Employee Acceptance of Handbook Arbitration Provisions: Part 2

Judge Abraham J. Gafni (Ret.)
Published on November 19, 2019 in The Legal Intelligencer

In my Sept. 23 article in the Legal Intelligencer titled, "When Does an Employee 'Accept' Employee Handbook Arbitration Provisions," I noted that courts have generally held that mandatory arbitration provisions between an employer and employee, when properly drawn and presented, are enforceable. Employers, however, often fail in their attempts to enforce such provisions because they cannot demonstrate that they have satisfied a basic element in making a contract under state law, i.e., securing the acceptance of the employee.

To illustrate this situation, I cited *Shockley v. PrimeLending*, 929 F3rd 1012 (8th Cir., 7/15/19), in which the court concluded that under Missouri law, employee Jennifer Shockley's acceptance could not be assumed, notwithstanding that she had twice accessed the employer's handbook that contained the arbitration provisions and a hyperlink to the full text of the handbook. In addition, by accessing the handbook she had generated an acknowledgment of its review. Nonetheless, there was no evidence that she had ever actually reviewed the handbook or opened and reviewed its full text.

The court held that an employee's general document review and the system's computer-generated acknowledgment did not create an unequivocal acceptance. Rather, further steps must be taken by the employer to support a finding that not only was the employee advised of but also presumably understood and by some deed or act expressly accepted the terms of the agreement. Otherwise stated, while silence or continuation of employment do not ordinarily manifest the necessary assent to the offer of an arbitration provision, continued employment may constitute acceptance where the employer sufficiently informs all of the employees that such continued employment constitutes acceptance.

One month later, the U.S. Court of Appeals for the Seventh Circuit, applying Illinois contract law, explained how one employer successfully provided such adequate notice, resulting in employee acceptance.

In *Gupta v. Morgan Stanley Smith Barney,* 934 F. 3rd 705 (7th Cir., 8/19/19), Morgan Stanley moved to compel arbitration of Rajesh Gupta's claim relating to his dismissal.

Gupta had been working at Morgan Stanley since 2013, under its CARE dispute resolution program, an agreement that did not require employees to arbitrate disputes. The CARE's terms did state, however, that it might be changed, and that any such changes "would be announced in advance" before becoming equally binding upon the employee and Morgan Stanley.

On Sept. 2, 2015, Morgan Stanley emailed Gupta a new arbitration agreement. The subject line read" Expansion of CARE Arbitration Program." The email explained that effective Oct. 2, 2015, final and binding arbitration under the new CARE arbitration program would be mandatory for all employees unless an employee individually elected to opt out. The email included links to the new arbitration agreement and revised CARE guidebook. It further encouraged employees to read and understand both documents as "they describe the terms, features and details of this program."

The final section of the email was titled "Next Steps." It attached a link to the arbitration opt-out form and again notified Gupta that he had until Oct. 2, 2015, to opt out.

In addition, the email twice cautioned that if the employee did not opt out, continued employment would reflect that the employee "consented and agreed to the terms" of the arbitration agreement and CARE guidebook.

Finally, the email concluded with the assurance that opting out of the arbitration agreement would not adversely affect Gupta's employment.

The opt-out form attached to the email prominently placed the opt-out deadline in bold capital letters, allowed for submission by email, and provided directions if Morgan Stanley failed to confirm that the employee had opted out of mandatory arbitration.

Over the 30-day opt-out period, employees had access via links to the arbitration agreement, CARE guidebook and arbitration opt-out form. Significantly, Morgan Stanley's intranet page, which was accessible to all employees, contained a reminder about the upcoming mandatory arbitration program and opt-out deadline. This reminder again encouraged employees to "carefully review the Sept. 2 email from human resources" and instructed that unless they chose to opt out, continued employment would bind them to the terms of the new arbitration agreement.

Gupta did not respond to the email in any fashion and continued to work at Morgan Stanley for two more years when the dispute relating to the termination of his employment arose.

The court was required to resolve whether Gupta's silence and inaction constituted acceptance of the proposed arbitration agreement.

The court, mirroring the legal conclusions in *Shockley*, found that silence alone was generally insufficient to support a finding of acceptance; rather, there must be further factors that would allow the employer to conclude that the recipient employee presumably understood the nature of the message so that that silence would, in fact, reflect acceptance. Otherwise stated, an employee by acts and conduct, including silence and prior dealings, may, in certain circumstances, indicate assent and become bound by the agreement's provisions.

In *Gupta,* the court found such acceptance from the nature and number of communications from Morgan Stanley.

First, the initial agreement containing the CARE program, which Gupta had signed, explicitly stated that its terms were subject to change "after an announcement in advance;" thus, Gupta was aware that he must keep abreast of advanced announcements of dispute resolution changes.

Such prior announcement was, in fact, emailed to Gupta personally. It granted a 30-day review period and included a conspicuously displayed opt-out form. Moreover, Morgan Stanley posted a continual company intranet reminder of the new arbitration policy and opt-out date and repeatedly informed that it would construe silence as acceptance of mandatory arbitration.

Finally, Morgan Stanley's business practice generally during Gupta's employment had included regular email communications. Such course of dealing would reasonably bolster the company's expectation of a diligent response from Gupta and a justifiable assumption that his silence indicated acceptance of mandatory arbitration. This repeated business practice differed, therefore, from a single unsolicited offer from a stranger, where responses would be rare and unexpected.

In summary, the Sept. 2, 2015, email to Gupta that constituted an offer to enter into a contract:

- Mentioned the new arbitration agreement eight times;
- Explained that arbitration would become the exclusive forum for covered claims;
- Informed Gupta that he was free to opt out without consequence; and
- Instructed Gupta that if he did not elect to opt out, his continued employment would be construed as acceptance.

Finally, and most significantly, continued reference and advice regarding these changes appeared on a daily basis in the company's intranet posting.

The distinction from *Shockley*, where the silence of the employee was not deemed to reflect consent, appears clear. In *Shockley*, the communications with the employee were limited and not attention grabbing. In *Gupta,* however, there were numerous and varied methods of notice that continued on a daily basis for the entire opt-out period. The repeated instructions that silence and continued employment reflected acceptance of the offer of an arbitration agreement, particularly in light of the parties' employment

relationship, made it reasonable to expect that Gupta would notify Morgan Stanley if he intended to opt-out and that his silence would convey acceptance.

(It should be noted in this regard that some states do not allow an employer to construe silence as acceptance but always require an express acceptance).

The lessons for both employer and employee are clear. If employers wish to convey that automatic changes will occur unless the employee specifically objects, such notices should be clear, highlighted and repeated often. This will assure that there can be no reasonable contention that the employee was unaware or could have failed to appreciate their significance, including that failure to respond would be deemed an acceptance. Conversely, for employees, the lesson is that a message, conveyed clearly, prominently and repeatedly as to mandatory arbitration, if ignored, will, in all likelihood, become binding without formal assent. •

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