

When Does an Employee ‘Accept’ Employee Handbook Arbitration Provisions?

Judge Abraham J. Gafni (Ret.)

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Many companies prefer mandatory arbitration programs for the resolution of disputes between employer and employee; and, courts have made clear (often to the consternation of the employees) that such provisions, properly drawn and presented, are enforceable.

A recent case from the U.S. Court of Appeals for the Eighth Circuit reflects, however, that such mandatory arbitration provisions will fail if in their preparation and presentation, the employer has not satisfied the basic elements required in the making of a contract under state law.

That case, *Shockley v. PrimeLending*, 929 F. 3rd 1012, (8th Cir., July 15, 2019), dealt with employer PrimeLending seeking to rely on mandatory arbitration provisions contained in its online employee handbook. (It should be noted that the considerations discussed herein apply to both paper and online handbooks.)

Jennifer Shockley had been employed by PrimeLending for approximately one year from June 2016 through July 2017. PrimeLending had an accessible computer network that contained employee-related information, including a handbook.

The handbook recited two provisions relevant to this case:

- A “dispute resolution/arbitration clause” (arbitration provision) under which the parties would resolve any dispute exclusively through final and binding arbitration on an individual basis, and waived their right to trial by judge or jury as well as the right to initiate a class, collective, representative or private attorney general action.

- A “control of decisions” provision (delegation provision), which accorded to the arbitrator (and not to any court or agency) the exclusive authority to resolve any claim relating to the interpretation, applicability enforceability or formation of the arbitration provision including any claim that all or any part of it was void or voidable.

Shockley sued PrimeLending for violating the Fair Labor Standards Act alleging that she had not been paid all of her earned wages and overtime pay.

PrimeLending moved the district court to compel arbitration under the arbitration provisions contained within its employee handbook.

The issues for the district court, and, eventually, the court of appeals to consider were:

- Whether a court, rather than an arbitrator, should determine the validity of the arbitration provisions, notwithstanding the delegation provision; and, if so,
- Whether the agreement to arbitrate had been validly formed and was, therefore, enforceable.

The following information was presented relative to the delegation and arbitration provisions.

In August 2016, some two months after she had been hired, and again in February 2017, as part of her annual review, Shockley had accessed PrimeLending’s network, and in particular the handbook, by clicking and opening it with a mouse. The clicking of the handbook not only generated an acknowledgment of its review by Shockley, but also a pop-up window containing a hyperlink to the full text of the handbook. Shockley did not recall reviewing the handbook, and there was no evidence that she had ever opened or reviewed its full text.

The district court determined, and the appellate court agreed, that even though an employer has provided to the employee a handbook that contained the arbitration and delegation provisions, (which might be deemed an “offer”), an employee’s review of the handbook did not constitute an acceptance of that offer.

In considering this matter, the appellate court recognized the following general principles:

- Arbitration agreements are favored by federal law and will be enforced as long as a valid dispute exists and the dispute falls within the scope of the agreement.
- Arbitration is a matter of contract law so that a party that has not contractually agreed to be bound by the arbitration clause cannot be compelled to arbitrate.
- The party seeking to compel the arbitration carries the burden of proving a valid and enforceable arbitration agreement.
- The state law of Missouri governed whether an enforceable contract had been created.

- The creation of an enforceable contract under Missouri law requires:
 1. An offer which is considered made when the person receiving the offer would reasonably believe that the offer had been made; no specific terms of art are required for a valid offer, but it will include the ability to accept through affirmative words or action.
 2. An acceptance that will be found when the offeree signifies assent to the terms of the offer in a positive and unambiguous manner. However:
 - Silence cannot generally be translated into acceptance.
 - Continuation of employment alone does not manifest the necessary assent to the terms of arbitration.
- Continued employment may constitute agreement, where the document clearly states that continued employment constitutes acceptance, “and the employer informs all employees that continued employment constitutes acceptance.”
- A delegation provision, which is an agreement authorizing the arbitrator to decide threshold issues, including the validity of the arbitration agreement, is an additional, antecedent agreement which may be viewed as standing alone from the arbitration agreement itself. Its separate validity will be based upon whether it contains the aforementioned three requisite elements of any contract.

The appellate court held, based on the principles in Missouri contract law, that even if it assumed that the online delegation provision in the online handbook, constituted an offer, it could not conclude that this offer had been accepted. There was nothing in the “signals” sent by Shockley to PrimeLending to objectively manifest her acceptance of an intent to be bound by the delegation provision. Accordingly, it was for the court to rule on the validity of the arbitration provisions.

These same principles were applied by the court in determining that Shockley was not bound by the arbitration provisions.

Although Shockley had twice opened the internal system, she could not remember reviewing the handbook, and there was no evidence that she actually did so.

It was true that as a result of the simple act of opening the internal system containing the handbook, she had been advised of these materials and was acknowledging her review of them. Moreover, the court accepted that this acknowledgment could be deemed to reflect that she was aware of the terms of PrimeLending’s purported contractual provisions as they related to mandatory arbitration.

Nonetheless, the critical holding of the court was that, “We are aware of no legal authority holding that an employee’s general knowledge or awareness of the existence of a contract constitutes the positive and unambiguous unequivocal acceptance required under Missouri law.” Otherwise stated, even if these clauses constituted an offer, “Shockley’s document review, and the subsequent system-generated acknowledgment, does not create an unequivocal acceptance; therefore, no contract was created.”

In short, merely including a mandatory arbitration provision or delegation provision in an employee handbook will not be sufficient in Missouri and many other states to bind an employee, even if that employee later reads and reviews the provisions. Further steps should be taken to support a finding that the employee has been advised of, and, more importantly, presumably understood and by some deed or act, expressly accepted the terms of the agreement.

Such suggested steps have included:

- Distributing the arbitration agreement and delegation provision separately from the employee handbook, to further assure the employee's awareness of these provisions.
- Requiring that the employee acknowledge not only that he or she has read the arbitration provisions that have been prominently displayed but also that he or she accepts them by:
 1. Agreeing to them in writing by signing a document; or,
 2. Striking a link immediately adjacent to and following such prominently displayed provisions.
- Displaying a statement prominently on the handbook (whether online or in print) that continuation of employment constitutes acceptance of the terms contained within the handbook.

Otherwise stated, proving that an employee has not only appreciated but also accepted the provisions of delegation or mandatory arbitration provisions relating to employment may be tricky. Accordingly, employers must consider utilizing varying methods to satisfy a court or arbitrator of such acceptance. •

Abraham J. Gafni is a retired judge and mediator/arbitrator with ADR Options. He is also a Professor of Law Emeritus at the Villanova University Charles Widger School of Law.

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