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COURT OF APPEAL PROVIDES GUIDANCE TO EMPLOYERS ON PREPARING ENFORCEABLE EMPLOYEE ARBITRATION AGREEMENTS

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The 1st District Court of Appeal shot down an employee arbitration agreement that was egregiously one-sided toward the employer and was forced upon the employee with no time to review it. In finding the agreement unconscionable and unenforceable, the Court set forth a number of guidelines that should help employers create employee arbitration agreements, or modify existing agreements, that stand up to judicial scrutiny and will be held enforceable.

In *Carlson v. Home Team Pest Defense Inc.*, 2015 DJDAR 9447 (Aug. 17, 2015), the Court of Appeal upheld the trial court's denial of the defendant's motion to compel arbitration. The plaintiff, Julia Carlson, accepted an offer of employment from defendant Home Team Pest Defense. On her first day, Carlson was given access to the company's electronic system that contained the company policies, including the agreement to arbitrate. However, Carlson was not given access to the dispute resolution policy, which set forth the arbitration terms. When Carlson complained that she did not have access to the policy, and that she did not feel comfortable signing the agreement without seeing the policy and negotiating the terms, she was told that she could call a telephone number "in a couple of weeks" to see if someone had a copy of the policy. She was advised, however, that she could not wait to review the policy before signing the agreement to arbitrate, and that refusal to sign would be considered a refusal to accept the job offer. Fearful of losing the potential job, as well as her unemployment benefits, Carlson agreed to sign the agreement.

In affirming the trial court's denial of Home Team Pest Defense's motion to compel arbitration, the Court of Appeal found first that the agreement to arbitrate was procedurally unconscionable. The court focused on the fact that the agreement was a contract of adhesion, offered to Carlson on a take it or leave it basis, and on the fact that she was not even provided with the actual dispute resolution policy before being required to sign the agreement, despite her objection to not being able to review the policy in advance.

The Court of Appeal also found the agreement to arbitrate to be substantively unconscionable. Among the unconscionable elements identified by the court were:

- Home Team Pest Defense was permitted to seek judicial intervention for most of the claims that it would potentially pursue against Carlson, while Carlson was required to arbitrate nearly all claims that she might ever have against the company;
- Home Team Pest Defense was permitted to seek recovery of its attorney fees for any judicial action, while Carlson did not have that opportunity;
- Carlson was required to make a request for dispute resolution before demanding arbitration, and any claims not raised in that request would be waived and barred from any future arbitration, while the company was not subject to that limitation;

- Carlson was required to submit to an unspecified form of alternative dispute resolution before demanding arbitration and could not retain counsel for that proceeding, while the company was not subject to that limitation; and
- Carlson was required to pay a $120 filing fee within 90 days after making an initial request for dispute resolution, after which all fees and expenses incurred in the arbitration would be split between the parties.

The court said these terms together made the agreement to arbitrate one-sided, objectively unreasonable, and lacking in mutuality. The court further held that this substantive unconscionability analysis was not preempted by the Federal Arbitration Act, finding that the unconscionability of the agreement to arbitrate did not mandate any procedural rules that were inconsistent with the fundamental attributes of arbitration.

Finally the court held that the trial court did not abuse its discretion when it refused to sever the unconscionable portions of the agreement to arbitrate. The court agreed with the trial court that to sever all of the unconscionable portions of the agreement would have essentially required the trial court to entirely rewrite the agreement, which a trial court is not permitted to do.

In light of this ruling, employers would be well-advised to take at least the following steps to ensure the enforceability of employee arbitration agreements:

- Provide the employee with some period of time to review the arbitration agreement before entering into it. Even if the agreement is non-negotiable, allowing the employee time to consider it is a factor the courts will consider in making an ultimate decision on unconscionability.
- Make sure to include the actual terms of the arbitration agreement when requesting that an employee enter into such an agreement. Do not simply offer to make the agreement available for review at another time or location or refer the employee to a third party for access to the agreement.
- Make the agreement as close to "fair and equal" as possible. If the agreement restricts the employees' access to the courts, the company should likewise be willing to limit its own access to the courts for resolving disputes. Likewise if the employee is required to take certain steps before initiating arbitration, the company should abide by those same steps.
- Do not require the employee to pay fees in connection with the arbitration. This is a factor that weighs heavily against the employer — considering the financial inequity between the employees and the employer, it will appear unreasonable to require the employee to foot the bill for pre-arbitration or arbitration proceedings.

It is clear that while the courts in recent years have provided employers with substantial tools for limiting their liability in labor and employment matters, this case and others like it reflect the fact that the courts will still find ways to level the playing field if it appears that the employer is attempting to take undue advantage of its employees. The more reasonable the employer appears in its arbitration demands, the less likely the court is to step in on behalf of the employees.

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