

ARBITRATION

Court outlines do's and don'ts for ensuring enforceable arbitration agreement

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All too often, employers bury form arbitration clauses in employee handbooks without much thought about whether the provisions will stand up to scrutiny if and when they need to enforce them. But the benefits of crafting and properly implementing a binding arbitration agreement are clear.

Arbitration offers employers what is often a more cost-effective, expedient way to resolve disputes by current or former employees. And significantly, California courts have upheld class action waivers included in arbitration agreements, providing a huge cost savings to employers.

As one recent court case illustrates, crafting and implementing an arbitration agreement that California courts will enforce is absolutely doable, but it requires careful thought and attention not only to what the arbitration agreement says but also to how it's presented to the employee. You may be surprised to learn that the way you present an arbitration agreement to an employee can be critical when a court evaluates whether the agreement is binding.

How-to guide on enforceable arbitration agreements

A former property manager, Madeline Serafin, filed claims in state court for harassment, defamation, and wrongful termination against Balco Properties, Ltd., a real estate investment and management company in the Bay Area. Shortly after she filed her lawsuit, Balco called the court's attention to the arbitration agreement she signed early on in her employment, and the court sent her case to arbitration.

Balco ultimately won at arbitration. Serafin appealed the arbitrator's decision, arguing she shouldn't be bound by the arbitration agreement. She claimed the agreement

wasn't binding both because of its contents and how it was presented to her.

The court rejected Serafin's arguments, and in doing so, it outlined several points that are very helpful to employers looking to make sure their arbitration agreements will be enforceable.

It's not just what you say; it's how you say it

The court determined that the arbitration agreement signed by Serafin was enforceable because unlike many arbitration agreements buried in an employee handbook, Balco's agreement was an easy-to-read, two-page stand-alone document. Unlike handbook arbitration

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clauses that often don't have a separate signature page beyond the standard informational handbook acknowledgment form, the Balco arbitration agreement clearly identified itself as a man-

datory, enforceable contract between the company and Serafin and made clear to her that by signing it, she was agreeing to arbitrate all employment-related claims.

A Balco HR representative presented the arbitration agreement to Serafin along with a number of new-hire documents during an orientation in the first few days of her employment. As the court noted with approval, the HR representative made every effort to call Serafin's attention to the arbitration agreement and invited her to ask any questions about it.

Like many arbitration agreements, Balco's agreement stated that all employment-related claims would be arbitrated under the rules of the American Arbitration Association (AAA). Serafin argued that the arbitration agreement wasn't binding because it referred to the AAA rules but didn't actually include a copy of them. The court rejected that argument.

The court ruled that it was enough that Balco's arbitration agreement made clear that Serafin could ask for a copy of the rules from HR or get them directly from the AAA. However, employers interested in heading off this line of argument are well-advised to provide a copy of the AAA rules along with any arbitration agreement they present to employees.

Serafin also argued that the arbitration agreement wasn't binding because Balco didn't sign it; only she did. The court rejected that argument as well, stating that the employer doesn't need to sign the agreement if it is clear that it is holding itself to the agreement's terms. Balco made clear it was holding itself to the agreement by authoring the agreement, presenting it on company

letterhead, and seeking to enforce it by bringing the case to an arbitrator.

Agreement may survive even if certain provisions are unenforceable

The court agreed with Serafin's argument that certain provisions regarding payment of attorneys' fees in Balco's arbitration agreement weren't allowed under California law. Specifically, the court agreed that the agreement improperly deprived Serafin of her right to obtain attorneys' fees if she were to prevail on her claims and improperly required losing employees to pay the company's attorneys' fees, even if they filed their claims in good faith—in violation of California's Fair Employment and Housing Act (FEHA).

Significantly, however, the court also found that the unlawful attorneys' fees provisions didn't doom the entire arbitration agreement. Balco's agreement had a valid severability clause that allowed the court to uphold the remainder of the agreement even if it refused to enforce the attorneys' fees provisions. At the end of the day, the company's arbitration victory remained intact. *Serafin v. Balco Properties Ltd., LLC* (California Court of Appeal, 1st Appellate District, 3/16/15).

Bottom line

This case offers several important pointers on how to draft a binding arbitration agreement and, just as important, how to properly present the agreement to employees:

- Don't bury your arbitration agreement in an employee handbook. An arbitration agreement should be a short stand-alone document written in precise, easy-to-read language that makes clear that employees are signing a contract, not just an acknowledgment that they have received the document.
- HR professionals should clearly identify and present arbitration agreements to employees and make sure they are available to answer any questions employees may have about the agreements.
- To avoid unnecessary disputes down the line, attach a copy of the relevant arbitration rules to the agreement itself. Alternatively, inform employees in writing and orally that HR will provide a copy of the arbitration rules upon request or that employees may obtain a copy of the rules online.
- Consult with your lawyer to make sure your arbitration agreement doesn't have any provisions that are contrary to California law. Also ensure that your agreement has a valid severability clause so that striking one provision doesn't doom the entire thing.

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