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Trials&TRIBULATIONS

'Opt in' to binding arbitration for employer-employee disputes

With the often costly process of litigating matters in courts these days – in terms of both time and money – employers have been turning more to Alternative Dispute Resolution to resolve disputes with their employees. ADR, such as arbitration and mediation, is often less expensive than litigating in court and provides a means for a quicker resolution.

When initially evaluating whether an employer may want to consider arbitration as an option for resolving disputes with employees, the employer must first establish that the parties contractually agreed to engage in arbitration. Courts will not force parties into arbitration where there is no clear intent to do so. Unlike mediation, where the parties negotiate a resolution with the help of a mediator, arbitration involves the decision of an independent arbitrator, who provides his decision to the parties. However, prior to engaging in arbitration, the parties can decide whether they would like the final decision to be binding or non-binding.

By VICTORIA GLEASON
Daily Record Columnist

The court's role in the arbitration process is to determine whether the parties consented to arbitration for the issue at hand, particularly where one of the parties is resisting arbitration. If the court finds that the parties agreed to arbitrate their dispute, the court must stay the proceeding (or dismiss it) and compel arbitration. Where an agreement to arbitrate exists, the court is prohibited from ruling on the merits of any claims or disputes covered by that agreement as those are the province of the arbitrator.

To streamline the process of creating arbitration agreements, many employers have engaged in the practice of sending out mailings or emails describing the company's arbitration process that require employees to "opt out" of mandatory arbitration if they wish to pursue claims in court should a dispute arise.

Given that this practice creates an affirmative obligation on the part of the employees to opt out of binding arbitration, it is not surprising that there have been issues with this practice, including employees asserting that they never received the mailings or emails informing them of their option to opt out. Such was the case in the recent matter of *Couch v. AT&T Services, Inc.*, Slip Copy, 2014 WL 7424093, in which plaintiff Christopher Couch asserted that he never received AT&T Services Inc.'s emails informing its employees of its arbitration program, and, therefore, that he never agreed to engage in arbitration.

Couch commenced an action in the District Court for the Eastern District of New York against AT&T, alleging age discrimination after he was discharged from employment with the company. In response to the complaint, AT&T filed a motion to dismiss and to compel arbitration under the Federal Arbitration Act, on the grounds that the parties had contractually agreed to engage in binding arbitration for any dispute between the parties. Couch disputed that any such contractual agreement existed.

In or around 2011, AT&T decided to implement a new program whereby any disputes between an employee and AT&T would be resolved by binding arbitration. To effectuate this program, in 2011 and 2012, AT&T sent out three emails to its employees explaining the arbitration program and further explaining that the employees had the option to "opt out" of the program.

The emails specifically provided as follows: "If you do not opt out by the deadline, you are agreeing to the arbitration process as set forth in [AT&T's Arbitration Agreement]. This means that you and AT&T are giving up the right to a court or jury trial on claims covered by the Agreement." The emails then explained the process for opting out.

The emails also included an acknowledgment button that employees could click to signify their review of the email. In effect, the emails required employees to take affirmative action to opt out of the program; by doing nothing, the employees were agreeing to partake in the binding arbitration program. After the initial email was sent explaining the program, reminder emails were sent to those employees who had not yet clicked on the acknowledgment button within the email.

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Couch asserted that he never received any of the emails, that he did not know about the Arbitration Agreement to which he supposedly agreed, and that therefore, he was not required to arbitrate his discrimination claim. AT&T, however, provided proof that all three emails had been sent to couch's work email address. AT&T also provided evidence that it had successfully distributed company policies and acknowledgments via email on 20 other occasions. Finally, AT&T argued that Couch assented to the arbitration program by continuing to work at AT&T after the deadline to opt out had passed.

In deciding in favor of AT&T, dismissing Couch's complaint and compelling arbitration, the court found that the parties had reached an agreement to engage in binding arbitration because Couch failed to rebut the presumption that he received the arbitration emails. The court first explained that under the FAA, parties will not be forced to engage in arbitration; only where the parties have agreed to arbitrate will the FAA then enforce the provisions of such an agreement. The court further explained that whether an agreement to arbitrate has been reached is determined by applying the principles of New York contract law of offer and acceptance.

When making its determination on the issue of whether Couch's denial of receipt of the emails was sufficient to negate the existence of an agreement to arbitrate, the court relied upon the Second Circuit case of *Manigault v. Macy's E., LLC*, 318 Fed. App'x 6 (2009). In *Manigault*, defendant Macy's implemented an arbitration program and informed its employees of this program via mail. The mailing informed employees that they could opt out of arbitration if they did not wish to participate. The plaintiff in *Manigault* had commenced an action for sexual harassment and retaliation against Macy's, and Macy's responded by moving to compel arbitration.

Similar to the plaintiff in *Couch*, the plaintiff asserted that she never received the mailing and, therefore, was not required to arbitrate her claim against Macy's. The plaintiff's evidence included her assertion that she did not receive the mailing, as well as similar assertions from two other employees. In opposition, Macy's provided an affidavit asserting that it mailed plaintiff the arbitration materials at the address it had on file, and that plaintiff's mail was not returned as undeliverable.

In finding in favor of Macy's, the Second Circuit cited the New York law principle that if documents are "mailed to the party's address in accordance with regular office procedures" it is presumed that the party received the documents. It found that plaintiff's offered evidence – her denial and the denials of two other employees that they ever received the mailing – was insufficient to rebut the presumption of receipt. Lastly, the Second Circuit held that plaintiff had, indeed, assented to the arbitration program by continuing to work at Macy's after receiving the arbitration mailing.

Based upon *Manigault*, the court in *Couch* found that Couch's evidence that he did not receive the emails was insufficient to rebut the presumption of receipt established by AT&T. To defeat the presumption, the court noted that Couch would had to have offered evidence that the "regular office procedures" for sending emails were flouted or "carelessly executed," in addition to denying receipt of the emails.

The court further noted that an employer only has to establish by a preponderance of the evidence that an agreement to arbitrate existed; it is not required to demonstrate that the employee actually received it mailings or emails informing the employee of the arbitration program. Finally, in aligning with the Second Circuit, the court agreed with AT&T that Couch's continued employment with AT&T after the opt-out deadline constituted his assent to the arbitration program.

Couch and *Manigault* highlight that employers seeking to implement binding arbitration programs with their employees should follow established office procedures when mailing or emailing any new or amended policy and follow up on any communications that are returned as undeliverable. Employers should also fully explain the arbitration program and the scope of disputes covered by arbitration in the mailings or emails.

Furthermore, employers' communications should make it exceedingly clear that employees are required to affirmatively opt out if they do not wish to participate in the program, and should include explicit instructions for how to opt out and the opt-out deadline. If properly implemented, a binding arbitration program can greatly benefit an employer by reducing the cost and time (and headaches) involved in resolving employer-employee disputes.

Victoria S. Gleason is an associate at The Wolford Law Firm LLP, where she practices in the areas of commercial and employment litigation.