What Notice Is Required for Mandatory Employee Arbitration?

Judge Abraham J. Gafni (Ret.)
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Increasingly, employers are seeking to impose mandatory arbitration provisions to resolve disputes with employees. Often, however, those employees object to arbitration and prefer a trial in court. They contend that the arbitration provisions the employer is imposing are unenforceable not only because of alleged unconscionability but also because the employees were not made aware of these provisions or their applicability to them.

Recently, a federal district court in the Sixth Circuit was confronted with such a notice problem. It issued a ruling that should cause employers generally to reconsider the adequacy of the procedures by which they advise their employees of these dispute resolution procedures.

Cerjanec v. FCA, US, 2017 Case Number: 2:17-cv-10619 (E.D. Michigan, Dec. 15, 2017) involved four current or former employees of Fiat, Chrysler Automobiles (FCA), who, as part of a class, contended that an employee evaluation policy at FCA resulted in older employees receiving lower evaluation scores. This, they claimed, adversely impacted their employment opportunities and, in addition, resulted in age discrimination.

In responding to these claims, FCA sought to compel arbitration. It contended that the named employees were subject to the company's mandatory arbitration policy.

In its opinion, the district court first reviewed four general principles relating to the formation of an agreement to arbitrate. These were:

- The Federal Arbitration Act (FAA) “embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.”
- As arbitrations are matters of contract, a party may not be required to submit to arbitration any dispute to which s/he has not so agreed.
- Employee-related statutory claims such as those alleging age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA) are enforceable under the FAA.
- As arbitration agreements are contracts, the court will review their existence and applicability according to the applicable state law of contract formation.

All of the named employees in this action had been employed before 1995. When they were hired, at least three of the four had signed employment applications in which they agreed to follow all “orders, policies and regulations.”

In 1995, FCA implemented an employee dispute resolution process (EDRP) under which nonunion employees were required to arbitrate most of the disputes arising from their employment. In May of 1995, a letter was sent to the employees informing them that the company would soon implement an EDRP. “Attached to that letter was a brochure that provided an overview of the process and stated about the EDRP, ‘IT APPLIES TO YOU. It will govern all future disputes between you and Chrysler that are covered under the process’.” The 1995 EDRP policy provided for exclusive, final and binding arbitration for ‘all eligible disputes whether based on federal, state or local law including breach of contract, discrimination or retaliation claims. ‘“

The named employees continued to work at FCA following this notice.

FCA did not assert that the employees had either signed or openly acknowledged any arbitration agreement. Moreover, it did not contend that by agreeing to follow “all orders, policies and regulations” when first employed, they became bound once they received the May 1995 letter.

Rather, FCA argued that by continuing to work after receiving notice of the EDRP in May of 1995, the employees essentially assented to and entered into a binding agreement to arbitrate.

In rejecting FCA’s position, the court recognized that there is no specific form of acceptance required for an arbitration agreement to be effective. It acknowledged that acceptance may be implied from an employee’s conduct, including remaining employed by the employer which had adopted an EDRP. But it emphasized that continued employment,

by itself, is not always sufficient to manifest assent to an arbitration policy. “To the contrary, the Sixth Circuit has made clear that continued employment can manifest assent when the employee *knows* that continued employment manifests assent.”

Thus, in another case in the U.S. Court of Appeals for the Sixth Circuit, *Seawrigh*t *v. American General Financial Services.,* 507 F. 3rd 1967(6thCir. 2007), an employee had received a letter advising of the effective date of the arbitration program. The letter was accompanied by an informational brochure that expressly stated: “Seeking, accepting, or *continuing* employment with [defendant] means that you agree to resolve employment related claims against the company … through this process instead of the court system.” Two years after the effective date of the program, another brochure was sent out to the employee that reiterated that “continued employment” with the company meant she agreed to resolve employment programs through the company’s arbitration program. The employee continued working at the company after the receipt of these notices.

The circumstances in the *Seawright* case reflected to the court a “knowing” acceptance of a valid and enforceable agreement to arbitrate. Similar holdings in other Sixth Circuit cases were cited in which an arbitration agreement was found to be enforceable following advice to the employee that continued employment would constitute acceptance.

On the other hand, a case in which the notice did not contain a specific provision stipulating that continued employment would constitute acceptance of the arbitration provisions resulted in an unenforceable arbitration agreement.

In yet another case, the provisions in the guidelines manual that had earlier been distributed to employees included mandatory arbitration policies. The court found that by earlier availing herself of other actions in the manual, the employee had reflected her assent to mandatory arbitration. In this case, however, the notice given by FCA in the EDRP stood on its own; it was not a part of the manual of policies distributed to the employees which would have contained other provisions of which the employees might have availed themselves.

But, what about the warning attached to the FCA letter informing the employees of the establishment of the EDRP that, “IT APPLIES TO YOU. It will govern all future legal disputes between you and Chrysler that are covered under the process”? FCA argued that these statements “put the employees on sufficient notice that continued employment would constitute assent to the EDRP”

The district court disagreed, however, finding that the above language was insufficient in that it does not inform employees “how the EDRP applies to them and does not tell them that it applies to them if they continue to work at FCA. It is not a ‘provision that stipulated continued employment would constitute ‘acceptance.’ ”

Whether the standards for acceptance of arbitration suggested by the court in this case are too rigorous or restrictive and will ultimately be adopted by courts beyond the Sixth Circuit need not be considered at this time. The opinion of the court does reflect, however, that employers seeking to assure the viability of their arbitration provisions would be well-advised to take extra measures that would satisfy *any* court that the employees were not only made aware of how the arbitration provisions applied to them but that they had knowingly assented to them by remaining employed. These steps might include:

- Obtaining signed agreements or other written acknowledgments of an arbitration agreement.
- Distributing materials that clearly and expressly advise employees that by continuing their employment, they are accepting the terms of the mandatory arbitration agreement.
- Regularly releasing reminder memos that continued employment with the company reflects an agreement that the employee is subject to the mandatory arbitration agreements.
- Including reference to the arbitration provisions in other employee manuals upon which the employees rely.

Only by taking extra care in these procedures may an employer enjoy some sense of confidence that a court will find that the employee knowingly agreed to be subject to the mandatory arbitration provisions promulgated by it. •

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