

To require employee to arbitrate dispute, employer must prove agreement signed

By Dan Eaton

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A California employer that seeks to compel a former employee suing for wrongful termination to arbitrate the dispute rather than proceeding in court must prove the employee agreed to do so. If the employer will not concede he signed the agreement, the employer must prove he did.

A recent published California Court of Appeal ruling underscored unique challenges an employer faces when the agreement was signed electronically.

Background

Some California employers condition prospective or continued employment on an employee's agreement to submit employment-related disputes to private arbitration, usually before a retired judge. The streamlined arbitration process generally results in faster resolution of the dispute and relieves overburdened courts, even as both sides retain procedural and substantive rights available in court. Accordingly, federal and California law favor contractual arbitration of disputes, but only if the parties agreed to it.

Former employees and their attorneys generally prefer litigating in court. Besides attacking the procedural and substantive fairness of the employer's arbitration framework, the plaintiff may deny having agreed to arbitrate or may not recall having done so. Where the agreement had to be signed electronically, the employer faces a special challenge.

Facts

Marinidence, a Bay Area operator of a skilled nursing facility, confronted that challenge when former employee Maureen Bannister opposed the company's motion to compel her to arbitrate her wrongful termination lawsuit.

Marinidence onboarded Bannister and other employees in connection with the company's purchase of the facility. To access the onboarding portal, an employee had to enter their name and Social Security number, as well as a Marinidence Client ID and pin number which were the same for all employees. Employee Social Security numbers were available to Marinidence in their personnel files.

The company's human resources manager Barbara Matson declared under oath that she had sat next to Bannister as Bannister typed her onboarding information into the computer, though Matson did not say she witnessed Bannister click the "I agree" button to affix her electronic signature to the arbitration agreement.

By contrast, Bannister claimed she never touched the computer during the onboarding process. Bannister claimed that during what she called a rushed onboarding process, Matson asked Bannister some questions and Matson typed the information into the onboarding forms. Bannister further asserted that Matson herself clicked the "I agree" button to affix Bannister's electronic signature to the arbitration agreement without showing the agreement or other onboarding documents to Bannister.



The Law at Work column(San Diego Union-Tribune)

Ruling

The court of appeal upheld the trial judge's decision denying Marinidence's motion to compel Bannister to arbitrate her dispute. The court of appeal declined to second-guess the trial court's factual finding that Bannister's story was at least as credible as Matson's. That meant Marinidence failed to meet its burden of proving it was more likely than not that Bannister had electronically signed the arbitration agreement.

Under Civil Code section 1633.7, an electronic signature is legally as good as a handwritten one, so that wasn't the problem. The problem was that Marinidence failed to authenticate the signature, that is, to show the electronic signature was "the act of" Bannister.

Marinidence, said the appellate court, "did not establish that Bannister was assigned a unique, private user name and password such that she is the only person who could have accessed the onboarding portal and signed the agreement. . . ."

Takeaways

Taking three steps may enable an employer to establish later that an employee electronically signed an arbitration agreement: (1) require a unique login and password known only to the employee to affix the electronic signature; (2) develop mandatory procedures to sign the document; (3) establish security precautions for the process.

Though that is not the only way to prove the authenticity of an electronic signature, a different appellate panel concluded such evidence sufficed in a 2016 ruling. In that case, unlike this one, the employer telephoned the prospective employee to provide a user name and password to access the online portal. After logging in using that user name and password, the employee was required to change the password to one of his own choosing. Only after completing those steps could the employee ultimately proceed to affix his electronic signature to the company's arbitration agreement and other documents.

An employer proves an arbitration agreement was signed by hand in a different way. Under Evidence Code section 1417, where the employee will not acknowledge signing the agreement, the employer may prove the authenticity of the signature by providing the judge with another handwriting sample from the employee to which to compare it.

An employer should consider right when it asks an employee to sign an arbitration agreement, electronically or by hand, how it will later prove the signature is authentic to avoid the employee successfully resisting arbitration on this ground.

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