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Ninth Circuit Upholds Changes to Employer's Arbitration Policy

By Jamie L. Lopez

A recent Ninth Circuit case, *Davis v. Nordstrom, Inc.*, 755 F. 3d 1089, not only approved an employer's revised arbitration policy in light of a recent U.S. Supreme Court decision, but it provides insightful guidance, especially for California employers, as to how to go about making unilateral changes to employee handbooks and other important internal policies. In the 2011 case *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the U.S. Supreme Court found that the Federal Arbitration Act preempted a California state rule banning class action waivers in arbitration agreements. In response to the ruling, Nordstrom, Inc. revised its employee arbitration policy, which was contained in its employee handbook, to require that employees arbitrate most employment disputes on an individual basis, thereby precluding employees from bringing class actions in most cases.

Nordstrom's internal human resources policies stated that employees would be provided with 30-days written notice of any substantive changes to its handbook so that the employees were allowed time to consider the changes and decide whether or not to continue their employment with Nordstrom. In light of this policy, after Nordstrom changed its arbitration provision, it sent a copy of the new arbitration policy to all employees along with a cover letter stating that the "current version" of the arbitration provision was attached.

Weeks after the policy change was implemented, and in spite of

the change, Nordstrom employee Faine Davis filed a class action on behalf of herself and other similar employees alleging Nordstrom had violated various state and federal employment laws. Nordstrom, citing the revised policy, moved to compel Davis to individual arbitration of her claims. The federal district court denied the motion because it held that the cover letter, by referring to the revised policy as the "current version," implied that the provision was already effective, and thus obviated the 30-day notice provision. The district court also interpreted California law, which states that an employer may terminate or modify a contract after a reasonable time period if it provides employees with reasonable notice and the modification does not interfere with vested employee benefits, as requiring that employees specifically be told that continued employment past the notice period constituted acceptance of the new terms of employment.

On appeal, Nordstrom argued that the notice provision satisfied California law and further argued that the company did not attempt to enforce the revised policy within 30 days of any employee's receipt of the new policy.

The Ninth Circuit reversed the lower court's judgment. The court found that the notice to employees, while not a "model of clarity," nevertheless "satisfied the minimal requirements under California law for providing employees with reasonable notice of a change to its employee handbook." The Ninth Circuit further held that Nordstrom did, in fact, abide by its own methods of policy modification and employee notice. Thus, the new provision was enforceable.

The *Davis* case sets forth a couple of lessons for California employers. First, it makes clear that California employers may change arbitration provisions to include class action waivers and require employees to arbitrate their individual claims. Second, *Davis* serves as a reminder that employers can unilaterally change their policies so long as they provide adequate notice and abide by any self-imposed requirements.

Once an employer has determined the appropriate procedure for implementing a policy change, careful consideration should also be given as to the communication of the change. Ensure that the policy change is effectively communicated to those employees who are affected. Management and supervisory employees should be properly trained and prepared to communicate the information in a consistent and clear manner and be prepared to answer questions. *Davis* serves a cautionary tale that demonstrates the need for careful attention to the wording of even the simplest of documents, such as a cover letter, for precise wording can not only provide clarity, but it can also help head off possible litigation.

Employers should also consider the need for documentation showing the acceptance or refusal of the policy. In some cases, minor policy changes may not call for a signed acceptance. However, it may be helpful to retain evidence of acceptance or receipt of other policies. For example, retaining evidence of receipt of notice of a major change to an employer's arbitration clause can be vital, should litigation arise as it did in the *Davis* case. Occasionally, there will be employees who refuse to sign an acknowledgement form, for various reasons. Many times, these employees may assume that their refusal to sign the acknowledgment means they will not be bound by the new policy. However, the acknowledgement form only demonstrates receipt of the policy, and employers should make clear that all employees are still bound by their policies regardless of whether an employee provides an acknowledgement. And while an employer cannot force an employee to sign an acknowledgment, they do have a few options. The employer can ask the employee to write "I refuse to sign the acknowledgement" in their own writing, or an employer representative can note the employee's refusal to sign. In some cases, simply noting that the employee refused to sign the acknowledgement is enough evidence to show that the employee had been presented with the policy.

Davis did not completely resolve all matters to do with class action waivers in arbitration agreements. The Ninth Circuit remanded the case for further proceedings on Davis' argument that the new arbitration agreement was unconscionable under the California Supreme Court case of *Gentry v. Superior Court*, 42 Cal. 4th 443 (Cal. 2007). Therefore, employers considering modifications to their arbitration policies should consider consulting with legal counsel to ensure they are fully aware of any legal implications of their proposed policy changes.


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