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Employer Arbitration Policies Mean Little Without Proper Documentation of Employee Acceptance

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A recent decision of the Sixth Circuit Court of Appeals confirms that if employers want binding arbitration of employment termination claims rather than a jury trial, the agreement to arbitrate must be properly documented. In *Hergenreder v Bickford Senior Senior Group*, a nursing home discharged a newly-hired RN after she had surgery and took recuperation time when she had not yet accrued paid time off or FMLA eligibility. The nurse sued under the Americans with Disabilities Act, and the district court held that she was required to arbitrate her claim.

Reversing the district court's decision, the Court of Appeals held that even though the employer had adopted a written Dispute Resolution Process (DRP) that required arbitration of employment disputes, there was insufficient evidence that the employee knew of or agreed to the binding arbitration provision. The following facts were key to the Court's ruling: (1) although the employee signed an acknowledgment that she had read and understood Bickford's Employee Handbook, she claimed she never received the DRP, which was a separate document; (2) the Employee Handbook and the acknowledgment form stated that the terms of the handbook were not a contract; (3) the Employee Handbook made no specific mention of arbitration and simply referred employees to the parent company's DRP for details; (4) the employee never signed an acknowledgment that she agreed to be bound by the DRP or an arbitration provision. Although Bickford's VP of employee relations stated that the DRP "is distributed to employees," there was no showing that the DRP was provided to the plaintiff, who denied she ever saw the DRP.

Because arbitration agreements are contracts, the Court applied Michigan law to find that the employee never assented to Bickford's offer to arbitrate. Because the Employee Handbook disclaimed that it was a contract, the employee was not required to refer to the separate DRP document. Moreover, mere reference to the DRP with no mention of arbitration did not satisfy the requirement under Michigan law that there be objective manifestation of intent by the employer to offer binding arbitration as well as intent by the employee to accept.

Employers who want employment discrimination claims arbitrated rather than litigated in the courts should have job applicants or new hires sign a separate, free-standing arbitration acknowledgment and agreement along with the employment application, tax and insurance forms and other documents that employers typically require employees to sign prior to or at the time of hire. Failure to do so leaves the employer vulnerable to claims that the employee never received, never saw or never intended to be bound by the arbitration agreement.

For more information, contact your Miller Canfield Employment + Labor attorney.