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Employer Communication

E-Mail Can Compel Employees to Arbitrate Workplace Claims

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A federal appeals court has ruled that an e-mail sent to all employees can satisfy the “written provision” requirement of the Federal Arbitration Act (FAA)¹ and result in a legally enforceable agreement to arbitrate employment-related disputes.

In *Campbell v. General Dynamics Government Systems Corporation*,² the U.S. Court of Appeals for the First Circuit held that the federal E-Sign Act prohibits any interpretation of the FAA’s “written provision” requirement that would fail to give legal effect to an agreement solely on the basis that it was in electronic form.

Thus, an arbitration agreement may not be held to be unenforceable simply because the notice of the requirement was transmitted via e-mail. The First Circuit, however, made clear that any such notice must still afford sufficient notice to apprise a reasonably prudent employee that continued employment constitutes a waiver of the right to pursue employment-related claims in a judicial forum.

Background

On April 30, 2001, General Dynamic’s president sent an e-mail to all employees announcing the implementation of a new dispute resolution policy. The message consisted of a one-page letter advising that the company was committed to addressing and resolving employee issues concerning legal protected rights and related matters.

The letter went on to explain that the company’s new policy was developed as a means of handling legal issues arising at the workplace, outlined the company’s four-step approach to such issues, and further stated that the policy

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INTERNET ISSUES



would be effective the next day.

The letter concluded by urging its reader review the “enclosed materials carefully, as the [Policy] is an essential element of your employment relationship.”

No part of the e-mail, however, required a response acknowledging receipt of the policy or

In ‘Campbell,’ the U.S. Court of Appeals for the First Circuit stated that the Electronic Signatures in Global and National Commerce Act, or E-Sign Act, prohibits judicial hostility to agreements confirmed by e-mail.

signifying that a party had read and understood its terms. Likewise, the e-mail made no mention of how the company’s policy would affect an employee’s access to a judicial forum, nor did it mention that the policy would become binding upon continued employment.

In addition, the e-mail did not indicate that the term “workplace disputes” included federal protected rights such as Title VII of the Civil Rights Act of 1964 or the Americans with Disability Act (ADA).

The “enclosed materials” referenced in the e-mail consisted of information about the new policy accessed by hyperlinks. While the hyperlinked “materials” made clear that the company’s arbitration policy would be mandatory, the court could not rely upon the materials because the e-mail did not make clear their importance.

The plaintiff was a former employee who had been terminated for persistent absenteeism and tardiness. The record evidence showed only that the plaintiff had opened the e-mail message shortly after it was initially distributed and was generally familiar with e-mail, but there was no indication the plaintiff had ever read the e-mail or clicked on either of the two hyperlinks.

Alleging that his infractions and subsequent dismissal stemmed from sleep apnea, and that General Dynamics should have accommodated his condition, the former employee sued in Massachusetts’ state court for disability discrimination under the ADA and state law.

General Dynamics removed the action to federal court, and then moved to stay the proceedings and compel arbitration under the Federal Arbitration Act. The District Court for the District of Massachusetts denied General Dynamic’s motion and declared that “a mass e-mail message, without more, fails to constitute the minimal level of notice required” to enforce an agreement to arbitrate ADA claims.³ The employer appealed.

The First Circuit began its analysis by taking note of the liberal policy favoring arbitration embodied in the FAA, and stated that §2 of the FAA guarantees that:

a written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction...shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for

the revocation of any contract.

The circuit court further explained that the FAA provides simply that arbitration agreements are a matter of contract, and therefore enforceable only to the same extent as any other contract. As a result, questions of enforceability and validity are governed by general principles of state contract law, and parties seeking relief under the FAA must show that under state contract principles that "a valid agreement to arbitrate exists."

When a party relies upon the FAA to assert a contractual right to arbitrate a claim arising under federal statutes, the court must further inquire as to whether the agreement is enforceable with respect to the particular statutory claim at issue, in this case the ADA.

The court found nothing in ADA or its legislative history that evidenced any congressional intent to put ADA claims beyond the reach of the FAA. To the contrary, the ADA actually expressly endorses arbitration "where appropriate and the extent permitted by law."⁴

Accordingly, the court had to determine whether these were appropriate circumstances under which arbitration of an ADA claim could be compelled.

The answer turned upon whether, under the totality of the circumstances, the employer's communication to its employees provided a "minimal level of notice" sufficient to apprise a reasonably prudent employee that continued employment would effect a waiver of his right to pursue such claims in a judicial forum.

Relying on *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,⁵ the court stated that this is an "objective standard" and that factors relevant to this standard, include, but are not limited to, the method of communication, the workplace context and the content of the communication.

The District Court in *Campbell* had sharply discounted General Dynamics' arguments for sufficient notice based in part upon its opinion that e-mail was an inappropriate medium for forming an arbitration agreement.

The First Circuit strongly disagreed, stating, "We do not share such skepticism: we easily can envision circumstances in which a straightforward e-mail, explicitly delineating an arbitration agreement, would be appropriate."

The circuit court further stated that the Electronic Signatures in Global and National Commerce Act,⁶ or E-Sign Act, prohibits judicial hostility to agreements confirmed by e-mail:

[The E-sign Act] likely precludes any flat rule that a contract to arbitrate is unenforceable under the ADA solely because its promulgator chose to use e-mail as the medium to effectuate the agreement. ...By its plain terms, the E-Sign Act prohibits any interpretation of the FAA's 'written provision' requirement that would preclude giving legal effect to an agreement

solely on the basis that it was in electronic form.

Having determined that the employer's use of e-mail was not per se determinative, the court then examined the context in which notice was given and its content.

Focusing first on context, the court noted that while e-mail was the preferred method of communicating within the company, that e-mail was not the way the company had historically handled personnel matters.

Typically, changes to policies effecting the employment relationship had involved conventional writings that required an employee's signature. Therefore, because e-mail was not the manner that the company had conveyed contractually binding terms and other matters effecting employee's legal rights in the past, it was not a method designed to highlight the importance of this particular notice.

In particular, the court noted that the company did not require a response acknowledging receipt and review of the e-mail and its hyperlinks. It opined that acts such as signing an acknowledgment or clicking a box are modern hallmarks associated with entering into a contract.

E-mail Notice Insufficient

Based upon these facts, the court concluded that the mere sending of an e-mail notice was insufficient to put a reasonable employee on notice of the imposition of a legally significant alteration to the terms and conditions of his employment.

The court concluded by examining the content of the e-mail and the two hyperlinks, and finding that they did not signal a key shift in the employer's policy sufficient to put a reasonable employee on notice that continued employment constituted a waiver of rights.

Specifically, the court focused first upon the broadcast message as an introduction to the policy change, and questioned whether it provided sufficient notice so that an employee could be held responsible for not making further inquiry, or at least opening the two hyperlinks.

The court observed that the broadcast message did not explicitly state that the policy contained an arbitration agreement that was meant to effect a waiver of an employee's right to access a judicial forum.

The court further noted that the language actually employed could reasonably be read as communicating the notion that arbitration was an option available to an employee, and that such an option had the company's blessing.

A Reasonable Employee

The broadcast message did not necessarily suggest, however, that arbitration was a mandatory remedy excluding the availability of a judicial forum. The result was that a reasonable employee could have read the announcement and concluded that the

policy presented an optional alternative to litigation rather than a replacement for it.

The court cautioned against a reading of its holding as expressing hostility to the use of e-mail as a medium for contract formation in the workplace. It noted that there were several simple steps the employer could have taken to insure the adequacy of the notice, and that the rejection of the notice in this case was a highly fact specific determination.

Campbell suggests that agreements established by e-mail cannot be automatically rejected by courts as too informal to bind employees.

Moreover, while New York views arbitration in at least as favorable a light as the First Circuit panel in *Campbell*, our courts still generally require evidence that agreements containing jury waivers were entered into knowingly and voluntarily.⁷

Therefore, while employers should not hesitate to use e-mail and other electronic mediums to communicate company policies, including mandatory arbitration policies, all such communications should contain the typical formalities associated with hard copy dissemination.

This would include:

(1) a clear and concise statement that continued employment constitutes a waiver of the right to a judicial forum to resolve employment related disputes;

(2) a clear and concise statement that the term "employment disputes" includes, but is not limited to, the waiver of statutory discrimination claims such as Title VII, the ADA, the New York Human Rights Law, and other similar statutory claims; and

(3) an acknowledgement that the policy has been read, reviewed and understood by the recipient. This acknowledgment should require an affirmative act by the recipient such as a return e-mail, or marking a box indicating acceptance. Records should be maintained, and follow ups made with respect to any employees that do not return the acknowledgement in a prompt manner.

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 1. 9 U.S.C. §§1-16.
 2. No. 04-1828 (First Circuit, May 23, 2005).
 3. See *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 321 F. Supp.2d 142, 149 (D. Mass 2004).
 4. 42 U.S.C. §12212.
 5. 170 F.3d 1 (1st Circuit 1999).
 6. 15 U.S.C. §7001(a).
 7. See *Fletcher v. Kidder, Peabody and Co.*, 81 N.Y.S.2d 623, 601 N.Y.S. 686 (1993) (New York law reflects the modern trend favoring arbitration of employment disputes); *Brown v. Cushman & Wakefield Inc.*, 235 F. Supp.2d 291 (S.D.N.Y. 2002) (jury waiver must be made knowingly and voluntarily).

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