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Arbitration Agreement Valid Despite Employee Claim That He Never Received E-mail About It

By Chris McFadden

It is a situation familiar to anyone who regularly sends out emails containing deadlines: eventually there will be a recipient who, long after the deadline has passed and the consequences for failing to respond come to fruition, will claim he or she simply never received the email in the first place. In many circumstances, regardless of the veracity of the recipient's claim, the problem can be resolved with minimal, if any, consequences to either party. But what happens when the email is from an employer to its employees, and the employee claims to have not received the email in an attempt to escape an otherwise valid arbitration policy?

A recent federal case out of New York, *Couch v. AT&T Services, Inc.* (decided December 31, 2014), looked at this very issue. The 62-year-old plaintiff had worked for AT&T from 2008 until 2012, when his employment was terminated. In December 2011, AT&T sent an email to its employees, including the plaintiff, informing them that all disputes from that point forward between the company and its employees would be resolved by binding arbitration. The email contained the subject heading "Action Required: Arbitration Agreement" and explained the arbitration process as a more informal, possibly speedier alternative to lawsuits. The email also stressed that employees were free to reject the arbitration agreement and could opt out of giving up their right to a court or jury trial by following a link in the email and registering their decision

to opt out. The email also included a link to the arbitration agreement for employees to review and explained that all claims related to the employment relationship would be covered. Employees had an opportunity to press a button indicating that they acknowledged having seen the agreement. The email closed by stating that the deadline to opt out was February 6, 2012.

Prior to the opt-out deadline, AT&T sent the email two additional times to its employees. The plaintiff never acknowledged or opted out of the arbitration agreement. After his employment was terminated, he filed a lawsuit against AT&T. AT&T moved to compel arbitration based on the plaintiff's failure to opt out as instructed. In response, the plaintiff claimed he never received the emails and therefore should not be bound by the arbitration agreement.

The Federal Arbitration Act provides that written provisions to arbitrate are enforceable just like any other contract. Once a court determines that a valid agreement to arbitrate exists, it must compel arbitration.

Thus, the only issue the court considered was whether, under these facts, the parties had actually reached an agreement to arbitrate under New York law. AT&T provided evidence that it had sent three emails to the plaintiff giving him an opportunity to review the policy and opt out if he so chose. The plaintiff claimed he never received any of the three emails. He argued that because he was unaware of the existence of such agreement and that his failure to opt out would cause him to be bound to arbitrate, there was no enforceable agreement in place.

He further argued that AT&T had to prove that he actually received those emails to show that there was a valid agreement in place. In support of his position that he had not received the emails, he presented evidence that 20 percent of employees who received the arbitration emails did not respond to them. This, he argued, suggested that the email system in place was not infallible and some of those employees may not have received the communications. Further, he showed that he himself had never clicked on the link to view and acknowledge having seen the agreement. Because his job required him to appropriately respond to work emails, especially those marked "very important," as the three emails had been designated, he argued this fact to be further evidence that he never received the emails in question.

The court reviewed New York contract law, which provides that there is "a presumption that a party has received documents when [the documents are] mailed to the party's address in accordance with regular office procedures." The court noted that this presumption also extended to emails, and AT&T had produced

evidence that it repeatedly emailed the plaintiff the notice regarding the agreement and need to opt out. The plaintiff's mere denial of receipt was insufficient to rebut the presumption that he had received those emails. Further, the plaintiff continued to work after presumably receiving the notice, thereby indicating a manifest assent to the agreement to arbitrate. Thus, the court concluded, the arbitration agreement should be enforced. The plaintiff's case was dismissed.

Employers often deal with employees who claim not to have received notice about certain provisions or terms of their employment, such as the agreement to arbitrate in this case. Because of variations in state contract and employment law, courts have come out on different sides of the issue as to what constitutes sufficient notice or an offer that can create a binding agreement. This case is a positive development for New York employers in that it presumes notice has been provided when the employer follows its regular procedures for communicating by mail or email with its employees. As a result, an employee's unresponsiveness alone cannot defeat that presumption.

In the interest of caution, however, and because there is some variation among contract and employment law in different jurisdictions, employers generally still should strive to obtain an affirmative acceptance of important changes to employment conditions whenever possible. Achieving universal acknowledgment may be a daunting task, especially for larger employers (the AT&T emails in this case went out to about 100,000 employees, for instance), but persistence and stressing the importance of response to employees may help achieve that goal. Consider providing varied forms of notice as well to help ensure all of your employees actually receive the communication. For instance, in addition to electronic means, you can reach your employees though physical postings in a conspicuous location at the workplace, internal employee websites, and regular mail.

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