Continued Employment Amounts to Consent for Arbitration Agreement

Client Advisories

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On August 18, 2020, the New Jersey Supreme Court held that an employee's continued employment was sufficient to manifest assent to the terms of an arbitration agreement, and reinstated the trial court's order to compel arbitration over New Jersey Law Against Discrimination claims. However, the employer in that case, Pfizer, took key precautions in its language and follow-up communications that the Court noted led to its opinion. The Supreme Court made clear that the language of the specific arbitration agreement at issue, plus the additional communications sent out by the company about the arbitration agreement, made the continued employment sufficient assent to the arbitration agreement. It was undisputed that the LAD claim fell squarely within the list of types of claims included within the arbitration agreement.

In Skuse v. Pfizer, Inc., Pfizer distributed new arbitration and class action waiver policies to its employees. Pfizer advised its employees that after sixty (60) days of continued employment, they would be deemed to have assented to the policy. Pfizer also sent employees e-mails with arbitration policy information, a FAQ document, and "training modules," containing presentations with informational slides regarding the arbitration agreement and a box to click "I ACKNOWLEDGE," acknowledging their obligation to agree to the arbitration agreement as a condition of continued employment with Pfizer. The plaintiff, Skuse, was employed for four years at the time, received a copy of the new policies, opened the e-mails titled "training modules," and ultimately, clicked the box acknowledging that she had an obligation to agree as a condition of her continued employment. Thereafter, she continued working for Pfizer for an additional thirteen (13) months.

Pfizer's arbitration agreement clearly stated in bold terms that acknowledgment of the contract was not necessary to be deemed enforceable and that continued employment alone would constitute consent to the agreement. This point was echoed by the informational e-mails, the FAQ document, and four slides of the training modules.

The arbitration agreement also clearly stated in capital letters that agreement meant any dispute would be resolved by arbitration only and not by a court, jury, or judge. The FAQ document explained what arbitration was, the role of the arbitrator, the effect of an arbitration decision, the arbitration organization to be used, and

arbitration rules that would apply. The additional communications further made clear that there is a distinction between arbitration and a judicial forum.

The e-mail communications also clearly and unmistakably explained the rights to be waived by agreeing to the arbitration agreement, which complied with New Jersey's line of "waiver-of-rights" cases. Notably, delivering the agreement by e-mail was of no issue to the Court. Further, the Court did note that the Company sent the e-mail communications about the agreement in the form of training modules, which was not appropriate, but not detrimental to the Court's opinion.

In sum, while continued employment alone can constitute sufficient assent to an arbitration agreement, the Court has made clear that there are still critical precautions that employers must take in not only drafting arbitration agreements, but also in educating employees about the rights that they are giving up, and what their continued employment means without affirmatively acknowledging or accepting the terms of the agreement.

Drafting tips include using language that visually is set off from the rest of the language, such as bold, capital letters, both of which were used in Pfizer. Furthermore, drafters must take the time to make the necessary explanations of judicial forums, arbitration, and the rights employees have and are being asked to forego. Language in these agreements must be clear and not confusing. It must also be made clear that simply continuing employment is sufficient for manifesting assent. While e-mail was sufficient in this case, the Appellate Division had taken issue with that method. Therefore, it is advisable to also use another form of communication such as mailing or in-person delivery. Finally, while continued employment was sufficient, it is advisable to have employees sign off on an acknowledgment form and follow up if one is not received.

Educating employees includes providing informational documents, such as the FAQ document, and e-mails to further explain arbitration, rights the employees have, and what they are being asked to give up. They should also advise employees to consult with an attorney. Follow-up communications should be more clearly titled to direct employees' attention to their relevance to the arbitration agreement (unlike Pfizer's reference to "training," which the Court found inappropriate). Follow-up communications should not cause any confusion and should deliver a uniform, clear message.

If you have questions about whether your arbitration agreement is enforceable, or how to implement an arbitration agreement with your employees, please contact any member of Archer's Labor & Employment Group in: Haddonfield, NJ at (856) 795-2121, Princeton, NJ at (609) 580-3700, Hackensack, NJ at (201) 342-6000, Philadelphia, PA at (215) 963-3300, or Wilmington, DE at (302) 777-4350.

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