Employer Update

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Shock[ley] and Awe: What a Recent Circuit Court Decision Can Teach Employers About the Perils and Pitfalls of Online Arbitration Agreements

By Gary D. Friedman and Thomas McCarthy

In This Issue

A recent decision out of the Eighth Circuit is causing many employers to reexamine their use of electronic arbitration agreements, as well as other important agreements such as those involving restrictive covenants. In *Shockley v. PrimeLending*, the Court found that the employer had failed to form a valid and binding arbitration agreement with its employee, despite the fact that the employer established that its employee had accessed its handbook containing the arbitration provisions on *multiple* occasions and acknowledged her review of same.[1] The Eighth Circuit's holding provides employers with a valuable reminder of the importance of the concepts of offer and acceptance in an age of predominantly online Human Resources infrastructures, and offers lessons that are applicable to policies and agreements beyond those involving arbitration, including restrictive covenant agreements, confidentiality agreements, and anti-discrimination and harassment policies.

Historically, the commencement of an individual's employment was accompanied by a large stack of paper policies, and agreements that required the employee to execute, acknowledge and return to Human Resources. This hardcopy method presented practical difficulties of administration, tracking and storage; however, despite these challenges, the execution and acknowledgment left little doubt about whether the employee had agreed to the arbitration provision, restrictive covenant, or employer policy at issue.

As more employers continue to modernize their HR structure through the use of portals, intranets, and shared drives, company policies and employee agreements have migrated online as well. While this provides employers with more flexibility with respect to updating policies and eliminates the need for burdensome physical storage of signed documents, a substantive risk exists that employers are sacrificing enforceability at the altar of efficiency. The different methods companies are using to distribute policies and agreements do not always adequately address the contract principles of offer and acceptance, leading employers to realize too late that the "agreements" they are relying on are not worth the paper on which they could have been written.

This can be particularly important where, as was the case in *Shockley*, an employer is hoping to avoid costly class action and individual lawsuits through the use of mandatory pre-dispute arbitration agreements. As of late 2017, more than half of all non-unionized workers in U.S. companies were

subject to arbitration agreements,[2] and employer use of arbitration clauses has spiked sharply since the Supreme Court's May 2018 decision in *Epic Systems Corp. v. Lewis*,[3] in which the Court rejected a challenge to mandatory class-action waivers in individual arbitration agreements.[4]

A Shock-ing Decision?

Given the powerful momentum towards mandatory arbitration and the distribution by employers of these agreements online, the Eighth Circuit's decision in *Shockley* serves as a splash of cold water on any employer assuming that enforcement of their arbitration provision is guaranteed. PrimeLending, a Texas-based mortgage lender, maintained an internal computer network accessible by its employees, which contained employment-related information and policies, such as the company's Employee Handbook. PrimeLending's Handbook provided that any disputes between the employer and an employee would be resolved through final and binding arbitration, and that both parties waived their right to trial by jury or before a judge in a court of law. The Handbook also included a "delegation provision," which stated that any disputes or claims relating to the "interpretation, applicability, enforceability or formation" of the arbitration provisions would be decided by an arbitrator.

Shockley, a former employee, sued PrimeLending, alleging violations of the Fair Labor Standards Act, and PrimeLending moved to compel arbitration based on the online arbitration provision in its Handbook. PrimeLending provided undisputed evidence that Shockley accessed the section of PrimeLending's internal network containing the Handbook and clicked on the Handbook itself, which generated an automatic acknowledgment of review. PrimeLending established that Shockley went through this process *twice* – once shortly after beginning her employment, and again as part of a required annual policy review. Each time, Shockley was specifically advised that by entering the internal system she acknowledged her review of these materials. When clicking on the Handbook, she was also presented with an opportunity to review the full text of the Handbook through an optional hyperlink.

Despite all of this evidence, the district court found that PrimeLending had not shown that Shockley had actually accepted the arbitration and delegation provisions contained in the Handbook, and therefore there was no enforceable agreement to arbitrate any disputes. The court further held that because the arbitration language was contained in an employee handbook that could be unilaterally modified by PrimeLending at any time, this did not even constitute a valid offer under contract law. On appeal, the Eighth Circuit focused primarily on the "acceptance" portion of the lower court's ruling, and ultimately agreed that Shockley's mere continuation of employment did not manifest consent to the arbitration provisions, because her offer of employment was not explicitly conditioned on her review and acceptance. The court pointed out that there was no evidence that Shockley had ever *clicked on the hyperlink* and reviewed the full text of the Handbook, and therefore no evidence that she had actually seen the arbitration language. Even assuming that Shockley had reviewed the language, the court stated, the automatically-generated acknowledgment did not constitute assent or acceptance because "an acknowledgment of a review of offered terms alone does not evince an intent to accept those terms." As such, the Court held that the arbitration provisions did not constitute an enforceable agreement, and rejected the employer's appeal, which sought to overturn the lower court's denial of its motion to compel arbitration.

Shockley is not the only case in which courts have found an employer's online arbitration provisions wanting. In *Campbell v. General Dynamics Government Systems Corp.*, an employer e-mailed its employees regarding a new dispute resolution policy.[5] The email described the company's dispute resolution policy, identifying the last step as "arbitration by a qualified and independent arbitrator." The email urged the employees to review the enclosed materials, as the policy was "an essential element of [their] employment relationship." The email also included two links – one to a two-page brochure describing the dispute resolution policy, and one to the full text of the

policy itself, which the company also posted to its intranet. The brochure informed employees that continued employment would mean that they would be covered by the policy's terms. The brochure also stated that the arbitration policy was the "exclusive means of resolving workplace disputes," and that the company would compel arbitration in response to any lawsuits by employees.

When a former employee brought a claim against the company under the Americans with Disabilities Act, General Dynamics moved to compel arbitration. The district court held that the e-mail notification, without more, failed to constitute the minimum level of notice required to enforce an agreement to arbitrate, and that because the plaintiff lacked knowledge of the employer's offer, his continued employment did not manifest the required assent. On appeal, the circuit court disagreed with the lower court's blanket disapproval of email as a method of notification, but nonetheless found the e-mail inadequate because it did not include (1) the actual text of the policy, (2) a statement that the policy included a waiver of the right to access a judicial forum, or (3) any statement that the agreement to arbitrate would become binding upon continued employment. Furthermore, the email did not require any acknowledgement of receipt, and the company did not record whether its employees actually reviewed the policy or brochure. Thus, General Dynamics had not sufficiently established Campbell had assented to the arbitration agreement.

Other Rulings Demonstrate the Range of Potential Judicial Reactions to Online Agreements

Not all courts have come out so harshly against companies looking to enforce arbitration agreements. In one case decided approximately one month post-*Shockley*, the Seventh Circuit compelled arbitration in *Gupta v. Morgan Stanley Smith Barney, LLC*, where an individual sued his former employer for common law defamation and discrimination and retaliation in violation of the Uniformed Services Employment and Reemployment Rights Act.[6] When the plaintiff commenced employment, the defendant's dispute resolution policy did not require arbitration of discrimination claims, but the defendant subsequently e-mailed all employees stating that the arbitration program was being amended and that employees must affirmatively opt out within 30 days if they did not want to be subject to the agreement. The email included links to the new arbitration agreement, a guidebook on the policy, a link to the opt-out form, and a statement that if the employee did not opt out, continued employment would constitute agreement.

The Court compelled arbitration even though there was no proof that the plaintiff had ever actually read the email. The Court focused on the fact that the prior version of the dispute resolution program stated that its terms were subject to change with advance notice, therefore requiring that the plaintiff keep abreast of any potential changes. Furthermore, the email itself stated that employees must individually opt out of the policy, an important contrast to *Shockley* and *Campbell*. The Court also observed that the plaintiff's employment included regular email communication, and justified the employer's expectation of a reply, and its assumption that the plaintiff's silence indicated his acceptance of the mandatory arbitration.

Several district court decisions reached similar results but on somewhat different bases. In *Mill v. Kmart Corporation*, for example, the Northern District of California compelled arbitration where the employee was required to acknowledge receipt and acceptance of an arbitration policy in the employer's online portal.[7] Even though there was no proof that the employee had actually read the terms of the arbitration agreement, the Court focused on the fact that (1) the employee was required to visit a page on the portal with hyperlinks to the agreement, as well as the opt out form, and (2) the arbitration agreement was a standalone document, and notified the employee in bold font that opting out would not result in any adverse employment action. In *Alexander v. Raymours Furniture*, the employee had signed an acknowledgment form stating that he had received the company's handbook, that the provisions of the handbook were subject to change at any time, and that continued employment constituted agreement that any changes applied to the employee.[8] The employer later incorporated an arbitration program

into the handbook, and notified all employees via email of the new program. Employees were required to acknowledge their review of the revised handbook, and were advised to pay "special attention" to the updated sections regarding arbitration. The company provided evidence that the employee had logged onto the portal and electronically acknowledged that he had reviewed the revised handbook, and, thus, the court granted the company's motion to compel arbitration. Finally, in *Nevill v. Johnson Controls International PLC*, the Eastern District of Wisconsin granted a motion to compel arbitration where the employee was required to log into an online interface to review and accept equity awards, and the interface required the employee to actually open the applicable equity plan and individual award agreements containing arbitration provisions and attest that he had read the documents before accepting the equity award.[9]

The employers in the above-described cases used a variety of different procedures for notifying their employees of their arbitration and for confirming receipt, review, and/or acceptance. These lessons can also be applied to other agreements and policies maintained solely through intranets or web portals. In *BMO Harris Bank NA v. Lailer*, an employer sought a preliminary injunction against a former employee for alleged breach of non-solicitation and confidentiality obligations contained in an offer letter the employee received as part of a lateral, internal transfer.[10] The employee denied that she was ever presented with the offer letter. In support of its motion, the employer established that (1) the employer had twice emailed the offer letter to the employee, (2) the employee had to go through an online offer and acceptance process as part of the transfer process, and (3) the employee had affirmatively clicked an option accepting the transfer offer, which option also included a statement that the employee had read and accepted the offer letter. The district court granted the employer's motion for a preliminary injunction, in large part because the employer had been able to provide evidence of affirmative acceptance of the agreement by the employee.

Employer Takeaways

Below, we have outlined some the important lessons that employers can glean from recent decisions on this subject:

- **Resist the Urge to Include Important Agreements in Employee Handbooks**. Although it may be tempting for employers to have "one stop shopping" with respect to company policies and agreements, companies should be cautious about integrating arbitration clauses, restrictive covenants, and confidentiality provisions into employee handbooks. Employee handbooks are generally quite long and are often viewed by many employees as a source to be consulted when they have particular questions impacting their terms and conditions of employment rather than a document to be carefully and thoroughly reviewed at the outset of their employment. Important agreements concerning arbitration, restrictive covenants and confidentiality will often be buried in such a voluminous tome, and therefore run the risk of not being read in any detail, if at all. Moreover, most handbooks specifically include language stating that (1) they do not create a contract of employment, and (2) they can be altered at any time by the employer, which some courts have found negate an offer under contract principles. As such, we recommend separating important agreements, such as those involving arbitration and restrictive covenants, from employee handbooks.
- **If You Have To Combine Documents, Ensure that Key Text Stands Out.** If an employer is insistent on integration, it should strongly consider putting the arbitration and restrictive covenant language in separate sections, or even appendices or addendums for example, making those sections bold or in all-caps, and calling out those sections as being particularly important in the introduction or in any cover notes to employees. Separately, the employer should send email communications to its employees drawing their attention to these important agreements to buttress the highlighted agreements on the portal.

- **Full Text Over Hyperlinks.** For important agreements, employers should consider whether it even makes sense to include hyperlinks to the full text in emails or other communications to employees. As the courts in *Shockley* and *Campbell* noted, employees are not guaranteed to click through to the relevant policies even if encouraged to do so. Employers should minimize the number of steps between an employee receiving notice of the existence of a policy and the employee's ability to review the full text of that policy. If possible, employers should include the full text of policies in communications or on the applicable intranet or portal page.
- **Unless You're Talking About Opt-Outs.** If employers want to offer employees the opportunity to opt out of arbitration (or they are required to do so), then it may make sense to create a hyperlink to the opt-out form. Employers should not hide that option or make it overly burdensome to access, but the same human tendencies that lessen the likelihood of an employee clicking through to the full text of an agreement apply to an employee's potential inclination to affirmatively opt out.
- **Avoid Summaries.** Employers often think they are doing employees favors by providing summaries of agreements or policies in an effort to make things easier to understand. Unfortunately, this often results in summaries that are misleading, inaccurate or incomplete – there is a reason, after all, that the agreements and full policies include all of the language that they do. As seen in *Campbell*, a summary that leaves out important information, such as the fact that acceptance of a policy is a condition of employment, can be worse than no summary at all. Rather than try to provide information shortcuts, employers should focus on making the policies and agreements themselves more easily understandable.
- **What Can the IT Department Do For You?** Employers should consult internal or external IT resources to assess the practicality of implementing a forced review and acknowledgement process such as the one described in *Nevill*. Employers that require employees to click through and actually open relevant policies and agreements (and perhaps even to scroll through the entire document and click an acknowledgement, as some companies require customers to do with terms of service) will be in a much stronger position to argue the existence of an offer and affirmative, unequivocal acceptance by their employees.
- **Make Sure All Key Language is Covered.** Having the most up-to-date and advanced portal procedures in the world won't matter if the agreements themselves lack key terms and concepts. Employers should make sure their agreements are clear that, state law permitting, individuals' continued employment is conditioned on acceptance of the applicable arbitration and/or restrictive covenant agreement. Agreements should confirm that if an individual continues their employment after the policy becomes effective, and does not affirmatively object or opt-out of the policy, they will be deemed to have accepted the terms. In online interfaces, employers should make sure that the box the employee is supposed to check states that the employee *accepts* and *agrees to* the policy, in addition to acknowledging receipt and review.

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[1] *Shockley v. PrimeLending*, 929 F.3d 1012 (8th Cir. 2019).

[2] Colvin, Alexander J.S. "The Growing Use of Mandatory Arbitration." *Economic Policy Institute*, 27 Sept. 2017, https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.

[3] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

[4] It is noteworthy that at the time of this publication, the U.S. House of Representatives recently passed the Forced Arbitration Injustice Repeal Act, which would ban companies from requiring workers and consumers to resolve legal disputes in private arbitration. The legislation would also invalidate arbitration agreements with respect to any claims arising after the legislation goes into effect. Even so, the bill faces an uphill battle in the form of a Republican-controlled Senate and a Trump administration that could conservatively be described as "business-friendly." As such, it is unlikely that employers will start abandoning arbitration agreements in the near future, and therefore they must continue to make enforceability a priority.

[5] *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005).

[6] *Gupta v. Morgan Stanley Smith Barney, LLC*, 934 F.3d 705 (7th Cir. 2019).

[7] *Mill v. Kmart Corp.*, No. 14-CV-02749-KAW, 2014 WL 6706017 (N.D. Cal. Nov. 26, 2014).

[8] *Alexander v. Raymours Furniture Co.*, No. CIV.A. 13-5387, 2014 WL 3952944 (E.D. Pa. Aug. 13, 2014)

[9] *Nevill v. Johnson Controls Int'l PLC*, 364 F. Supp. 3d 932 (E.D. Wis. 2019).

[10] *BMO Harris Bank NA v. Lailer*, No. 16-CV-545-JPS, 2016 WL 6155997 (E.D. Wis. Oct. 21, 2016).

The National Labor Relations Board Upholds Implementing Class Waivers in Response to Class Claims

By David R. Singh and Audrey Stano

In *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Gorsuch, J.), the Supreme Court of the United States held in a 5-4 decision that class- and collective-action waivers and stipulations that employment disputes must be resolved by individualized arbitration do not violate the National Labor Relations Act ("NLRA") and must be enforced pursuant to the Federal Arbitration Act. In its recent *Cordúa Rests., Inc*.[1] decision, the National Labor Relations Board (the "Board") took *Epic Systems* two steps further, holding that (i) an employer can require its employees to sign class waivers and individualized arbitration agreements in response to class claims against the employer and (ii) an employer may warn its employees that failure to sign the updated arbitration agreement will result in disciplinary action.

The Underlying Dispute

Cordúa Restaurants, Inc. ("Cordúa") operates several Latin-themed restaurants in the Houston, Texas area. In January 2015, a group of seven employees filed a collective action against Cordúa in the United States District Court for the Southern District of Texas, alleging violation of the Fair Labor Standards Act and the Texas Minimum Wage Act. On September 29, 2015—while the Southern District of Texas Action was pending and after additional employees opted in—Cordúa issued a revised arbitration agreement to its employees requiring them to waive their "right to file, participate or proceed in class or collective actions (including a Fair Labor Standards Act ('FLSA') collective action) in any civil court or arbitration proceeding" and specifying that they "cannot file or opt-in to a collective action[.]"[2] Additionally, one of Cordúa's assistant managers told employees that they would be removed from the work schedule if they did not sign the revised arbitration agreement. Around this time, Cordúa also terminated three employees who opted into the Southern District of Texas action, although Cordúa provided other reasons for their termination.[3]

The employees challenged the lawfulness of Cordúa's tactics. The matter was first heard by an administrative law judge ("ALJ") who, in a December 9, 2016 decision, found that Cordúa's revised arbitration agreement was unlawful and that the termination of one of the three employees was improper. The Supreme Court issued its decision in *Epic Systems* approximately one-and-a-half years after the ALJ ruled, and the Board sought to square the ALJ's ruling with recent Supreme Court precedent.

The Board's Decision

The Board considered two questions of first impression: (i) whether the NLRA prohibits employers from promulgating mandatory arbitration agreements in response to employees opting into a collective action; and (ii) whether the NLRA prohibits employers from imposing disciplinary measures on an employee who refuses to sign a mandatory arbitration agreement. First, and contrary to the ALJ's pre-*Epic* determination, the Board found that the NLRA "contains no such proscriptions"[4] and noted that, pursuant to the Supreme Court's *Epic Systems* decision, the Board "has routinely dismissed complaints alleging that employers unlawfully maintained and/or enforced arbitration agreements that require employees, as a condition of employment, to waive their right to pursue employment disputes through class or collective actions."[5] Second, the Board held that, pursuant to *Epic Systems*, Cordúa's issuance of the revised arbitration agreement does not violate the NLRA because the agreement "does not restrict" Section 7 activity (protected concerted activity; *i.e.*, the right to unionize or discuss wages or other conditions of employment with coworkers) "in any way," and because "opting in to a collective action is merely a procedural step" since "the effect . . . was simply to require employees to resolve their employment-related claims through individual arbitration rather than through collective actions."[6]

The Board further held that Cordúa's assistant manager did not "unlawfully threaten employees with reprisals" by explaining that they may be fired for failure to sign the revised arbitration agreement. The Board noted that, because *Epic Systems* permits employers to condition employment on employees entering into arbitration agreements containing class- and collective-action waivers, the statements by Cordúa's assistant manager "amounted to an explanation of the lawful consequences of failing to sign the agreement and an expression of the view that it would be preferable not to be removed from the schedule."[7] However, the Board did reaffirm the ALJ's decision that the termination of one employee because he "discussed their wages and other terms and conditions of employment" with coworkers and "fil[ed] the FLSA collective action" violated the NLRA.[8]

Interpreting the Board's Decision

The Board's decision in *Cordúa* resolved questions left unanswered by *Epiq Systems* and, on balance, is quite favorable for employers. The Board indicated its willingness to interpret *Epic Systems* broadly to uphold arbitration agreements that include class- and collective-actions both before and during pending litigation. The Board also sanctioned the use of disciplinary measures, such as removing employees from a work schedule, for refusing to sign the revised arbitration agreements. While it remains to be seen whether federal courts will defer to the Board's decision in *Cordúa*, employers without arbitration provisions who are sued in wage and hour collective or class actions now have the added tool in their arsenal of updating their arbitration provisions mid-stream in an attempt to defeat the pending litigation.

Weil's class action and employment litigators will continue to monitor this case, including how it is construed by the federal courts.

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[1] 368 NLRB No. 43 (2019).

[2] *Id*. at 17.

[3] Cordúa terminated three employees who opted into the Southern District of Texas action but asserted other reasons for their terminations. Cordúa stated that Steven Ramirez was terminated for dishonesty, Rogelio Morales was terminated due to customer complaints, and that Shearone Lewis was terminated for inappropriate conduct.

[4] 368 NLRB No. 43 (2019) at 1.

[5] *Id*. at 2.

[6] *Id*. at 2, 3; *see also id*. at 2-3 ("[A]n arbitration agreement that prohibits employees from opting in to a collective action does not restrict the exercise of Section 7 rights and, accordingly, does not violate the Act.").

[7] *Id*. at 4.

[8] *Id*. at 1, 4.

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