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Employers Continue Their Struggle to Write Enforceable Arbitration Provisions

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Drafting enforceable arbitration provisions in employment agreements has gotten a little more difficult. In a recent decision, Grey v. American Management Services, the California Court of Appeal reversed an arbitration award in favor of an employer, finding that the parties never agreed to arbitrate their dispute, despite the fact that the employee signed not one but two agreements with arbitration provisions.

Indeed, that was the problem. The employer had a solid program in place to ensure that job applicants would be subject to arbitration. Each applicant signed a well-crafted Issue Resolution Agreement (IRA). The IRA attached a copy of the arbitration rules that would govern the arbitration — an important factor in preventing the arbitration provision from later being determined unconscionably unenforceable. And both the prospective employee and employer signed the IRA. The arbitration provision was broadly written to encompass any claims "arising out of the application or eventual employment."

If hired, the employee was also required to sign an employment contract. The contract stated that it was the final expression of the parties' agreement on the terms of employment, except as may be amended by policies and procedures. The contract contained an arbitration provision that was written differently than the one in the IRA. This arbitration provision was limited to claims "arising out of a breach of the employment contract." These differing arbitration provisions would prove costly for the employer.

After being hired, the employee in the Grey case sued for discrimination on the basis of sexual orientation and a host of tort claims. The employer filed a motion with the court to compel arbitration. That motion was granted. The arbitration was conducted, and the arbitrator found in favor of the employer, which the court approved as a complete defense judgment.

The employee appealed that judgment, arguing that the arbitrator lacked authority. The Court of Appeal agreed, and reversed the judgment. The Court reasoned that:

- The contract, which contained an "integration clause," was the final expression of the parties' employment agreement
- The IRA was a signed "agreement" that was superseded, and not a "policy or procedure" that might modify the contract
- The arbitration provision in the employment contract was the only operative arbitration provision
- That provision was limited to claims for breach of contract
- None of the employee's claims were for breach of contract — they were all statutory and tort-based

Therefore, the arbitrator lacked authority to decide those claims, and the employer would have to defend the case again — this time in court, and face a jury.

The employer was tripped up by a seemingly trivial difference in language between the two agreements ("arising from employment" v. "arising from breach of the employment contract"), and by a failure to incorporate the IRA into the employment contract.

Conclusion. Arbitration provisions allow employers to avoid having employment cases go to a jury, which has certain attractions. But California state courts have been taking a very careful look at the employment documents (applications, handbooks, contracts, and policies) to ensure that the employees truly agreed to arbitrate their claims.