PLUNKETT COONEY

Are Your Employees 'Knowingly and Intelligently' Waiving Their Rights?

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According to a recent case before the U.S. Court of Appeals for the Sixth Circuit, employers, who require employees to sign employment applications or other agreements that waive one or more of their statutory rights, may not have enforceable agreements.

Such waivers may shorten the statute of limitations for bringing claims or waive the right to pursue a claim in court and require arbitration. One employer recently found its statute of limitations / arbitration agreement unenforceable because it could not establish a knowing and intelligent waiver of rights.

In *Alonso v Huron Valley Ambulance Inc*., the Sixth Circuit struck the agreement allowing the plaintiffs, who were former employees, to pursue their claims in federal court even though some claims were time barred under the agreement and the plaintiffs had failed to exhaust their administrative remedies required under the agreement.

Husband and wife Kimberly and Alan Alonso were hired by Huron Valley Ambulance (HVA) in 2005. As part of the interview process, they were required to sign an employment application agreeing to submit, as their exclusive remedy to employment claims, all disputes to the company's internal Grievance Review Board. The employment application stated:

Any dispute arising out of or in connection with any aspect of my employment by the Company, or termination thereof, including by way of example but not limitation, disputes concerning alleged civil rights violations, breach of contract or tort, shall be exclusively subject to review by the Grievance Review Board. Any decision of the Review Board shall be binding to both parties, and enforceable in circuit court.

There was also a six months statute of limitations imposed. Each plaintiff signed the application. Only after they were hired did HVA provide them with the operations policies and procedures manual which described the four-step process. Both plaintiffs signed for the manual and agreed to adhere to its terms.

While the district court had dismissed their claims, finding a knowing and intelligent waiver, the Sixth Circuit disagreed and reinstated their claims.

For the waiver to be knowingly and intelligently given, a court will consider: (1) the individual's experience, background and education; (2) the amount of time the individual had to consider the waiver and whether there was an opportunity to consult with legal counsel; (3) whether the waiver was clear; (4) whether the waiver was supported by consideration; and (5) "the totality of the circumstances."

The Sixth Circuit reviewed prior cases and noted that a waiver was found not to be knowingly and voluntarily given when employees "'were hired on the spot after a brief interview, during which the hiring manager hurriedly presented them with various documents that they were instructed to sign in order to be considered for the job; where 'managers would place an 'x' in every spot an applicant [was] required to sign, and applicants would be told to sign every 'x' without any explanation;' and where they were not given an opportunity to revoke their waiver."

"By comparison, a knowing and intelligent waiver has been found where the person executing it was a managerial employee capable of understanding the waiver and had two months to consider it, and where the waiver clearly indicated that she was waiving her right to sue in federal court. … [and, in another case] where the person executing it did not request extra time to consider it or contact a lawyer and did not indicate that he did not understand the waiver." The court found it significant that in each case where the waiver was enforced, the employee was given some documentation about the process that would replace judicial proceedings.

In this case, while the plaintiffs were educated and gave no indication that they did not understand they were waiving rights and, in fact, had used the grievance procedure several times without objection, the waiver "did not include any information regarding the Grievance Review Board or the procedures that would be used in place of a judicial proceeding." The initial waiver was signed as part of the four-page employment application, and the plaintiffs were not provided with any further information until they received the employee handbook nearly a month after they began work. Further, the plaintiffs were not told "of their right to revoke" their waiver. Therefore, the waiver was not knowingly and intelligently given and, as a result, the court struck the waiver of judicial forum and statutory limitations.

The lesson to be learned is straightforward. Make sure that you provide sufficient information concerning the rights being waived and the process or limitations period that will be substituted. Further, you must provide the individual with sufficient time to contemplate the agreement, and an opportunity to ask questions and seek legal advice.

Less clear from the court's opinion is how much opportunity must be provided to revoke the waiver. Although the court did not elaborate, it may suffice for employers to provide a specific time frame (i.e., three days) and simply wait to extend job offers until after the revocation period has passed.