2nd Circ. Arbitration Ruling Guides On Electronic Signatures

By **Linda Schoonmaker and Tayte Doddy** (July 27, 2022)

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Many employers rely on mandatory arbitration agreements as the sole form of dispute resolution with their employees. The agreements primarily serve to protect employers against large class actions from nonexempt employees, but are also useful in minimizing the costs of prolonged litigation and avoiding excessive jury verdicts for single-plaintiff cases that reach trial.

Mandatory arbitration agreements are often signed electronically to both streamline the onboarding process and keep quick access to the documents should they need to be produced. But what happens when an employer attempts to enforce the arbitration agreement, and the employee claims they never actually signed the document or even knew that it existed?

Today, courts across the country are facing disputes between employers and employees about electronically signed documents and the validity of the signatures included within them.

Some courts allow a simple "I never signed that" to serve as credible evidence from an employee, and then require an employer to provide more convincing evidence that the employee did in fact sign the documents. The U.S. Court of Appeals for the Second Circuit recently concluded as much in Barrows v. Brinker Restaurant Corp.

Other courts give the benefit of the doubt to the employer, and interpret within the four corners of the written document.

The question then arises for employers: What steps are necessary to increase the likelihood that electronically signed documents — specifically, dispute resolution agreements such as mandatory arbitration agreements — will be enforced by a judge?

A common error that creates an enforcement issue with arbitration agreements is an employer's failure to gather any evidence beyond the digital trail of the agreement.

Often, an employer provides the employee with a company account username and password, and later presents them with electronic documents to sign in the onboarding process. In seeking to later avoid the arbitration agreement, the employee may raise issues such as:

- The employer had knowledge of the employee's login credentials, which could permit an unauthorized signature on the employee's behalf;
- The employer has no other evidence to produce besides the electronic signature or click signature; and
- The employer did not affirmatively agree with the employee in writing that all documents will be electronically signed.

Without taking the necessary security precautions, employers may risk having their agreements not be enforced in court.

Second Circuit Ruling

In the Second Circuit, Barrows v. Brinker Restaurant Corp. showed that personal testimony can carry as much weight as the electronic signature itself.[1]

In this case, Savannah Barrows worked at a Chili's restaurant for four years. Shortly after her employment began, there was a change in management, which required all employees to go through a new onboarding process.

After her employment ended, the employee formed a class and brought various claims against her employer, contrary to the electronically signed agreement to arbitrate all claims.

The employer produced the employee's electronically signed arbitration agreement and asked the court to compel arbitration, but the employee responded with a sworn declaration in which she denied having any knowledge of the agreement or ever signing it.

The U.S. District Court for the Northern District of New York found for the employer and compelled arbitration because the employee provided no evidence that the signature was invalid or unauthorized.

On appeal, the Second Circuit on May 31 reversed the order on the grounds that personal testimony has been admissible evidence in Second Circuit precedent, thus creating a genuine issue of material fact for trial.

So, electronic signatures by themselves may not be sufficient to enforce an agreement. Employers will likely need other forms of evidence outside of the electronic signature itself to prove the authenticity of a signature and protect the enforceability of the agreement. Below are some points and methods to consider.

Ways to Increase Security

Because an electronic signature is often reduced to a mere click, the signature itself does not provide sound evidence that an employee read, understood and agreed to the terms in writing. However, there are considerations and processes that may be put in place to help an employer's case.

First, employers should preface any electronic agreement by affirmatively agreeing with the employee to proceed with electronic documents.

If possible, requiring a drawn signature on the agreement, instead of clicking, bolsters the credibility of the document at the outset. Programs like DocuSign allow sign by click and sign by draw, so requiring an employee to draw their signature on the acknowledgement of electronic agreements stage provides a solid account of assent to and knowledge of the agreement.

The draw is necessary for the first page, because if you allow click to sign for the entire document there is still a reasonable possibility of fraud, or that an unauthorized person clicked through and forged the signatures on all the documents in the agreement.

Second, the location where the agreement is signed is also important in gathering evidence for an employer. Employees often sign documents at the workplace, on a work computer and under a work ID account. This can be an issue because fraud and unauthorized signing could be inferred as long as the employee is operating with employer-generated login credentials.

Until an employee manually accesses their account and changes their password to something unique, the employee may assert that they were not the one who accessed their account to sign the documents.

Employers can protect against the potential for internal mishandling by sending all documents to the employee's personal email, to which the employee will have access free from any interference of agents of the employer.

Even if employees complete the onboarding documents at the workplace, requiring some type of email verification or two-factor authentication to control access to their personal email is another layer of evidence that will protect employers against employee denials.

Third, employers should make sure the document signing software they use is able to track and log any time the document is opened, accessed, viewed and signed.

Texas courts have found that data showing that a document was viewed and signed on a certain date outweighed employee testimony to the contrary, as was held by the Texas Supreme Court last May in Aerotek Inc. v. Boyd.[2]

If an employee opens and accesses a document, that gives the employer evidence to at least determine the employee was familiar with the document and was presented with it, eliminating the excuse that the employee never knew there was a document.

These tracked times can be traced back to any schedule or correspondence that mentions the process of signing onboarding documents.

Finally, employers should also schedule when the onboarding process will be completed and confirm that it was completed through email to establish a time frame of when the employee could have signed the documents.

Having a witness, such as a manager or supervisor, watch the employee sign the documents and/or personally administer the documents to the employee at the workplace also provides another account of the signing.

Physical Wet Signatures

The other option is to have employees physically sign documents in person, otherwise known as a getting a wet signature. Having a wet signature brings about fewer questions regarding the authenticity of the employee signature, but it can also place an employer in an unfavorable position in front of a judge if the process is not uniform and organized.

Employers should consider two things when using physical documents and wet signatures.

First, employers should separate any binding documents, such as mandatory arbitration agreements, waivers and acknowledgements, from any nonbinding documents, such as employee handbooks, guides or protocols, to avoid confusion and conflation of the documents.

If these documents aren't separated in some fashion, employees may attempt to conflate the nonbinding language in the documents with the binding language to assert that the document is unconscionable or illusory, and thus unenforceable.

If the documents are separated, then the employee will have a much harder time attempting to use terms and language from, for example, an employee handbook interchangeably with the language of a binding mandatory arbitration agreement.

An employee will find it easier to argue that all documents are one unit if the binding document is contained within the nonbinding document, e.g., a signed mandatory arbitration agreement contained within an unsigned employee handbook.

In Coady v. Nationwide Motor Sales Corp., the U.S. Court of Appeals for the Fourth Circuit on April 25 deemed a company's arbitration agreement illusory because of the location and language that was associated with it.[3]

The arbitration agreement was located within the company's employee handbook. On the page where employees signed to acknowledge receipt of the handbook, the employer noted that it retained the right to modify or abolish the handbook without notifying the employees.

The court ruled that the arbitration agreement was a part of the handbook, which could be unilaterally modified, and was thus illusory.

This shows that, especially in instances where the language of a document allows for unilateral modification by the employer, it is imperative to distinguish and separate binding agreements from nonbinding agreements to avoid them being conflated together.

Second, employers should be uniform in the manner they are sending out and collecting signed documents. If agreements are signed electronically, then all documents requiring a signature should be completed electronically. If physical documents are signed, all of them should be handled this way to keep uniformity in the process.

This is important because, in the event an employee claims he or she did not sign an agreement, having uniform processes eliminates doubt that there might have been errors on part of the employer in collecting the signatures. If there is a mashup of physical and electronic agreements, the possibility of internal error or mishandling of documents becomes much more plausible.

Regardless of the approach chosen, there will be challenges to arbitration agreements by disgruntled employees. However, those challenges potentially can be overcome with careful and consistent business practices in the onboarding process.

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[1] Barrows v. Brinker Rest. Corp., 36 F.4th 45 (2d Cir. 2022).

[2] Aerotek, Inc. v. Boyd, 624 S.W.3d 199 (Tex. 2021).

[3] Coady v. Nationwide Motor Sales Corp., 32 F.4th 288 (4th Cir. 2022).