Employment Law Update: Arbitration Clauses in Employment Agreements - October 2019

Arbitration Clauses in Employment Agreements: Keeping Them Enforceable

By: Malissa Wilson

Mandatory arbitration clauses in employment contracts reduce the possibility that legal action will be taken against employers. Wrongful termination, wage and discrimination claims can all be resolved in a private process before a disinterested third person, rather than publicly in court before twelve jurors.

While enforceable, arbitration clauses in employment agreements must still comply with basic principles of contract formation. For instance, an employee can still raise misrepresentation, mistake, and undue influence as defenses to the enforcement of an employment agreement containing an arbitration clause. In drafting arbitration clauses, it is important that the language is written in a way that is not confusing (use of terms that are vague or not commonly understood) or hard to read (font size is too small). It is also important that the clause is fair by not placing more of the cost to arbitrate on the employee or placing unreasonable limitations on damages or the proceedings themselves. The arbitration clause should name the arbitration organization, such as the American Arbitration Association, where the claim will be filed and whose rules will be followed.

When presenting an arbitration clause to potential and current employees, human resource personnel should go over the clause with the employee; answer any questions an employee may have; and, not rush or pressure the employee into signing the agreement. Last, the agreement must be signed indicating an understanding that the employee is waiving the right to pursue employment-related claims in court and is consenting to arbitrate them.

An employee does not have to sign an employer's arbitration clause. In turn, the employer has the right to terminate or refuse to hire an employee who does not sign.

The enforceability of arbitration clauses in employment contracts has been made certain by court rulings like the 2018 United States Supreme Court decision in *Epic Systems Corp. v. Lewis* that held arbitration agreements in employment

contracts can legally bar employees from collective arbitration requiring employees to individually arbitrate their claims. However, its certainty is currently being threatened by the Forced Arbitration Injustice Repeal (FAIR) Act.

The U.S. House of Representatives recently passed the FAIR Act – a bill that would render mandatory arbitration clauses in employment agreements unenforceable. The stated purpose of the FAIR Act is to "prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes. . . ." While the bill is unlikely to pass the Senate, it may not be the last attempt by legislatures – both state and federal – to ban arbitration clauses in employment agreements.

Enforcing Arbitration Clauses in Employment Contracts Based on Electronic Signatures

By: Mandie Robinson

Many companies require employees to arbitrate certain employment disputes as a condition of their employment. Coinciding with this trend, employers' use of technology to obtain and manage personnel records has resulted in the widespread use of electronic signatures on personnel documents – including arbitration clauses contained in employment agreements. While electronic signatures are generally enforceable, there are steps an employer should take to maximize the enforceability of such agreements.

Generally, federal laws, like the Electronic Signatures in Global and National Commerce Act, hold that electronic signatures are valid and enforceable. Many states have followed suit with their own statutes regarding the effectiveness of such signatures. However, individual litigants oftentimes seek to avoid arbitration of their claims by asserting they either did not sign the agreement at issue, or the agreement is unenforceable due to a lack of a "meeting of the minds" - being an understanding that the employee was in fact entering into an arbitration agreement as part of the documents signed.

An employer can combat an employee's claim that he did not sign such an agreement in different ways. For example, an employer may offer affidavit testimony of a company representative that witnessed the employee affix his electronic signature to the agreement. An employer may also offer testimony regarding the method of signing which reflects that the employee could not have continued working for the company without entering into the agreement. Likewise, an employer can combat a claim that there was no required "meeting of the minds" by offering affidavit testimony that the employee could not have been unaware of the agreement as he could not have electronically signed the agreement without having seen it. In *Bowles v. OneMain Fin. Grp., L.L.C.*, 927 F.3d 878 (5th Cir. 2019), the court held the plaintiff's argument that she had been unaware of the agreement failed in light of testimony from the employer that the system it utilized had physically shown the plaintiff the agreement before requiring her certification it had been read.

Thus, companies utilizing electronic signatures on employee arbitration agreements can take affirmative steps in advance to help protect their interests later. Companies can adopt measures which ensure at least one other employee is present when employment-related documents are completed, and that employees cannot begin work until all required documentation has been finalized. Further, companies can implement procedures which will not allow an employee to electronically sign arbitration agreements unless and until the system has required the employee to actually view the agreement.

While there is no guarantee that courts will summarily find such arbitration agreements to be valid in every case, these measures provide an employer with several methods to combat an employee's claim of invalidity.