Federal Court Offers Guidance re Arbitration of Employment Claims

April 23, 2013

Employers should think twice before relying on the arbitration provision contained in an Employee Handbook because for the second time in as many years, a Massachusetts federal court has refused to enforce such a provision. In July 2012, the First Circuit rejected an employer's bid to compel arbitration after an applicant for employment sued for discrimination. In that case, the court ruled that the arbitration requirement referenced in an employment application was ambiguous because the actual policy referred to "employees" rather than "applicants."

In a case decided last week, the federal trial court in Boston ruled that an arbitration policy contained in an Employee Handbook was unenforceable because the Handbook did not create a binding contract between employer and employee.

The Readers' Digest takeaway: remove your company's arbitration provision from the Handbook and make it a stand-alone document.

Background

Victoria Domenichetti worked at the Salter School, a two year for-profit institution, as an externship coordinator. By all accounts, her performance exceeded expectations. On May 1, 2012, Domenichetti informed Human Resources that she was pregnant and requested information about the school's maternity leave. Six weeks later, Domenichetti formally requested Family and Medical Leave (FMLA) leave to care for her newborn. The same day Domenichetti requested maternity leave, Salter promoted Domenichetti's peer, Erin Groves, to Director of Career Services. Domenichetti expected the promotion over Groves since she had trained Groves and had more experience than Groves in career services. To add insult to injury, a few days after Salter passed Domenichetti over for the promotion, Salter's president informed Domenichetti that he was transferring her to a 20 hour per week part-time position. Domenichetti's part-time status resulted in reduced benefits.

The Employee Handbook

Salter's Employee Handbook contained a mandatory arbitration provision, stylized as a "Dispute Resolution Policy." This policy required Salter employees to submit any employment related claim to arbitration, thereby forgoing the right to file such a suit in court. Domenichetti signed the Employee Handbook Acknowledgement, which stated, amongst other things, that she agreed to be bound by the school's policies, including its Dispute Resolution Policy. The Handbook emphasized that its policies did not form a contract, and that Sawyer reserved the right to unilaterally change its policies.

Following the Employee Handbook Acknowledgement page, Sawyer included two additional employment policies, one covering the school's Drug and Alcohol Abuse

policy and a second concerning "Conflicts of Interest." Salter's employees were required to separately sign and agree to these "stand-alone" policies.

The Lawsuit

Last summer, Domenichetti filed a lawsuit contending that Sawyer interfered with her right to take FMLA leave, and that it retaliated against her for exercising her right to such leave by failing to promote her and by subsequently demoting her. Sawyer asked the court to dismiss Domenichetti's lawsuit on the basis that she had agreed to arbitrate all employment related claims.

The Legal Issue

Whether Sawyer could compel Domenichetti to pursue her employment-related claims through arbitration?

Legal Analysis

The court refused to compel arbitration, reasoning that Dispute Resolution Policy was contained in the Employee Handbook, and that the Handbook was not a binding agreement between Sawyer and Domenichetti.

This case highlights the tightrope that employers walk when they try to have a Handbook do too many things. On the one hand, employers do not want an Employee Handbook to provide employees with any contractual rights. On the other, employers try to rely upon the policies contained in a Handbook to require employees to do certain things, or, as is the case here, give up certain rights. The *Domenichetti* ruling teaches that employers can't have it both ways.

In refusing to compel arbitration, the court relied on the following:

- **The Employee Handbook was not a contract.** The court ruled that the Handbook was not a contract because (i) it said it wasn't a contract; (ii) Salter had a unilateral right to change the terms of the Handbook, and; (iii) employees were not allowed to negotiate any terms of the Handbook.

- **The Dispute Resolution Policy could not be read as a policy separate from the Handbook.** Why?
    - The policy had headings similar to all other sections of the Handbook and Sawyer did not place any particular emphasis on the dispute resolution policy.
    - Unlike the Alcohol & Drug and the Conflict of Interest policies, the Dispute Resolution Policy did not require an additional employee signature.
    - The Dispute Resolution Policy appeared *before* the Receipt & Acknowledgment page, within the body of the Handbook itself. It did not

appear in an additional format or on an additional page, unlike the Alcohol & Drug and Conflict of Interest policies.

- **The Dispute Resolution Policy Was Ambiguous.** The court found that whether Sawyer retained the right to change any policy, or any policy other than the Dispute Resolution Policy, was ambiguous at best. Courts interpret any ambiguity against the drafter.

Takeaways

- Determine whether you want to compel arbitration of employment disputes. This decision should not be made without due consideration. Weigh the benefits (confidentiality, perhaps less expense and quicker resolution) with the drawbacks (no right of appeal, less predictability).
- Do not lump all employment policies in the Employee Handbook. Policies that the employer seeks to be contractual in nature should stand-alone and be subject to separate employee review, acknowledgment and agreement. Examples of such polices are those governing arbitration, confidentiality, competition, solicitation, and the like.
- If you decide to require employees to arbitrate employment disputes, ensure that your policy complies with recent legal developments. In 2009, the Supreme Judicial Court upheld an employer's right to compel the arbitration of statutory discrimination claims, but only when the agreement specifically refers to the statutory claims that the employee agrees to arbitrate. *Warfield v. Beth Israel Deaconess Medical Center*, 454 Mass. 390 (2009). Therefore, arbitration policies must advise the employee that she is giving up the right to pursue a discrimination claim in court, describe the law at issue (i.e., M.G.L. c. 151B, Title VII of the Civil Rights Act of 1964, the Massachusetts Equal Rights Act) and acknowledge hat the employee agrees to relinquish the right to bring the case to a jury of her peers.