‘Two steps forward, one step back’ when it comes to enforcing arbitration agreements

by Ryan McCoy

With the advantages inherent to arbitrating — rather than litigating — employment disputes, arbitration agreements between employers and employees have seen a sharp increase lately. But as recent case law has confirmed, these agreements are viewed with some suspicion, especially when they limit employees’ rights at arbitration compared to their rights in court. Courts have struggled to hand down a clear and concise standard guiding employers on which agreements will be enforced and which will be deemed unconscionable and unenforceable. A recent case provides the latest example of a California court refusing to enforce an employment arbitration agreement.

Employee signs, then later contests, arbitration agreement

In September 2006, Lena Ajamian was hired as an office manager for CantorCO2e. At the start of her employment, she signed an annual acknowledgment and certification form by which she acknowledged the employer’s policies and procedures manual. The manual included an “Arbitration Agreement and Policy.”

In March 2007, the employer promoted Ajamian to a broker job, and in connection with her new position, she received a new employment agreement, which also contained an arbitration clause. Before signing the agreement, she had an attorney review it. She eventually signed the agreement in December 2007.

In March 2010, Ajamian’s employment was terminated. Later that year, she filed a complaint in civil court asserting claims for sex discrimination, sexual harassment, retaliation, and various wage and hour violations. The employer tried to enforce the arbitration agreement, but Ajamian refused.

Who decides whether agreement is unconscionable?

The court first addressed who, under the parties’ agreement, would decide whether the arbitration agreement was enforceable. Under the Federal Arbitration Act (FAA), the enforceability of an agreement ordinarily will be determined by a court, but the parties may agree in the arbitration agreement that the enforceability issue will be delegated to the arbitrator. To establish this exception, it must be shown by “clear and unmistakable” evidence that the parties intended to delegate the issue to the arbitrator.

The relevant language of the agreement in this case read: “Any disputes, differences or controversies arising under this Agreement shall be settled and finally determined by arbitration.” The employer argued that language showed the parties intended that even the threshold issues of unconscionability would be decided by the arbitrator. The employee, on the other hand, argued that the language encompassed only substantive disputes, while the enforceability of the arbitration provision itself remained a matter for determination by a court.

The court conceded the “any disputes” language was broadly worded and noted the parties may have intended that arbitration might be conducted under the rules of an arbitration service that gives arbitrators the power to decide the validity of arbitration agreements. Yet nowhere in the agreement was there any “express grant of authority” to the arbitrator to decide threshold issues such as the unconscionability of the arbitration provisions. The absence of a specific grant of authority, combined with the reasonableness of the parties’ competing interpretations of the provision, led the court to hold that the “any disputes” language failed to meet the test of clear and unmistakable evidence. Consequently, the issue of enforceability was left to the court to decide.

Arbitration provisions procedurally and substantively unconscionable

The court then turned to whether the agreement was sufficiently fair to Ajamian to allow the dispute to go to arbitration. First, it found the nonnegotiable “take-it-or-leave-it” nature of the agreement constituted unfairness. Despite Ajamian having an attorney review it on her behalf, the agreement was not a product of negotiation. She had no “realistic bargaining power” and was required to sign the agreement to receive her promised compensation for work she had already performed.

The agreement also limited Ajamian’s ability to recover certain damages, forced her to forfeit “unwaivable” California statutes, and compelled her to travel to New York from California to attend arbitration, thereby costing her thousands of dollars she otherwise wouldn’t have to spend. Most important, the agreement allowed the employer, but not the employee, to recover attorneys’ fees as prevailing party. Those factors, taken as a whole, led the court to hold that the arbitration agreement was unconscionable and unenforceable. Ajamian v. CantorCO2e (California Court of Appeal, First Appellate District, 2/16/12).

Bottom line

Any arbitration provision intended to leave the issue of enforceability of an arbitration agreement to an arbitrator must be specific. Learning from this case, review your arbitration policies to insert specific language making it clear that the parties intend for any dispute over enforceability of the arbitration agreement to be decided by the arbitrator. You should also ensure that the substance of the agreement (e.g., not limiting the employee’s recovery and not adding extra costs for the employee) is sufficiently fair to the employee to pass muster.

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