SEYFARTH SHAW LLP
ATTORNEYS

Management Alert

Former Human Resources Director Dodges Obligation To Arbitrate

Introduction

California law recognizes that contractual obligations may be created even if the parties never signed a written agreement. Generally, these are known as implied-in-fact contracts, a contractual obligation that springs from the actions of the parties. In the employment context, the unilateral implementation of a new policy by an employer can give rise to an implied contract to continue the policy until the employer notifies employees that it has been changed or is no longer in effect.

The recent Court of Appeal decision in *Gorlach v. The Sports Club Co.* gives reason for employers to be cautious applying this concept in the context of imposing obligations to arbitrate employment disputes. According to the Court, if an arbitration agreement contains a provision requiring employees to sign it as a condition of employment, then employees are bound by the agreement only if they sign it.

The Facts

The Plaintiff, Susan Gorlach, was the former Human Resources Director for The Sports Club Company. In 2010, Sports Club introduced an arbitration agreement in its new Handbook, which included a provision stating that all employees must sign the Mutual Agreement to Arbitrate Claims as a condition of continued employment.

It was Gorlach's job, as HR Director, to present the Handbook to all employees and collect their signatures to the Agreement. She made presentations to employees and followed up with those who did not sign. She reported to the CEO that all corporate employees except four had signed the Agreement. She neglected to say she was one of the four. A week before she resigned, she sent an email to Sports Club executives asking how to handle employees who refused to sign the Agreement. She thus led Sports Club to believe she had signed the Agreement.

Gorlach resigned her position with Sports Club in August 2010 and then sued for wrongful termination.

The Trial Court Decision

Sports Club moved to compel arbitration, arguing that Gorlach assented to the Agreement by her continued employment with Sports Club, as a matter of an implied-in-fact contract, and that Gorlach, by deliberately misleading Sports Club into believing that she had signed the Agreement, was estopped from claiming that it did not apply to her. The trial court denied Sports Club's motion, noting that Gorlach was still in the process of collecting employees' signatures when she resigned. Meanwhile, she quit, without signing the Agreement, so there was no valid arbitration contract between the parties.

The Court of Appeal Holding

On appeal, Sports Club cited a factually similar case, *Craig v. Brown & Root, Inc.*, to argue that there was an implied contract between the parties because Gorlach continued her employment with Sports Club after learning about the Agreement. The Court of Appeal disagreed, distinguishing *Brown & Root* because there, the company sent a memorandum to its employees informing them that any employment-related dispute would be subject to arbitration: "The enclosed brochure explains the procedures as well as how the Dispute Resolution Program works as a whole … IT APPLIES TO YOU." The Sports Club arbitration provision, by contrast, required an employee signature.

The Court of Appeal held that Gorlach's case was more analogous to *Mitri v. Arnel Management Co.*, where an employee handbook similarly provided that "[a]s a condition of employment, all employees are required to sign an arbitration agreement." Although the Arnel Management employees signed an acknowledgment that they had received the handbook containing the arbitration agreement, they were not obligated to arbitrate unless they also executed the arbitration agreement.

The Court of Appeal also saw no evidence that Sports Club had relied to its detriment on Gorlach's implied representations that she had signed the Agreement. Thus, Gorlach was not equitably estopped from arguing that the Agreement did not apply to her. When Gorlach resigned, Sports Club had not yet completed the process of having its employees sign the Agreement, nor had it decided what it would do if an employee refused to sign the Agreement.

The Court of Appeal observed generally that while California law permits employers to unilaterally implement policies that may become implied-in-fact contracts when employees accept them by continuing their employment, whether those policies actually create unilateral contracts depends on the specific facts of each case.

What *Gorlach* Means for Employers

Gorlach makes clear that an employer's unsigned arbitration agreement that includes an express requirement that its employees sign as a condition of continued employment does *not* create a binding obligation to arbitrate. The most prudent course for employers to follow is to implement a system ensuring that all employees actually sign the agreement to arbitrate. Even though courts may find that an employee must arbitrate based on the issuance of an arbitration procedure stating that it applies to any employee who continues their employment, it is significantly easier to compel an employee's claim to arbitration if the employer is able to provide the court with a signed agreement to arbitrate. Alternatively, employers wishing to impose arbitration agreements should use language informing all employees that any employment-related disputes going forward will be subject to arbitration, regardless of whether the employee signs the agreement.

By: *Andrew M. McNaught* and *Laura Waluch*

Andrew M. McNaught is a partner in Seyfarth's San Francisco office and *Laura Waluch* is an associate in Seyfarth's Los Angeles office. If you would like further information, please contact your Seyfarth attorney, Andrew M. McNaught at *amcnaught@seyfarth.com* or Laura Waluch at *lwaluch@seyfarth.com*.