Continued Employment May Not Be Enough for Your Arbitration Policy to Be Enforceable With Employees

Client Advisories

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On August 11, 2017, the New Jersey Superior Court, Appellate Division held, in Kevin Dugan and Roman Zielonka v. Best Buy Co. Inc., and Garrett Hetrick, Docket No. A-1897-16T4, that when it comes to employers implementing new arbitration policies for any disputes with its employees, continued employment alone may not be explicit affirmative assent to arbitrate claims.

Like all contracts, arbitration policies require mutual agreement and consideration between employer and employee. While New Jersey courts have held continued employment is sufficient consideration for some employment-related agreements, the Appellate Division was clear that consideration is a concept and element of contract formation which is different from mutual assent, which was the concept at issue in Dugan v. Best Buy. Consideration requires each party give something up to the other to bind them to the agreement while mutual assent requires each party agree.

Arbitration agreements have been held to higher legal scrutiny recently, especially with the advent of Atalese v. U.S. Legal Servs., Grp., 219 N.J. 430 (2014), certif. denied, 135 S. Ct. 2804 (2015). The Appellate Division, relying on New Jersey Supreme Court precedent, explained that an employee's waiver of his or her right to sue in a court of law requires that he or she has a complete understanding of the agreement terms and rights being waived as well as must indicate an explicit, affirmative, and unmistakable assent.

Clearly, a signature is the best evidence of explicit, affirmative, and unmistakable assent. Without one though, the question is what is sufficient as another explicit indication of assent.

In Dugan v. Best Buy, Best Buy introduced its new arbitration policy with current employees through electronic prompts, which at the end of the pages of explanation of the policy, contained a box indicating "I acknowledge." The plaintiff, a current employee at the time of the policy being implemented, and manager at Best Buy, went through the electronic pages, but did not read the policy. Thereafter, he clicked the "I acknowledge" box and was

in charge of making sure employees subordinate to him also reviewed the electronic arbitration policy. He remained employed for three (3) weeks after the arbitration policy went into effect.

New Jersey Supreme Court precedent has been clear that mere acknowledgement pages are insufficient for assent. The Appellate Division indicated that revised language next to the box, perhaps including "and agree to the terms of the policy" would have "firmly established" the plaintiff's assent.

Moreover, Best Buy's arbitration policy stated even employees who did not click the "I acknowledge" box were bound by the policy, "by remaining employees." Therefore, the Appellate Division examined whether continued employment was sufficient in these circumstances to constitute explicit assent to the arbitration policy. The Appellate Division found that the plaintiff's knowledge of the policy's existence and his status as a manger were factors related to his understanding of the waiver of his right to sue in court, but were not factors related to his assent.

In a similar context, the Appellate Division, in Jaworski v. Ernst & Young, U.S., 441 N.J. Super. 464 (App. Div.), certif. denied, 223 N.J. 406 (2015), held that continued employment for five years after the effective date of a similar employment arbitration policy was sufficient explicit assent to the arbitration policy.

However, the Appellate Division, here, held that three weeks of continued employment after the arbitration policy went into effect was insufficient explicit assent to the policy. The Appellate Division expressly took issue with how brief the period of continued employment was in comparison to the high standard required to uphold arbitration provisions. The Appellate Division found that there was not enough time permitted for an employee who disagreed with the arbitration policy to find other employment if he or she took issue with the policy. The Court determined that since there was no negotiation of this arbitration provision, the take it or leave it approach was really no choice at all for this specific plaintiff who worked for the Company for almost sixteen years.

In summary, Dugan v. Best Buy means that for employers to have enforceable arbitration provisions for its current employees, there must be some other means of ascertaining assent from the employees. Acknowledgment pages and in certain circumstances, continued employment are simply not enough.

If you have questions about whether your arbitration policy is enforceable or whether your employees have provided explicit assent to arbitrate any employment disputes with you, please contact any member of Archer's Labor & Employment Group in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

Attachments

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