Lawyer Insights

Arbitration Pact Rulings Show Signature Snags For Employers

By Ryan Glasgow and Tyler Laughinghouse
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There is little debate that the legal landscape has tilted in favor of enforcing arbitration agreements in the employment context. Over the last few years, the U.S. Supreme Court has handed employers victories in a series of cases challenging the enforceability of arbitration agreements, including approving the use of class and collective action waivers.

Though the case law has become more favorable to employers seeking to implement arbitration programs, enforceability is not guaranteed in every case, and employers continue to face legal challenges on a range of substantive and procedural issues.

Though employers often prioritize and devote most of their time and attention to drafting legally enforceable arbitration agreements, employers sometimes overlook the far more basic question of how they will later prove — sometimes, years later — that the agreement was actually signed by the plaintiff employee or putative class member — a threshold issue that can derail enforcement of even the most carefully worded arbitration agreement.

Indeed, two recent cases highlight the challenges that employers face in proving that specific employees signed arbitration agreements.

In Hill v. Employee Resource Group LLC, for example, the U.S. Court of Appeals for the Fourth Circuit declined to compel arbitration because, even though the employer's policy required that all newly hired employees sign an arbitration agreement, the employer could not locate signed copies of such agreements for the named plaintiff and a subset of putative class members.

Similarly, the California Court of Appeals in Cummings v. Eureka Restaurant Group LLC recently refused to compel arbitration involving an electronically signed arbitration agreement because the employer could not rebut claims from the employee that his manager had used his login credentials to electronically sign the agreement without his knowledge or consent.

Hill and Cummings are not the first cases to address these issues, and they certainly will not be the last. However, as discussed below, employers can take certain steps to place themselves in a better position to defend against such claims and to ensure their arbitration agreements are enforced.

Signature Options

Arbitration agreements are — legally and practically speaking — contracts, and courts apply ordinary principles of contract interpretation to determine their enforceability. Thus, like all other contracts, arbitration agreements require an offer, acceptance and consideration. Proving acceptance typically

requires a showing that the employee actually signed, or otherwise indicated their affirmation of, the arbitration agreement.

Generally speaking, employers have two options for obtaining signed arbitration agreements from employees. Employers can either have employees physically sign paper copies or have employees e-sign electronic versions. Though physical signatures on paper agreements is the more traditional approach, under the federal E-Sign Act, e-signatures carry the same legal weight as paper-based signatures and are an equally viable method for employees to enter into binding arbitration agreements.[1]

Each of these two signature options presents its own challenges when it comes to proving that employees actually signed the agreements. With physical signatures, for example, employers need to be able to efficiently locate signed copies, often on short deadlines during litigation, and sometimes several years after they were signed.

These concerns are amplified in collective and class actions where employers may be called upon to locate and produce hundreds, if not thousands, of signed agreements across multiple locations under tight discovery and/or briefing deadlines. Employers can reduce these litigation burdens by implementing comprehensive and centralized document collection and retention policies, but they must still have a plan in place to address lost or misplaced agreements.

Though electronically signed agreements are typically easier for employers to locate during litigation — assuming they are stored in a central electronic repository — e-signed documents often require an extra layer of proof that the employee, as opposed to someone else, electronically accessed and signed the agreement.

There is no one-size-fits-all approach, and each employer should weigh the advantages and disadvantages of each option against their own business interests and capabilities. However, regardless of which option the employer chooses, employers should think strategically about how they will defend against claims from an employee that he or she did not review or sign the arbitration agreement.

Recent Case Law Shows Risks Are Not Just Theoretical

Courts have been generally unsympathetic to employers' efforts to overcome lost or missing arbitration agreements. In Hill v. Employee Resource Group[2] for example, the Fourth Circuit declined to compel arbitration in a wage and hour class action with respect to the named plaintiff and a subset of putative class members for whom the employer could not locate signed arbitration agreements.

Though the employer tried to overcome the missing agreements by relying on an affidavit from a human resources representative to explain that it was the company's policy and practice to require all new employees to sign arbitration agreements when they were hired and before they could begin working, the court held that this generalized evidence was insufficient to prove that the specific employees at issue actually signed arbitration agreements. In no uncertain terms, the Fourth Circuit held:

Almost all businesses and corporations have human resources policies. And many of them wish to believe that those policies are being strictly enforced. ... [A] human resource official's expectations or assumptions about what happened during a hiring process conducted by individual managers on many dates, in many locations is of little probative value.

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The Fourth Circuit is not alone. The U.S. Court of Appeals for the Fifth Circuit reached a similar conclusion in Chester v. DirecTV LLC,[3] where the court was unconvinced that the employee actually signed an arbitration agreement because the employer had lost all of the plaintiff employee's personnel documents, including the alleged arbitration agreement. The court likewise rejected the employer's reliance on its new-hire policies, which included a requirement that new hires sign arbitration agreements, noting that "policies are sometimes broken, either by mistake or design."

The U.S. Court of Appeals for the Second Circuit in Dreyfuss v. Etelecare Global Solutions-U.S. Inc.[4] also refused to compel arbitration where the employer could not locate a complete copy of the employee's arbitration agreement. Though the employer produced a portion of the agreement, including the signature page, the employer could not locate the second page of the agreement and had no way to prove the complete terms of the agreement, particularly because the employer had used different versions of the agreement during the relevant time period.

Employers have also faced challenges regarding the authenticity of e-signatures for electronic arbitration agreements. In Cummings v. Eureka Restaurant Group,[5] for example, the California Court of Appeals recently declined to compel arbitration because the employer failed to rebut the employee's claim that his manager obtained his username and password and used them to affix his e-signature without his knowledge or consent.

Though the employee was assigned a specific username and password for electronically accessing and signing the agreement, the court focused on the fact that the employer did not submit any evidence that the employee did not share his login credentials with his manager or that the manager did not otherwise have access to the system.

Practical Considerations

Given this case law and the practical reality that employees may challenge the enforceability of their arbitration agreements, employers should think strategically about how they will effectively and efficiently defend against such claims.

For physically signed agreements, the primary consideration for employers is the retention and retrieval of paper documents. Given the potential number of agreements and the realistic possibility that copies may be lost or misplaced over the years, employers should streamline the retrieval process and create backup records in the event a specific agreement cannot be found. In particular, employers should consider:

Creating a Centralized Repository for Paper Agreements

It is a business reality that nationwide employers often have to rely on individual managers at various locations to oversee the employee new-hire process, potentially leading to a patchwork of document storage and retention practices. In addition to increasing the possibility that certain documents will be lost or misplaced, a decentralized document storage practice often makes it more burdensome for employers to quickly locate and collect agreements during litigation.

Accordingly, employers should consider creating a centralized repository to collect and preserve arbitration agreements by requiring that managers send paper copies or electronically scanned copies to a corporate human resources representative for official storage and retention. Local representatives should always keep a backup copy at the specific location as a fail-safe option, but a centralized storage

system will streamline the retrieval process during litigation.

Implementing Safeguards to Ensure the Employer Receives a Signed Agreement from Every Employee

Employers should institute safeguards to make sure that every employee signs an arbitration agreement and that the company has an executed copy in its files. Employers have a variety of options to erect safeguards during the new-hire process and/or before employees receive their first paycheck.

Though employers should choose the option that works best for their particular business, the ideal approach is to assign a corporate human resources representative with responsibility for ensuring that a signed arbitration agreement has been signed and retained for every single new hire and, if not, following up with the relevant mangers until the signed agreement is provided.

Creating Backup Records to Prove the Existence of a Lost or Misplaced Agreement

Even with the most robust policies and practices, it is inevitable that some agreements will be lost or misplaced over time. Accordingly, employers should attempt to create additional contemporaneous records to show that an employee signed an arbitration agreement.

Employers can, for example, create a centralized record (i.e., an excel spreadsheet) that documents when the company received a signed copy from the employee and provides a description of where the document will be stored. Employers can also have employees sign new-hire checklists and other onboarding documents where employees acknowledge that they reviewed and signed an arbitration agreement.

Similarly, employers can have managers sign separate documents confirming that they reviewed the arbitration agreement with the employee and had them sign the agreement. Though these records will not take the place of an actual copy of the agreement, these records can be potentially persuasive in litigation when combined with the employer's policies and practices.

Keeping a Record of All Versions of Arbitration Agreements

To the extent employers periodically revise their standard arbitration agreement, they should retain all versions and keep detailed records of when each version of the agreement was created and rolled out. That way, an employer can identify the specific version of the arbitration agreement that an employee would have signed in the event the employer cannot locate all or part of the executed copy.

For e-signed agreements, the primary consideration is proving that the employee — and only the employee — had the opportunity to review and electronically sign the arbitration agreement. Given the possibility that employees may later claim that other individuals signed on their behalf, employers should implement certain security and other information technology protocols to protect the authenticity of the e-signature. In particular, employers should prioritize:

Choosing a Reliable and Secure E-Signature Software Program

The most important consideration for e-signed agreements is using a reliable and secure software program — either managed through a third-party vendor or through the company's own IT department —

to ensure that the e-signature is authentic. There are a variety of software platforms and options to consider.

For example, some software programs require employees to sign their name using a touchscreen or trackpad while other programs use a typed signature or use "I agree" buttons. Some programs force employees to review and scroll to the end of the agreement before signing while other programs provide hyperlinks for employees to voluntarily review the agreement in a separate window.

Software programs also offer different security protocols. Though most programs assign employees individualized login credentials, some programs require employees to provide additional personalized information when signing in and likewise prevent other company representatives (i.e., managers) from accessing the agreements. Though no one approach is per se better than the other, employers should consider these various options and choose the software program that best aligns with their organization structure and their particular security concerns.

Emailing a Signed Copy to the Employee

Employers should consider contemporaneously emailing the employee a copy of the e-signed agreement, and keeping a record of that email. Doing so provides the employee notice and an opportunity on the front end to dispute that they signed the agreement as opposed to someone else, and their failure to raise an issue on the front end will make it harder for them to later claim that they did not sign the agreement.

Creating a Written Explanation of How the Software Works

In the event of litigation, employers will need to explain how their e-signature software program works and the steps they have taken to ensure the authenticity of each e-signed agreement. Though a prewritten policy document is preferred, employers should at least identify someone at the company who is trained on the software and will be in a position to explain how it works in the event of litigation.

Planning Ahead

To be sure, employers can never completely eliminate the possibility that some arbitration agreements will be lost or misplaced, and employers cannot fully insulate themselves from one-off disputes about the authenticity of a particular employee's e-signature.

However, by analyzing these issues on the front end and thinking strategically about how they will later prove that an employee signed an arbitration agreement, employers can significantly decrease the likelihood that an otherwise well-written arbitration agreement will not be enforced.

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Notes

1. See 15 U.S.C. § 7001.

2. No. 18-2009 (4th Cir. Mar. 31, 2020).

3. 607 Fed. Appx. 362 (5th Cir. 2015).

4. 349 Fed. Appx. 551 (2d Cir. 2009).

5. 2d. Civ. No. B294120 (Cal. App. 2d. Dist. Jan. 7, 2020).

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