Labor Letter

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Two And A Half Lawsuits

Lessons Learned From The Charlie Sheen Litigation

By Tamara Devitt (Los Angeles)

The recent termination of Charlie Sheen from "Two and a Half Men," and the swirl of negative publicity around the incident, has shed light on the use of arbitration agreements. After he was fired, Sheen filed a $100 million lawsuit against Warner Bros. He wants the proceedings held in front of a jury rather than being privately adjudicated by an arbitrator as outlined in his Warner Bros. contract.

In And Out Of Court

Sheen's lawyers filed an emergency restraining order in March to avoid arbitration proceedings initiated by Warner Bros. The court denied Sheen's request. That's one lawsuit. The actor then filed another action to avoid arbitration which was first heard by the Los Angeles Superior Court on April 20, but the court ordered further briefing. That's two lawsuits. The dispute resolution company JAMS appointed an arbitrator in late March to adjudicate the dispute.

Following a lengthy briefing process, on June 15 the court ruled against Sheen. The court ordered that the dispute related to his employment agreement must proceed in arbitration as outlined in that agreement. The agreement spells out that any controversy or claim related to Sheen's employment agreement – including the issue of what matters should be arbitrated – were to be decided by the arbitrator. That's not a lawsuit at all, so we'll call that one the one-half.

The ruling in favor of Warner Bros. is significant for employers in at least two ways. First, it illustrates the significance of arbitration agreements in employment disputes. The actor and his attorneys would not be trying to avoid arbitration if they thought it was advantageous to their case. Second, this case reminds employers of how critical it is to prepare a well-written arbitration agreement.

Employees are increasingly litigious, so many employers favor arbitration for a variety of reasons. Unfortunately, crafting an enforceable arbitration agreement is a complex exercise. Requirements vary from state to state and it can be easy for employers to find themselves in a situation where an employee, looking to place a wrongful termination or unlawful harassment claim before a jury, challenges the previously-executed arbitration agreement. It is essential to regularly review the details of your arbitration agreement to ensure it's enforceable.

What The Courts Say

There has been significant activity recently in the courts in the area of arbitration in employment both at the federal and state level. The Federal Arbitration Act (FAA) provides that:

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

Courts broadly interpret the term "involving commerce," so that the FAA governs any arbitration agreement affecting commerce in any way. In addition, the FAA creates a presumption favoring arbitration and requires the enforcement of written arbitration agreements. And the U.S. Supreme Court has consistently made clear that the FAA mandates enforcement of arbitration agreements in employment cases. In one case, the high court reaffirmed the enforceability of arbitration agreements covering employment-related claims by stating: "[t]he Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law . . . ." The Court further emphasized that:"[w]e have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."

The Pushback

Despite court rulings, challenges to employment-related arbitration agreements, and specifically, whether state law should be preempted by the FAA, continue. One such issue – whether the FAA prohibits states from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures – was recently decided in favor of Arbitrability. This decision indicates that employers may want to consider including a class action waiver in their arbitration agreements. Implementing such a waiver may have important implications, so it's important that you consult with legal counsel before doing so.

Arbitration agreements are also subject to the same defenses available to the enforcement of any other contract. Common challenges to the enforceability of arbitration agreements include arguments that: 1) the agreement is a procedurally unconscionable contract of adhesion, because the employer has far superior bargaining power *vis a vis* the employee;

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2) the agreement is substantively unconscionable, because the agreement lacks mutuality, or binds only the employee and not the employer; 3) the employee failed to understand the agreement or there was no agreement because it was not conspicuous; or 4) employee's signature on the agreement was not voluntary, but obtained under fraud, coercion or duress. All these can be addressed in a carefully drafted agreement.

The Benefits v. The Downsides

The predictability of arbitration is one of the benefits for employers. Hearings and trial dates can be agreed upon quickly and discovery disputes and legal maneuvers are commonly streamlined because arbitrators often agree to hear issues without protracted briefing and on shorter timetables. An added benefit of arbitration is it's less expensive than litigating in court.

It's almost always a jury that is the fact finder in court, but a neutral arbitrator is charged with the task of deciding the facts in arbitration. Employment cases are highly unpredictable when they go to a jury. All jurors have biases and are more likely to be employees that have disagreed with their employers than employers who have had to manage problem employees. They are more likely to empathize with an employee-plaintiff than management-side witnesses. They are more likely to take a negative view of a "big corporation" private employer. Jurors are also more likely to forgive or minimize an ex-employee's misconduct because it may be similar to their own. Finally, because arbitration is private and not public, an adverse outcome is less likely to attract media attention.

Arbitration has its downsides. Generally there is no right to appeal an arbitration decision. So if the arbitration decision is adverse, the employer is stuck with it. In addition, some arbitrators may be less likely than a court to toss out a case based on a motion to dismiss or a motion for summary judgment. The arbitrator forfeits significant arbitration fees with an early disposition and that could have some bearing on this reluctance.

Further, in some states, the employer must pay the entire arbitration fees, which are not generally imposed by the courts. In these states, employees' lawyers may take advantage of the employer by involving the arbitrator in every pre-arbitration dispute no matter how small, which increases the company's cost. Finally, especially in cases with low settlement value, lawyers may use potential arbitrator fees as leverage to inflate the settlement value of their otherwise weak claims.

Best Practices For Implementing And *Enforcing* Arbitration Agreements

What are some best practices for avoiding the common pitfalls when drafting and implementing arbitration agreements? The following guidelines will help you avoid these common pitfalls:

1. **Don't Limit Remedies**

   Any provision limiting damages could be considered one-sided and gives an employee a chance to invalidate the agreement claiming it is "unconscionable." Make sure all remedies available in court are also available through arbitration.

2. **Don't Require Employees To Pay Costs Unique To Arbitration**

   Some states – like California, where Charlie Sheen's agreement was drafted – mandate that employers cannot require employees to bear any expense that they would not otherwise be required to bear had they elected to bring the action in court. As a result, for those states where the employer must bear the costs of arbitration, the agreement should not require the employee to pay for costs that are unique to arbitration, such as arbitration forum costs.

   Because arbitrators are private judges, they generally charge an hourly or daily fee in addition to administrative costs that are not levied if the matter is handled in court. These fees, unique to arbitration, must be paid by the employer in certain states. The rationale behind this rule is that requiring employees with less funds and less bargaining power to incur costs they would not otherwise have to incur to enforce their rights constitutes an unfair burden.

   Stated differently, requiring an employee to pay for arbitration is generally contrary to public policy, which disfavors creating barriers for employees to assert their rights. Be sure to work with legal counsel that specializes in your state's specific arbitration agreement guidelines.

3. **Make Sure The Arbitrator Is Neutral**

   Using only neutral arbitrators in contractual arbitration is essential. Whether an arbitrator is selected or appointed, maintaining impartiality during all stages of the arbitration is imperative to upholding the integrity and fairness of the process and helps ensure a valid and secure arbitration agreement.

4. **Require A Written Arbitration Award**

   The rules of the American Arbitration Association state that, for employment cases, there should be a written award unless the parties agree otherwise. A written award will show that the arbitrator's decision is well-reasoned and justified and will go a long way towards preventing an employee from invalidating the decision in the event of a post-award challenge.

5. **Provide For Adequate Discovery**

   The denial of adequate discovery may violate an employee's rights and may disadvantage an employer in preparing for arbitration. Both parties should be entitled to discovery, such as requests for necessary documents, land inspections and subpoenas. A lack of specific discovery procedures in an arbitration agreement may not necessarily be fatal but the agreement should contain specific provisions providing for adequate discovery and investigation, such as depositions.

6. **Know Which Items Cannot Be Arbitrated**

   Certain matters, such as workers' compensation and National Labor Relations Board disputes, cannot be compelled to arbitration by way of a pre-dispute employment arbitration agreement. Knowing what to exclude will make the agreement more enforceable.

7. **Make Sure The Agreement Is Clear, Conspicuous, And Unambiguous**

   Make sure the arbitration agreement is in a clearly labeled document separate from other pre-employment forms to defend against a possible challenge that the employee did not actually agree to arbitration because the executed agreement was in small print, or buried in an employee handbook. If the arbitration agreement is only included as part of an employee handbook, employment application or employment contract, it is even more critical that the agreement be conspicuous.

8. **Define the Scope of the Agreement Including Which Employer-Related Entities Will Be Bound by the Agreement**

   Arbitration agreements should specify that the agreement will apply to any and all employment-related disputes. This should effectively deter any challenge that the employment-related dispute at issue is outside the scope of the agreement.

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Not As Bad As We Feared

NLRB Issues Guidance On Social Media

By John McLachlan (San Francisco)

Earlier this year there was deep concern in the employer community because the National Labor Relations Board (NLRB) issued a complaint against an employer who disciplined an employee for highly derogatory comments she made about a supervisor on her Facebook page. Questions about whether an employer had *any* right to respond to such comments without violating the National Labor Relations Act (NLRA) were rampant.

But three recent memos from the NLRB's Office of General Counsel show that little has changed from the pre-Facebook analysis of the concept of "protected concerted activity."

First, Some Context

The NLRB analyses referred to are NLRB Advice Memos, which are prepared by the Office of the General Counsel (GC), a division within the NLRB, to respond to requests for advice from various NLRB Regions across the country about the proper response to some specific fact pattern under the Act. In answering these requests, the General Counsel considers the facts of the specific question posed and analyzes Board precedent relating to the situation.

The GC then reaches a conclusion whether the particular fact pattern violates the Act or not. If the fact pattern does not violate the Act, the Office of General Counsel indicates the unfair labor practice charge should be dismissed. If it finds a violation, it will direct the Region to issue a complaint if the matter is not settled in accordance with its analysis of the law.

All this analysis, and the conclusions, are incorporated into a document known as an Advice Memorandum. These Advice Memos are distributed for the information of all NLRB Regions so that they will all have the same guidance and can address similar questions in a coordinated and consistent manner throughout the United States. The Advice Memorandum does not have the same authoritative force as a published decision of the Board, but it does set out the agency's enforcement position on the questions covered and provides guidelines that will be followed by all Regions when faced with a similar situation.

All three Advice Memos were issued in July 2011, analyzing different scenarios in which employees had been disciplined for various postings on social media. In all three cases, the employers' discipline or termination decisions were found *not to violate* the NLRA.

JT's Porch Saloon & Eatery

The first Memo considered whether a restaurant employer in Illinois violated the Act by terminating a bartender for his Facebook complaints that he had not received a raise in five years and that he was required to do waitress work without tips. These comments were written in response to a stepsister's question about how his night went. Several days later, the employer, taking a cue from the fighting-fire-with-fire playbook, sent the discontented bartender a Facebook message telling him he was fired.

The Office of General Counsel concluded there was no violation of the Act because there was no evidence the bartender had engaged in "concerted" activity. The bartender did not discuss his posting with any other employees and no coworkers responded to his posting. There was no attempt to encourage group action on the tipping policy or wage increases. The bartender's complaint was purely individual; and, since it did not involve group action, his termination did not violate the Act.

Here is the General Counsel's summation of the reasoning used to analyze the terminated employee's posting. This identical analysis was relied on in two of the three Advice Memos referred to in this article and is obviously central to the process the NLRB uses to decide whether employee social media postings are protected or not:

> The Board's test for concerted activity is whether activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The question is a factual one and the Board will find concert "[w]hen the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise[.]" Thus individual activities that are the "logical outgrowth of concerns expressed by the employees collectively" are considered concerted. Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention.

Wal-Mart

The second Advice Memo involved an unhappy customer service employee of one of the retail giant's stores in Oklahoma. Most of this employee's rants against the employer generally and against an assistant manager specifically, unlike the bartender's, were directed to Facebook friends who were primarily coworkers. And several coworkers responded to his rants.

Management received a copy of the postings and disciplined the employee for "putting some real bad things on Facebook about Wal-Mart and [the assistant manager.]" The employee was told that he would be terminated if his behavior continued and was required to take a one day "decision day," which was paid but precluded eligibility for a promotion for 12 months.

The Office of General Counsel concluded that this charge should be dismissed because the customer service employee's complaints were primarily the product of his own individual grievance rather than a call to concerted action. "[C]omments made 'solely by and on behalf of the employee himself' are not concerted. Comments must look toward group action; 'mere griping' is not protected."

Martin House

The third fact pattern involved a non-profit residential facility for homeless individuals. The employee, a recovery specialist, put comments on her Facebook wall while she was working a night shift. These comments included negative references about the facility's clientele. Neither of the individuals she was communicating with that night were coworkers and she admitted that she was not Facebook friends with any of her coworkers. Unfortunately for the employee, she was Facebook friends with a former client of the facility who saw the comments on her Facebook page and complained to the employer about the specialist's negative observations.

The recovery specialist was terminated. In the termination notice the employer quoted her late-night comments about the employer's clients and went on to state, "[w]e are invested in protecting people we serve from stigma" and it was not "recovery oriented" to use the clients' illnesses for her personal amusement.

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Not As Bad As We Feared

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The General Counsel, after restating the paragraph quoted earlier on the test for concerted activity, concluded that there was no evidence of protected concerted activity. The employee did not discuss her Facebook posts with fellow employees and none of them responded to her posts. Nor was she attempting to induce or prepare for group action and her activity was not an outgrowth of group concerns. The employee was just communicating with her personal friends about what was happening on her shift. Her comments were not protected and hence her termination did not violate the Act.

What Can We Learn?

The lesson to be taken from these Advice Memos is that disciplining employees for comments they make in social media is neither prohibited, nor is it without risk. Any decision to discipline or terminate employees for social media postings should be carefully weighed and reviewed with your labor counsel before implementation. It should be some comfort to know that, based on a careful reading of the most recent Advice Memos, the rules for determining when activity is protected have not changed. Purely individual gripes aired through social media are no more protected now than they were before Facebook became the rage.

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But an issue commonly overlooked is which employer-related entities or employees are covered by the agreement. In employment disputes, particularly harassment claims, employees will often allege claims against supervisors or co-workers, as well as parent and affiliated companies. Since you will want to avoid litigating in multiple venues, make sure that the agreement specifies that it applies to all related entities.

9. Cover Current Employees

Even if you have not implemented arbitration before, you may require that current employees agree to arbitration. Continuation of employment is generally considered adequate consideration for an agreement to arbitrate, although there might be some variances by state. Should a current employee refuse to sign an arbitration agreement, consult with legal counsel before taking any adverse action.

10. Require Employees To Sign The Agreement

Courts have rendered different opinions as to whether and in what medium an arbitration agreement must be signed. Some courts have found proof of email distribution of the employer's arbitration policy to be sufficient to show that an employee agreed to be bound by the arbitration agreement. Other courts have found an arbitration agreement not to exist where the employee did not sign it. It is a good idea to err on the side of caution and make sure employees actually sign their names to the arbitration agreement.

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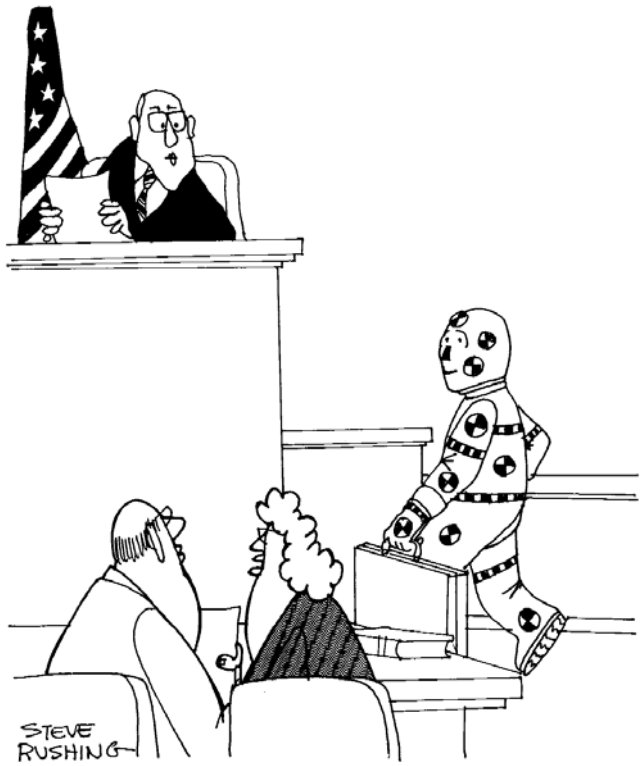

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