Sills Cummis & Gross P.C.

Client Alert Employment & Labor

Employers Beware of Relying on Handbooks to Create Enforceable Arbitration or Other Agreements with Employees

Employers frequently distribute employee handbooks containing general policies and procedures to new employees. It is not uncommon for employee handbooks to include mandatory arbitration clauses, requiring employees to arbitrate employment-related disputes, rather than litigate them in court. Often arbitration clauses are attractive to employers because they can help them avoid the costly, time-consuming process of litigation in court. Although courts have enforced contractual agreements to arbitrate employment disputes, employers should be wary of relying upon mandatory arbitration clauses in a handbook as creating binding obligations. This caution can be extended to other types of agreements such as confidentiality agreements as well. Employers should not believe that they can make some sections of the employee handbook binding, while disavowing the contractual nature of the handbook generally, as discussed in the recent New Jersey Appellate Division decision in C.M. v. Maiden Re Insurance Services, et al.

In C.M. v. Maiden, Plaintiff sued her employer, alleging disability discrimination in violation of the New Jersey Law Against Discrimination. Plaintiff's employer moved to remand the matter for arbitration, arguing that by electronically acknowledging receipt of the handbook containing the mandatory arbitration clause, Plaintiff waived her right to have her claims decided by a jury. Although the trial court granted the employer's motion to remand the matter to arbitration, the Appellate Division reversed on appeal, finding that the trial court erred in remanding the matter to binding arbitration. The

O c t
2015

Appellate Division found that Plaintiff's electronic response acknowledging receipt of the handbook was legally insufficient to constitute a knowing waiver of her constitutional rights to have her claims decided by a jury. The Court highlighted several deficiencies in the arbitration clause including that (1) it did not refer to plaintiff's statutory rights, (2) did not explain the nature of an arbitration proceeding, and (3) did not state that plaintiff was relinquishing her constitutional right to seek redress in a court of law before a judge and a jury.

In addition to the deficiencies in the arbitration provision, the Court also found that the employee handbook failed to create a binding enforceable agreement between the employer and employee. Specifically, the Court found that the handbook's language supported the conclusion that the employer did not intend for the handbook to create a binding agreement. For instance, the handbook included statements such as, "[T]he provisions of the handbook are not intended to create contractual obligations with respect to any matters it covers" and, "[T]he Policies outlined in this handbook should be regarded as management guidelines only."

Acknowledging that the employer likely included such language and disclaimers in an attempt to preserve its employees' "at-will" status, the Court reasoned:

> Defendants cannot selectively disavow the anti-Woolley language in the handbook to insulate the "arbitration" provision from the legal consequences of the disclaimer provision. The employee handbook cannot be a binding agreement with respect to the arbitration provision, and an unenforceable document merely containing "management guidelines" for the rest of its provisions.

In other words, this decision reinforces the idea that an employer cannot have it both ways. The employer in C.M. v. Maiden expressly disavowed that the terms and conditions stated in the handbook were "intended to create contractual obligations," yet then contradictorily attempted to compel arbitration based on "contractual obligations" derived from the same handbook.

Tips for Employers

The C.M. v. Maiden decision is not only applicable to arbitration clauses, but also to any type of handbook policy that an employer wishes to make binding on employees. It is a best practice for employers to have stand-alone agreements with employees to address significant issues such as arbitration clauses, confidentiality, email/

internet policies etc., when the employer also wants to maintain the at will status for employees and ensure that the handbook does not create a contract in other respects. If employers are uncertain whether their current or anticipated arbitration agreement or other type of policy would create binding and enforceable obligations on their employees, they should consult with their employment counsel for guidance.

If you have any questions regarding information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

David I. Rosen, Esq.
Chair, Employment and Labor Practice Group
drosen@sillscummis.com | (973) 643-5558

Galit Kierkut, Esq.
Client Alert Editor; Member, Employment and Labor Practice Group
gkierkut@sillscummis.com | (973) 643-5896

Charles H. Kaplan, Esq.
Member, Employment and Labor Practice Group
ckaplan@sillscummis.com | (212) 500-1563

Dana A. Brady, Esq.
Client Alert Author; Associate, Employment and Labor Practice Group
dbrady@sillscummis.com | (973) 643-6498