One Epic Year Later: Have You Implemented A Mandatory Arbitration Agreement Yet?

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A year ago, the United States Supreme Court issued its seminal decision in *Epic Systems v. Lewis*, which confirmed that employers may use mandatory individual arbitration agreements without fear of the National Labor Relations Act (see our prior client alert for more details).

In *Epic*'s wake, some employers, interested in eliminating or reducing the risk of class action lawsuits and the legal fees associated with them, drafted and implemented mandatory individual arbitration agreements across their workforce. But other employers took a wait-and-see approach, delaying action until they had more evidence that courts in a post-*Epic* world would sustain arbitration agreements over state law challenges to their conscionability. In doing so, employers not only deferred the administrative burden of rolling out new agreements, but also the potential threat to employee morale posed by implementing an agreement with questionable enforceability.

New England employers in this latter category should take note of *Bekele v. Lyft, Inc.*, a recent decision from the U.S. Court of Appeals for the First Circuit, which upheld a mandatory individual employer/employee arbitration agreement (read the decision here).

The Facts of *Bekele*

In *Bekele*, the plaintiff Yilkal Bekele was a putative class representative and driver for Defendant Lyft, Inc., who claimed that Lyft had misclassified him as an independent contractor, rather than an employee. Before the plaintiff started working for Lyft in 2014, and at several points thereafter, he tapped "I accept" on his iPhone 4 when presented with Lyft's "Terms of Service Agreement," regarding a variety of issues applicable to Lyft drivers and passengers. Each version of the terms of service that the plaintiff accepted included a mandatory arbitration agreement. The final iteration of the terms of service was an 18 page document (an estimated 54 pages on an iPhone 4) and contained the arbitration provision linked here. The agreement also purported to be governed by California law. An individual could not be a driver for Lyft (or even a passenger) without accepting Lyft's terms.

Lyft moved to dismiss the plaintiff's class action in favor of arbitration in his individual capacity, invoking the clause in its terms of service that required arbitration and precluded class proceedings. At the federal district court level, the plaintiff challenged the clause's applicability and enforceability, arguing (among other things) that the clause did not reach his Massachusetts Wage Act claims and was unconscionable. Despite the California choice-of-law provision, the district court interpreted the terms of service under Massachusetts law, reasoning that Massachusetts had the most significant relationship to the parties.

In Massachusetts, a contract is unenforceable when it is both procedurally unconscionable (meaning that the employee has no reasonable choice and the terms amount to an unfair surprise) *and* substantively unconscionable (meaning that the terms were oppressive to one party). The same is true in Rhode Island (as demonstrated by a November 2018 First Circuit decision).

The *Bekele* district court rejected the plaintiff's procedural unconscionability argument, pointing out that the arbitration provision used capital letters in relevant places and the agreement's font size could be enlarged through normal text expansion on the phone. Additionally, the court observed that Lyft imposed no deadline on a prospective driver to accept its terms. True, drivers could not drive for Lyft until they accepted the terms, but they were not under any Lyft-imposed time pressure. The district court also concluded that special language was not required to bring the plaintiff's Wage Act claims within the scope of the arbitration clause.

The plaintiff appealed to the First Circuit, which affirmed, focusing on the issue of substantive unconscionability.

First, the appeals court rejected the plaintiff's contentions that the agreement was unconscionable because it contained an arbitration fee-splitting provision that required the plaintiff and Lyft to split equally the arbitration's costs, a financial burden that he contended Lyft drivers could not afford. The court held the agreement could survive because Lyft offered to pay the arbitration fees after suit was filed.

Second, the court rejected the plaintiff's argument that a provision of Lyft's terms of service permitting Lyft to modify the terms of the agreement upon notice and acceptance of the new terms by a driver rendered the agreement unconscionable. The court explained that this term did not permit unilateral modification, which would have been problematic. Rather, "provisions like Lyft's – that require notice to users and acceptance by users" prior to any modifications becoming effective are not unconscionable. Accordingly, the arbitration agreement was enforceable.

What Employers should Take Away from *Bekele*

Bekele **is helpful for employers in that it shows that the bar for an enforceable arbitration provision is low, and a viable option even for employers who are reluctant to use them (or draw attention to their use of them) out of fear that doing so could hurt morale or spawn efforts to organize a union. The** *Bekele* **clause was far from perfect; it had several significant flaws, and it was buried in a lengthy "Terms of Service Agreement." Yet it was still enforced.**

But, while *Bekele* **should provide a boost of confidence to employers considering using arbitration agreements, the arbitration agreement in that case was far from a model contract. Employers looking to maximize enforceability should consider:**

- **Choice of law. Always choose a governing state law that is helpful for your company and to the extent possible, relevant to the employment. Be aware, however, that courts will sometimes brush choice of law provisions aside (as the district court did to the California choice-of-law provision in** *Bekele***).**
- **Form. A standalone agreement to arbitrate, containing nothing else, is more likely to be upheld. However, for business reasons (e.g., to assist in a smoother roll-out), including the arbitration clause in another agreement signed by the employee (for example, a confidentiality agreement) might be more practicable. That said, DO NOT make the arbitration agreement part of your employee handbook or manual.**
- **Style. Use large font, with bold, all capital disclaimers, alerting the employee that he or she is waiving their right to a jury trial and to proceed as part of a class or collective action. Consider including language acknowledging that the agreement was knowingly and voluntarily executed (making it harder for the employee to later claim otherwise).**
- **Timing. Arbitration agreements provided at the beginning of employment, in connection with a promotion or payment, and/or with sufficient time for the employee to think about whether to execute the agreement are more likely to be enforced in certain jurisdictions. However, even without additional consideration, many courts will still enforce the provision and hold that continued employment (even at-will employment) is adequate consideration for the agreement.**
- **Breadth and Specificity. Include language specifying broad classes of claims that the arbitration agreement covers – as well as the specific employment laws it covers.**
- **Fee-Splitting. Choose a fair fee-splitting arrangement and consider offering to pay for the arbitration if an employee files a court action.**
- **Arbitration Forum and Rules. Specify a neutral arbitration forum and procedure. Specifying arbitration through the American Arbitration Association using the employment or commercial rules is common.**
- **Unilateral Modification. Avoid pairing arbitration clauses with provisions allowing unilateral modification of the agreement by the employer (the latter of which are common in employee handbooks).**
- **The States Involved. Be aware of discrepancies between different states' laws for the requirements of arbitration clauses (not just the law of the state chosen by the arbitration agreement, but those of states where an action would likely be filed – e.g., where the work is performed).**

As *Bekele* **demonstrates, employers who are hesitant to use a long, standalone arbitration agreement out of fear of the effect doing so may have on the workplace or union formation may still benefit from placing a short mandatory arbitration provision in their confidentiality agreements or other employee contracts. The existence of the agreement alone may cause employees to believe arbitration applies and lead to easier settlement of disputes. Moreover, given the** *Bekele* **Court's leniency as to the form and substance of the provisions, a less than perfect**

clause may be enforceable. But that does not mean employers should try to draft one without assistance. Employers are strongly advised to consult with an employment attorney as to whether mandatory individual arbitration is right for them and their workforce and, if so, the precise language to include in their arbitration agreements and how to best roll out the agreements to employees.

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