

PUBLICATION

Arbitration Agreement from Online Employee Handbook Unenforceable

April 19, 2011

Employers must be mindful of how they structure and integrate electronically posted terms into employee policies and handbooks in order to make sure they constitute binding obligations. In addition, attached provisions may not always be separable, which means courts' willingness to enforce those terms will rely on the enforceability of the underlying agreement.

In March, the Dallas Court of Appeals held that an obligation to arbitrate, incorporated by reference in an employee handbook distributed by email, could not be separated from its underlying agreement, and was therefore unenforceable under the circumstances. The court found that the employee handbook did not create a valid contract because it did not bind the employer to any individual employee and did not create a mutuality of obligation – meaning the document purported to place requirements on employee's conduct without any reciprocal responsibility on the employer.

However, it was not the employee handbook but an arbitration provision electronically incorporated by reference into the employee handbook that shaped the primary issue in this case. According to the court, because the arbitration provision was interconnected with the structure and language of the employee handbook, the arbitration provision was not separable and was therefore unenforceable, along with the underlying agreement.

While this case was decided by the Dallas Court of Appeals applying Texas law, the court applied general principles of contract and employment law to the electronically incorporated provision. This case does not imply that employers are powerless to enforce or even unilaterally update employment policies. However, it is a telling example of the consequences of not incorporating or executing those terms correctly.

Weekley Homes L.P. v. Rao, Tex. App., No. 10-570, 3/22/11

Facts

Len Rao, a former Division President of Weekley Homes, L.P., filed suit alleging a number of causes of action. The company filed a Motion to Compel Arbitration based on an alleged agreement to arbitrate contained in Weekley's Dispute Resolution Policy.

Weekley's Employee Handbook was distributed electronically to all employees, including Rao. It included language stating, "[i]t is important to point out that this Handbook is not a contract of employment," and "[t]he Handbook shall not bind the Company to employ any individual," and "all employment is 'At-Will'...mean[ing] that your employment can be terminated at any time by you, OR the Company, with or without cause, and/or with or without notice."

The four-page Dispute Resolution Policy, which contained the arbitration clause at issue, could be found by clicking on a hyperlink in the Employee Handbook's Dispute Resolution section. As part of the proceedings, the parties entered into evidence an email from the company confirming Rao's receipt of the Handbook. In an

affidavit Rao stated that "I never viewed [the email] as my agreement to arbitrate anything. It was simply an acknowledgment, after being hounded consistently by HR, that I had in fact received the document."

Issue

Was the arbitration agreement found in the Dispute Resolution Policy binding upon Rao?

Analysis

The Dallas Court of Appeals noted that "Mutual promises to submit employment disputes to arbitration constitute sufficient consideration to support an arbitration agreement; however if the employer can avoid its promise to arbitrate, the agreement is illusory. ... When illusory promises are all that support a purported bilateral contract, there is no mutuality of obligation, and therefore, no contract." Moreover, "[i]f an employer can unilaterally modify or terminate the purported agreement, without prior notice to an employee, that agreement is based upon an illusory promise and thus not enforceable."

Following this reasoning, the court found the Employee Handbook to be illusory. However, it still had to determine whether the arbitration provision, which was housed in a separate document, was binding upon Rao. Rao argued that the promise to arbitrate was illusory and unenforceable because of language in the handbook stating, "[p]olicies are not to be interpreted as a promise by the Company that any particular situation will be handled in the express manner set forth in the text." The company argued that the Dispute Resolution Policy was enforceable because the right to modify policies in the handbook did not apply to the "separate," "fully valid and enforceable" Dispute Resolution Policy.

However, the court noted that the Dispute Resolution Policy was built into the structure and language of the handbook. The section entitled "PURPOSE OF THIS HANDBOOK" did not distinguish between the handbook and related documents. In addition, the table of contents includes a category of provisions titled "DWH POLICIES SECTION" that included a provision titled "DISPUTE RESOLUTION."

Holding

Because the company maintained the opportunity to unilaterally modify the Dispute Resolution Policy, including the arbitration agreement, and the document was inextricably tied with the illusory Employee Handbook, the arbitration clause was not enforceable.