

Make arbitration agreements separate documents, not part of your handbook

There's no time like the present! If, like many employers, you have neglected updating your employee handbook, now is a good time to do so. That's particularly true for Texas employers that use arbitration agreements to keep employment law disputes out of court.

A recent Texas appeals court case highlights the dangers of including arbitration agreements in your employee handbook. They should be stand-alone documents, instead.

Here's why: For decades, lawyers have been telling employers to put a disclaimer up front in their handbooks, making it crystal clear that the handbook is not a contract and that all employment is at-will. Another common disclaimer typically states that the employer reserves the right to change anything in the handbook at any time.

Employers that want to use arbitration to resolve employment-related issues often include an arbitration agreement right in the handbook.

There's a problem with that. If an employee sues, the employer will invoke the arbitration agreement and try to get the case transferred into arbitration. However, the employee may successfully argue that she's not bound by the arbitration agreement since the handbook disclaimed the existence of any contract.

In other words, the "not a contract" language can trip up employers because arbitration agreements are, in fact, intended to be contractual. Here's how it played out in a recent case.

Recent case: Yvonne worked for a Whataburger restaurant and was injured at work. Whataburger moved to compel arbitration. In support of its motion to compel, Whataburger introduced evidence that it had an arbitration agreement in its handbook, and that Yvonne had signed an acknowledgment of receipt of the handbook. The acknowledgment sheet also included "a specific place where acknowledged the binding nature of the arbitration policy."

Whataburger also showed that Yvonne's regular paychecks "contained an almost identically worded statement acknowledging the arbitration policy."

Yvonne opposed arbitration on a number of grounds, including claims that the arbitration agreement was "unconscionable and illusory." She also argued that since the agreement was contained in the handbook (which stated that Whataburger could unilaterally change the handbook at any time), that effectively nullified the arbitration agreement due to lack of consideration.

The Texas appeals court sent the case back to the trial court with instructions to figure out whether or not the agreement was enforceable as a contract. By putting that agreement in the handbook, Whataburger now has to spend time, energy and money fighting a lawsuit over the validity of its arbitration agreement before ever getting the case moved to arbitration. (*Whataburger Restaurants v. Cardwell*, Texas Court of Appeals, 2017)