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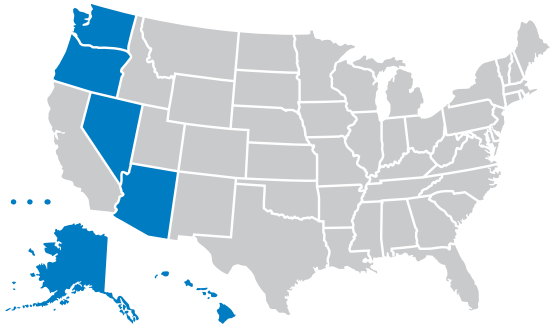

ARBITRATION

Take care to preserve contractual rights to arbitrating employment disputes

AK | AZ | HI | NV | OR | WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

An article in the March issue of West Employment Law Letter provided helpful insights into the advantages and disadvantages of requiring employees to sign arbitration agreements following a banner year of jury verdicts in favor of employees (see "Avoiding runaway jury verdicts through arbitration" in our March newsletter).

Shortly after that article was published, the U.S. 9th Circuit Court of Appeals (whose rulings apply to employers in Arizona, Alaska, Hawaii, Nevada, Oregon, and Washington) affirmed a district court's order compelling an employee to arbitrate, rather than litigate, her clams. The court's opinion explained how an employer must act to avoid waiving its right to arbitrate disputes with employees who signed an arbitration agreement. You should take care to heed these steps because the burden on the party opposing arbitration is no longer a "heavy" one.

Background

Teresa Armstrong agreed to arbitrate any employment-related disputes she had against her employer Michaels Stores, Inc. But when a dispute arose, she filed a complaint in federal district court, rather than demanding arbitration.

In response to Armstrong's complaint, Michaels filed an answer, asserting its right to arbitration as an affirmative defense. It also noted that it would ask the court to compel arbitration after discovery (pretrial exchange of evidence) was complete.

While discovery was ongoing, the U.S. Supreme Court issued its decision in *Epic Systems*, ruling that employee arbitration agreements are enforceable under the Federal Arbitration Act (FAA). Two weeks later, Michaels asked Armstrong to dismiss her claims voluntarily and pursue them in arbitration. When she refused to do so, the company asked the court to compel arbitration. Armstrong opposed the request, asserting Michaels waived its right to arbitration due to delay.

The district court ruled in favor of Michaels and sent the case to arbitration. The arbitrator eventually awarded judgment in favor of Michaels, and Armstrong appealed the district court's ruling to the 9th Circuit.

Reduced burden: easier to find waiver

During Armstrong's appeal, the U.S. Supreme Court issued its decision in *Sundance, Inc.*, reducing the burden on the party opposing arbitration from a "heavy burden" with the intent "to make arbitration agreements as

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enforceable as other contracts, but not more so." Therefore, the 9th Circuit noted that because she was asserting waiver, she must demonstrate:

- Knowledge on the part of Michaels of an existing right to compel arbitration; and
- Intentional acts by Michaels that were inconsistent with its existing right to arbitrate the claim.

Because there isn't a "concrete test" for assessing whether Michaels waived its right to arbitrate, the 9th Court considered "the totality of the parties' actions." The issue it considered was whether Michaels' actions holistically indicated a conscious decision to seek judicial judgment on the merits of arbitrable claims, which would be inconsistent with its right to arbitrate. The 9th Circuit decided that Michaels preserved its right to arbitrate by taking several actions consistent with that right.

First, Michaels didn't make an intentional decision not to ask the court to compel arbitration. Instead, it preserved that right in its answer and repeatedly stated its intent to do so in the case management statement. It also asked the court to compel promptly after the Supreme Court decided *Epic Systems*.

Second, Michaels didn't actively litigate the merits of the case for a prolonged period. It never sought a decision on the merits of the case from the court. Had it sought a decision on the merits of a key issue, it would have waived the right to arbitrate. Unlike other cases in which the 9th Circuit had found a waiver, the court noted, "Michaels never wavered from the view that it had the right to arbitration."

Takeaway

Employers that find themselves in litigation initiated by an employee who signed an arbitration agreement must take careful steps to preserve their right to arbitrate claims under the agreement. This is especially important now that the Supreme Court overturned the previous "policy favoring enforcement of arbitration agreements."

To start, you should inform counsel retained to defend the litigation that the arbitration agreement exists. This will allow able counsel to assess whether defending the litigation in court is preferred or whether you will want to defend the claims in arbitration. Waiting too long to make this assessment could very well result in the court finding that you waived your right to arbitrate.

Jodi R. Bohr, an attorney with Tiffany & Bosco, P.A., practices employment and labor law, with an emphasis in HR management counseling, litigation, class actions, and other HR matters. Jodi's determination and responsive style consistently earn client trust and confidence as well as successful results. She may be reached at jrb@tblaw.com or 602-255-6082. ■

PAYROLL VIOLATIONS

Making peace with piece-rate pay

AK	**AZ**	HI	NV	OR	WA

by Jill Chasson, Coppersmith Brockelman PLC

When determining how to compensate nonexempt employees, employers have a variety of options. Paying an hourly rate is certainly the most common, but other methods include salary, commissions, daily rates, and piece-rate pay (sometimes referred to as piece work). Piece-rate pay refers to a system in which employees are paid a fixed amount per item of work completed per day or per week. Unfortunately, some employers don't realize piece-rate workers are covered by minimum wage and overtime rules—or worse, they ignore the rules. This can result in substantial liability if employees file suit or complain to the U.S. Department of Labor (DOL). One Arizona company recently learned this lesson in a very expensive and burdensome way.

Background

Piece-rate pay is most commonly used by manufacturing companies and other types of businesses in which outputs can be measured. For example, employees may be paid based on the number of products assembled, the number of autos serviced (and/or type of work done), or the number of appliances installed.

Like all nonexempt employees, piece-rate workers are covered by the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), which means although piece-rate workers aren't paid based on the hours they work, employers must still track each employee's hours (in addition to total