Insight

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Missouri Courts Scrutinize Employment Arbitration Agreements

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Two recent Missouri Supreme Court decisions demonstrate Missouri courts will carefully scrutinize employment arbitration agreements in determining their validity. The Missouri Supreme Court in *Baker v. Bristol Care, Inc., et al.*[1] invalidated an employment arbitration agreement that was agreed to by the parties at the time the employee was given a promotion and raise. The court held that continued employment for an at-will employee and mutual promises to arbitrate where the employer had the ability to modify the terms of the arbitration agreement did not constitute valid consideration to support the agreement. In *State ex rel Hewitt v. The Honorable Kristine Kerr,*[2] the Missouri Supreme Court upheld an arbitration agreement, but held the arbitrator section provision unconscionable.

Missouri may be the most difficult state in which to enforce an employment arbitration provision. A review of the *Baker* and *Hewitt* decisions, as well as other intermediate appellate decisions, provide guidance on what an employer must do to have a valid and enforceable arbitration agreement in Missouri.

The Missouri Supreme Court's Decision in *Baker*

In *Baker*, an employee signed both an employment agreement and an arbitration agreement at the time she was promoted and given a raise. The employment agreement and the arbitration agreement contained mandatory arbitration provisions, but the court read both agreements as one since both agreements were executed contemporaneously.

The employment agreement indicated that employment would "continue indefinitely," but gave the employee and employer options on terminating the employment agreement. The court held that the employee was an at-will employee since the employment did not contain a definite duration of employment. The court also held that continued at-will employment is not valid consideration for an enforceable contract, and thus would be insufficient to support an agreement to arbitrate.[3]

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1 50 S.W.3d 770 (Mo. banc Aug. 19, 2014).

2 2015 Mo. LEXIS 30 (Mo. banc Apr. 14, 2015).

3 The *Baker* decision recognized that the federal courts have come to a contrary position in holding that continued employment is sufficient consideration to support an arbitration agreement. *See Berkley v. Dillard's, Inc.*, 450 F. 3d 775, 777 (8th Cir. 2006).

The arbitration agreement, as well as the employment agreement, contained a mutual agreement that all legal claims the parties have against one another would be resolved through binding arbitration. The arbitration agreement also provided that the employer "reserves the right to amend, modify or revoke this agreement upon thirty (30) days prior written notice to the Employee." The court held that this provision allows the employer to change the agreement to arbitrate unilaterally and retroactively, and therefore, the employer's agreement to arbitrate is illusory and does not constitute consideration.

The holding in *Baker* that a valid arbitration was never formed because there was no consideration is in line with prior Missouri appellate decisions invalidating employment arbitration agreements that are discussed below.

Additionally, the employer argued that the employment agreement contained a delegation clause under which the arbitrator has "exclusive authority to resolve any dispute to the applicability or enforceability" of the arbitration agreement. However, the court stated that the question presented to it was whether a valid arbitration agreement was formed, and the issue of contract formation was an issue for determination by Missouri courts. The court distinguished *Rent-A-Center, Inc. v. Jackson*, 130 S.Ct. 2772 (2010) because the arbitration provision in that case provided the arbitrator with the exclusive authority relating to the "interpretation, applicability, enforceability or formation" of the arbitration agreement. Thus, the court held that it was responsible for determining whether an agreement to arbitrate was formed, not an arbitrator.

The Missouri Supreme Court's Decision in *Hewitt*

In Hewitt, the Missouri Supreme Court carefully reviewed the arbitration provisions in an employment agreement to determine the validity of the provisions. In this case, the court acknowledged the liberal policy of the Federal Arbitration Act of favoring arbitration, and found that there was clear intention of the parties to arbitrate claims. The language of the agreement indicated that "any dispute which may arise" between the parties was to be arbitrated, and the agreement was signed by both the employer and employee. The court found that even though the employee alleged the agreement was not negotiated, it was not established that the employee could not have negotiated the agreement. Further, a difference in bargaining power between an employer and employee is not sufficient in and of itself to render an arbitration agreement unenforceable.

Additionally, the employer in *Hewitt* was seeking to utilize certain guidelines in conducting the arbitration, but the court found that guidelines governing an arbitration procedure were not incorporated into the agreement and were not made known to the employee at the time the agreement was entered into. Thus, the employee could not have assented to procedures the employer was trying to utilize for the arbitration. The guidelines were invalidated, but the court held that since the parties had a valid arbitration agreement, the procedures set forth in Missouri Uniform Arbitration Act (MUAA) would be utilized for the arbitration. The court also found that the agreement's designation of a specific person to arbitrate claims was unconscionable because of the designated person's potential bias. Instead of invalidating the entire arbitration provision, the court held the selection of an arbitrator should be made in accordance with the MUAA,[4] which allows the trial court to appoint an arbitrator. Finally, the court held that non-signatories to the agreement could enforce the arbitration agreement against the employee when the employee was treating his claims against the non-signatories the same as those against the signatories to the agreement.

Intermediate Appellate Missouri Decisions Invalidating Arbitration Provisions

In a series of appellate decisions prior to *Baker*, Missouri courts had consistently invalidated employers' arbitration agreements and provisions because of lack of acceptance, failure of consideration, and unconscionability. The arbitration provisions challenged in these cases were in employment agreements, separate arbitration agreements, and handbooks.

In *Morrow v. Hallmark Cards, Inc.*,[5] the employer had a multi-tiered Dispute Resolution Program (DRP) that required binding arbitration of the employees' claims at its last stage. The employer informed employees that by continuing employment, the employee consented to the terms of the DRP. Employees were not required to sign the DRP. The "covered claims" under the DRP were only those claims employees had against the employer. The DRP excluded certain claims such as non-competition agreements or claims involving intellectual property.

4 Section 435.360 of the Revised Statutes of Missouri.

5 273 S.W.3d 15 (Mo.Ct.App. 2008).

An employee brought a lawsuit claiming age discrimination, which was a "covered claim." The trial court and the arbitrator held there was a valid contract to arbitrate. The employee contended that no contract to arbitrate existed, thus she could not be compelled to arbitrate.

The Missouri Court of Appeals held that no enforceable agreement existed. The lack of a signature by the employee did not support the existence of an arbitration agreement. Additionally, the lack of mutual promises by the parties to arbitrate the claims that the parties may have against the other was a consideration in determining that an enforceable agreement did not exist. The court of appeals noted that the employer's unilateral right to modify or discontinue the DRP at any time showed a lack of consideration to support the agreement. The court noted that continued employment of the employee did constitute consideration for enforcement of the agreement.

In *Frye v. Speedway Chevrolet Cadillac, et al.*,[6] the employer required its employees to sign an acknowledgement agreeing to be bound to a DRP. The DRP was a multi-tiered program culminating in arbitration. The DRP gave the employer the unilateral right to modify the program.

An employee filed a lawsuit alleging sex discrimination, sexual harassment, and retaliation. The employer removed the case to federal court and answered the Petition without asserting that the claims were subject to arbitration. The employer moved only to compel arbitration 18 months later. The trial court denied the motion to compel arbitration.

The employee denied signing the acknowledgement to the arbitration agreement, and the date of the employee's acknowledgment pre-dated the inception of the DRP. The court stated that the continuation of employment of an employee at-will provides no consideration to support the agreement. While the employer claimed that there were mutual promises to arbitrate, the DRP concerned only claims that the employee had against the employer. Further, the court held that the provision in the DRP pertaining to amendments to the DRP was vague as to whether employees must be given notice of the amendment or whether such amendments were prospective in nature, so the employer's obligation to be bound by the terms of the DRP was illusory. Finally, the employer's delay in seeking enforcement of the agreement constituted a waiver, especially since there was prejudice to the employee because of the delay.

In *Kunzie v. Jack-in-the-Box, Inc.*,[7] the employer contended the employee signed an arbitration agreement after working several years for employer, and continued to work after the arbitration agreement was allegedly signed. The employee filed a discrimination claim after his termination. The employee contended he did not sign the arbitration agreement because his name was spelled incorrectly and the agreement did not have his correct social security number. The trial court held that irrespective of whether the employee signed the agreement, the arbitration agreement was enforceable because the employee continued to work after he was aware that there was a mandatory arbitration agreement program in place for employees. While indicating that continuation of employment could constitute acceptance of an arbitration agreement, the court of appeals reversed the trial court and indicated the trial court should have conducted an evidentiary hearing to determine if the employee's actions in continuing employment were sufficient to constitute an intention by the employee to be bound by the employer's proposed arbitration agreement.

In *Manfredi v. Blue Cross Blue Shield of Kansas City, et al.*,[8] a chiropractor entered into an agreement with BCBS to be reimbursed for medical services. BCBS was the largest health care insurer in the area where the chiropractor practiced, and BCBS provided health care coverage for about 44% of the population. BCBS gave the chiropractor a "take it or leave it" contract for the chiropractor to provide services to BCBS' insureds, and the contract had a mandatory arbitration provision. The arbitration clause gave BCBS the right to change procedures for disputes that would be arbitrated. The arbitration provision excluded disputes that involved discretion and medical judgment. The agreement did not allow arbitrators to award consequential or punitive damages. The court of appeals indicated that these provisions made the agreement to arbitrate unconscionable, and refused to enforce the arbitration provision.

In *Whitworth v. McBride & Sons, Inc., et al.*,[9] the employer had an existing employee sign an employment contract and an application for employment, both with arbitration clauses. The employment contract stated it was the entire agreement of the parties and could not be modified except by written agreement of the parties. The employee was presented also with an arbitration agreement. The employment

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6 321 S.W.3d 429 (Mo.Ct.App. 2010).

7 330 S.W.3d 476 (Mo.Ct.App. 2010).

8 340 S.W.3d 126 (Mo.Ct. App. 2011).

9 44 S.W.3rd 730 (Mo.Ct.App. 2011).

contract was signed by a general manager, but the application and arbitration agreement were not signed by the employer. The employment contract contained an integration clause that stated it was the entire agreement between the parties, and that the employment agreement could be modified only by written agreement between the parties. The employee was also given a handbook that referenced the procedures for arbitration, and contained a binding arbitration provision. The procedures for arbitration set forth in the handbook were not referenced in the employment contract, application, or arbitration agreement. The handbook also indicated that any contract with the employer must be in writing and signed by the president or his authorized representative. The handbook was not signed by the employee or employer. Several months later, the employee signed an acknowledgement of receipt of the handbook which reiterated the arbitration procedures, but it was not signed by the employer.

The court of appeals held that because the employment contract contained an integration clause, the employee was not obligated to arbitrate by the terms of the procedures in the handbook since the handbook was not signed by the employer. Neither the application nor the arbitration agreement could not be used to force the employee to arbitrate since neither was signed by the employer. Further, the handbook and acknowledgment of the handbook specifically stated that nothing in the "manual" was to confer any contractual rights. The court of appeals indicated also that the employment contract was not signed by the president, and it was not arguably enforceable.

The court of appeals indicated further that there was insufficient consideration to enforce an agreement to arbitrate. The court stated that continued at-will employment was insufficient consideration. Additionally, any obligation to pay commissions in the employment contract was a duty that was already imposed on the employer since the employment contract was signed before the arbitration agreement. Finally, the right of the employer to unilaterally modify the arbitration procedures made any obligation for the employer to follow those procedures illusory. The court of appeals found there was no valid or enforceable agreement to arbitrate.

In *Katz v. Anheuser-Busch, Inc.*,[10] the employer adopted a DRP after the employee was hired. The DRP provided that by continuing employment, an employee would be subject to a DRP, which included mandatory arbitration. The employee did not sign the DRP. Later, the employee signed a mutual agreement to arbitrate claims (MAAC), but the MAAC contained a provision that the MAAC would terminate upon change in control of the company.

On appeal, the employer contended for the first time that the DRP and the MAAC contained delegation clauses that required an arbitrator to decide whether a claim was arbitrable; however, the appellate court stated that the employer waived this argument since it was not raised with the trial court.

The employer contended that the employee's claims arose before the change of control, and thus the employee's claims should be subject to arbitration. However, by express terms of the MAAC, the requirement to arbitrate ceased with the company's change of control, and therefore the MAAC did not apply.

The appellate court also held that the employee's continued employment did not constitute acceptance of the DRP, even though the employer introduced evidence that the employee was aware of the DRP during her employment.

In *Marzette v. Anheuser-Busch, Inc.*,[11] employees completed a job application with an arbitration clause stating that if they become employed by the employer, any claims they have against the employer would be subject to arbitration. Thereafter, employees filed a discrimination lawsuit, and the employer sought to compel arbitration.

The court of appeals stated that enforcement of an arbitration provision requires that a contract be formed—namely that there be an offer, acceptance, and bargained-for consideration. The court found that the employer's willingness to consider an employee for employment or a subsequent offer of employment was insufficient consideration to support an agreement to arbitrate. The court also found that the arbitration provision did not contain mutual promises to arbitrate, and only an employee agreed to arbitrate any claims against the employer. Thus, there was insufficient consideration to support the employer's promise to arbitrate.

In *Sniezek v. Kansas City Chiefs Football Club*,[12] an employee signed an arbitration agreement several weeks after she began working. In the agreement, the employee agreed that "in all matters in dispute between me and the Club ..." that she would be bound by the arbitration provision.

10 347 S.W.3d 533 (Mo.Ct.App. 2011).

11 371 S.W.3d 49 (Mo.Ct.App. 2012).

12 402 S.W.3d 580 (Mo.Ct. App. 2013).

The court of appeals indicated that the language of the agreement provided only that the employee agreed to be bound to arbitrate, and therefore, the agreement did not contain mutual promises to arbitrate to constitute sufficient consideration. Also, the employee was presented with the arbitration agreement after accepting the employer's offer to work and after her first day on the job. Since the employee was an at-will employee, the terms in the agreement imposed upon her were not enforceable as contractual duties. Further, as an at-will employee, once her employment ended, her obligation to fulfill the terms and conditions of her employment ended. Thus, there was insufficient consideration to support the agreement.

In *Johnson v. Vatterott Educational Centers, Inc.*,[13] the employer sought to compel arbitration based on a separate pull-out section in an employee handbook entitled "At-Will Employment Binding Arbitration Agreement," that was signed by both the employee and employer. The arbitration section was removed from the handbook and made part of the employee's personnel file.

The Missouri Court of Appeals noted that it was well established that employee handbooks that are subject to change by the employer at any time do not establish contractual rights. The handbook specifically stated that nothing in the handbook creates a contract, and the handbook stated that the employer had the right to change or rescind any provision in the handbook. Thus, the court held that the language in the handbook was ambiguous at best concerning whether the arbitration agreement was an enforceable contract, and thus, it was not binding on the employee.

In *Baier v. Darden Restaurants, Inc., et al.*,[14] the employer presented the employee with a DRP that required mandatory arbitration. The employee signed an acknowledgement of the DRP, but it was not signed by the employer even though there was a signature line for the employer. The employee signed a second acknowledgment of the DRP, and the employer did not sign the acknowledgment. The employee was presented a DRP a third time, which she signed, but there was no signature line for the employer.

The court of appeals refused to compel arbitration, stating that the employer had the burden to establish that it accepted the agreement, and in the absence of a signature, it must establish that it assented to be bound by the terms of the contract. None of the DRP acknowledgements were signed by the employer, and since there were signature lines on the first two acknowledgements for the employer to sign, the court reasoned that the signature line was placed on the acknowledgement for the employer to sign and assent to the agreement. The court stated that the employer failed to establish that a valid arbitration agreement was formed.

In *Jimenez v. Cintas Corporation et al.*,[15] an at-will employee signed an employment agreement that contained an arbitration provision that the employee was required to sign when she was hired for new and future employment. The arbitration provision provided mutual promises to arbitrate claims, and included the many types of claims that the employee would be required to arbitrate and excluded claims that could not be compelled to arbitration, such as unemployment and workers' compensation claims. The arbitration provision also excluded claims for equitable relief, and referenced a non-compete provision in the employment agreement that allowed the employer to go to a court of law to enforce the non-compete clause.

The Missouri Court of Appeals held that new, continued, or future employment does not constitute consideration for an arbitration agreement of an at-will employee. With respect to mutuality of promises, the court stated that if one party has the right to unilaterally divest itself of an obligation of a promise initially made, then the agreement lacks consideration. The court held that the agreement exempted the employer from arbitrating the non-compete provisions while the employee was required to arbitrate any such claims. The court held that there was not a validly formed arbitration agreement since there was not mutuality of obligation, and thus, the court did not enforce the arbitration provision.

Recommendations for Creating a Valid and Enforceable Arbitration Agreement

When drafting or revising an arbitration agreement in Missouri, employers should keep the following in mind:

1. Agreements to arbitrate should be contained in an agreement that is signed by both parties, and possibly constitute a separate agreement. As reflected in the *Morrow, Whitworth, Katz, and Baier* cases, the lack of a signed agreement creates questions whether there was acceptance by the employee. It is unlikely that an arbitration provision in a handbook alone, especially if there is no signed acknowledgement by the employee or no signature by the employer, is valid.

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13 410 S.W.3d 735 (Mo.Ct.App. 2013).
14 420 S.W.3d 733 (Mo.Ct.App. 2014).
15 Case No. ED101015 & ED101241, 2015 Mo. App. LEXIS 11 (Mo. Ct. App. Jan. 13, 2015).

2. The arbitration agreement should contain mutual promises by both parties to arbitrate claims that one may have against the other. The lack of mutuality of promises to arbitrate can cause an arbitration agreement to be invalid for lack of consideration. However, it is permissible for certain claims, such as claims calling for equitable relief or claims in which arbitration is not allowed, i.e., claims for unemployment compensation or workers' compensation claims, to be exempt from arbitration. However, if both parties have the ability to assert a type of claim, the rights of each should be the same for that type of claim.
3. New or continued employment should not serve as the consideration for an agreement to arbitrate, and the consideration should be mutual promises to arbitrate. If an arbitration agreement is presented to a new employee, it should be done at the time the offer for employment is made. For existing employees, there must be mutual promises to arbitrate the claims the employee and employer have against the other.
4. The arbitration agreement should not allow the employer to unilaterally modify the arbitration agreement or procedures, even if the employer gives employee advance written notice of a change.
5. The arbitration provision should contain a delegation clause that gives the arbitrator exclusive authority "to resolve any dispute relating to the interpretation, applicability, enforceability or formation" of the agreement so that an arbitrator, not a court, will determine the validity of an arbitration agreement.
6. The procedures to be utilized in the DPR process should be contained in the arbitration agreement or specifically reference a procedure created and maintained by a separate entity that does not allow the one party to the agreement to make unilateral changes to the DRP. Adopting arbitration procedures of the American Arbitration Association (AAA) or JAMS (formally known as Judicial Arbitration and Mediation Services, Inc.) is acceptable. If the employer has its own procedures, any change to those procedures should require some sort of written acceptance by the employee. The procedures being used for the arbitration should be attached or made available at the time the arbitration agreement is given to the employee for consideration, either a paper copy or through a link to the procedures.
7. It is unlikely that arbitration provisions in employment applications will be enforced.
8. Employers should not attempt to shorten time limitations or remedies that are statutorily provided for.
9. Filing fees should not be more than what it costs to file a lawsuit in that jurisdiction.
10. A party should be able to request additional discovery beyond what is provided for in the arbitration agreement by adding a provision that either party can make a request to the arbitrator for additional discovery.
11. The arbitration agreement should not restrict an employee from filing a complaint or charge with a governmental agency.
12. Venue selection and choice of law provisions should relate to the location where the employee actually works.
13. Class action and collective action waivers should be included in an arbitration agreement, but be carefully written.
14. Since Missouri courts have interpreted the Missouri Human Rights Act to allow individual liability in harassment, discrimination, and retaliation claims, the arbitration provision should require the claimant-employee to arbitrate any claim against any employee, officer, director, or partner of the employer arising out of the employee's employment.
15. If there is any question whether the employer conducts a sufficient amount of business to constitute interstate commerce under the Federal Arbitration Act, then the employer should include the notice in the arbitration agreement required under Section 435.460 of the Revised Statutes of Missouri, which provides "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."

A carefully drawn arbitration agreement will be enforced, but gone are the days that Missouri courts will enforce any arbitration provision.

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