

Management Alert



District Court of New Jersey Finds Plaintiff Agreed to Arbitrate By Not Opting Out of the Arbitration Program

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Seyfarth Synopsis: *The District Court of New Jersey recently found an arbitration agreement to be enforceable where the employee acknowledged receipt and did not follow the procedure to opt out of the arbitration program.*

In *Horowitz v. AT&T, Inc.*, No. 3:17-cv-4827-BRM-LHG (D.N.J. Jan. 2, 2019), a federal district court upheld an employee arbitration agreement, which provided in pertinent part, “[i]f you do not opt out by the deadline, you are agreeing to the arbitration process as set forth in the Agreement. This means that you and AT&T are giving up the right to a court or jury trial on claims covered by the Agreement.” In *Horowitz*, the plaintiffs opened their emails, clicked on the hyperlink containing the agreement, and did not opt out by the deadline.

Seeking to avoid the agreement and pursue claims relating to the termination of their employment in court, the plaintiffs argued that they never affirmatively agreed to be bound, and their failure to opt out could not serve as consent. The court disagreed, noting that as opposed to an actual signature, “some concrete manifestation of the employee’s intent as reflected in the text of the agreement itself” was required to enforce a waiver of rights.

Notably, *Horowitz* adds to a “split on whether the failure to opt out of an arbitration agreement after receiving notice is sufficient to signify intent to be bound by the arbitration agreement.” In two prior cases, the same court was presented with facts similar to *Horowitz*, but reached different results.

In *Jayasundera v. Macy’s Logistics & Operations, Dep’t of Human Res.*, No. 14-cv-7455, 2015 WL 4623508 (D.N.J. Aug. 3, 2015) (Wigenton, J.), the court found that a plaintiff who had electronically signed an acknowledgement of receipt of the company’s offered arbitration program, and then did not follow the opt out procedure, had accepted the company’s offer to enter into the arbitration agreement. Conversely, in *AT&T Mobility Servs. LLC v. Jean-Baptiste*, No. 17-cv-11962, 2018 WL 3425734 (D.N.J. July 16, 2018) (Arleo, J.), the court found that acknowledgement of receipt, without any further action, and even though the arbitration agreement provided an opt-out provision that the employee failed to follow, could not constitute an agreement to be bound.

The *Horowitz* court found *Jayasundera* persuasive, pointing out that the agreement at issue specifically contemplated an employee receiving and accessing the agreement without opting out by the deadline as a manifestation of intent to be bound. Because the employee did exactly what the agreement called for, the court found a valid acceptance of the terms by the employee.

Employer Takeaways

The nuances surrounding arbitration agreements in employment continue to be a hot area of litigation. *Horowitz* adds to an apparent divergence in the way that district court judges interpret arbitration agreements in the digital age with respect to what constitutes a party's agreement to be bound. We will continue to monitor developments in this area. In the meantime, employers seeking to create or maintain arbitration and alternate dispute resolution programs would be well-served by reviewing their policies and procedures to ensure their agreements are enforceable.

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