Sen. Ted Kennedy. Brown opposes the federal health overhaul, and his election meant Republicans could filibuster (and potentially kill) the bill on the next round.

The president's plan would extend health coverage to uninsured Americans and require insurers to cover people with preexisting conditions. It would postpone imposing an excise tax on so-called premium health coverage from employers until 2018 for everyone affected, rather than just members of labor unions. It would also provide federal dollars for all states – and not just Nebraska as earlier proposed – to pay for the cost of Medicaid expansion through 2017.

Republicans had protested that a bipartisan bill would need to start from scratch, a notion the White House rejected. Conservative opponents of the President's proposal argue that the plan is too costly, that it will endanger health coverage that many Americans say they are happy with, and that it embraces an unpopular effort to expand the role of government.

As a last-ditch effort, Democrats have discussed attaching a unified

health bill to a federal budget bill that would require only 51 votes in the Senate to pass. That option is not a sure bet, however, and has been widely criticized.

Swine Flu Threat Winding Down For Now

Flu strains, including the feared H1N1, were on the wane in Texas, according to data released in mid-February, with the Texas Department of State Health Services classifying activity as “sporadic.” That’s down significantly from “widespread” H1N1 activity nationwide last October, according to the Centers for Disease Control. The sporadic designation is used when small numbers of influenza cases are confirmed in labs, with no increase in flu-like illnesses. Only 19 (four percent) of 478 samples tested positive for influenza at Texas labs during the week ending Feb. 12. Of those, only two tested positive for H1N1.

Even so, DSHS Commissioner Dr. David Lakey recommends Texans “absolutely” get vaccinated for the H1N1 strain if they have not already. Supplies of the vaccine are now plentiful and can be found at doctor’s offices, by entering a city and zip code at the Web site texasflu.org, or by calling 211 and asking an operator for the nearest location of the vaccine provider.

“The challenge is that flu is a very unpredictable virus,” Lakey said. “During a pandemic, it comes in waves. So we’re predicting a next wave may come, a third wave. We don’t know how widespread it will be or how severe it will be. It’s very important that we protect ourselves, and the best way to protect ourselves is through a vaccine.”

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Federal legislation being monitored by the Alliance is listed below:

HR 635 by Rep. Baca (D-CA)

Description: Establishes the National Commission on State Workers' Compensation Laws.

STATUS: Referred to the House Committee on Education and Labor on January 22, 2009.

HR 991 by Rep. Gutierrez (D-IL)

Description: *Consumer Fairness Act of 2009* - Amends the Consumer Credit Protection Act to treat as an unfair and deceptive trade act or practice under federal or state law any written provision in a consumer transaction or contract that requires binding arbitration to resolve a controversy arising out of or related to the transaction or contract, or the failure to perform any part. Declares such a provision unenforceable. Permits a written agreement to determine an existing controversy by binding arbitration if the parties agree after the controversy has arisen.

STATUS: Referred to the House Committee on Financial Services on February 11, 2009.

HR 1020 by Rep. Johnson (D-GA)

Description: *Arbitration Fairness Act of 2009* - Declares that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights. Declares, further, that the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. Exempts from this Act arbitration agreements in collective bargaining agreements.

STATUS: Referred to the Subcommittee on Commercial and Administrative Law on March 16, 2009.

HR 1237 by Rep. Sanchez (D-CA)

Description: *Fairness in Nursing Home Arbitration Act* - Provides that a pre-dispute arbitration agreement between a long-term care facility and a resident (or anyone acting on the resident's behalf) shall not be valid or specifically enforceable.

STATUS: Referred to the House Committee on Judiciary on February 26, 2009.

Referred to the Subcommittee on Commercial and Administrative Law on March 16, 2009.

Referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law and the Subcommittee on Crime, Terrorism, and Homeland Security on July 23, 2009.

HR 3590 by Rep. Rangel (D-NY)

Description: *Patient Protection and Affordable Care Act* - This is the vehicle for the version of the health care reform proposals that will be debated in the Senate.

STATUS: Passed Senate with an amendment and an amendment to the Title by 60-39 vote on December 24, 2009.

HR 3962 by Rep. Dingell (D-MI)

Description: *Affordable Health Care for America* - House proposal for health care reform.

STATUS: Read the second time. Placed on the Senate Legislative Calendar under General Orders. Calendar No. 210.

S 512 by Sen. Martinez (R-FL)

Description: *Fairness in Nursing Home Arbitration Act* - Provides that a pre-dispute arbitration agreement between a long-term care facility and a resident (or anyone acting on the resident's behalf) shall not be valid or specifically enforceable.

STATUS: Read twice and referred to the Committee on the Judiciary on March 3, 2009.

Important Compliance Information for Nonsubscribers

State law requires employers in Texas that do not carry workers' compensation insurance to file DWC Form-5 with the Texas Department of Insurance-Division of Workers' Compensation (TDI-DWC). Additional information on DWC Form-5 is available at: <http://www.tdi.state.tx.us/forms/dwc/dwc005nocov.pdf>.

Nonsubscriber employers with four or more employees are also required to use form DWC Form-7 to report each work-related injury resulting in more than one day of lost time, all occupational diseases of

which the employer has knowledge (regardless of lost time), and all fatalities occurring during the calendar month. The completed form reporting all such injuries that have occurred during a calendar month must be filled with the TDI-DWC no later than the 7th day of the following month. For more information on DWC Form-7 go to: <http://www.tdi.state.tx.us/forms/dwc/dwc7.pdf>.

Failure to comply with either requirement is an administrative violation and could result in administrative penalties. The Alliance encourages its members and all nonsubscribers to comply with these requirements.

Links to DWC-Forms 5 and 7 are available on the Alliance Web site at: www.nonsubscriberalliance.org.

Future Board Meetings (All calls are 1:00 p.m. CST)

- **March 17, 2010 – Conference call**
- **May 19, 2010 – Conference call**
- **July 21, 2010 – Conference call**
- **September 15, 2010 – Conference call**
- **October 20, 2010 – Annual meeting in Dallas**



The Texas Alliance of Nonsubscribers

An employer-driven, nonprofit trade association dedicated to ensuring that nonsubscription interests are better prepared, more cohesive, and strategically proactive in preserving their choice to manage occupational injury claims.

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