

New Tx. Supreme Ct. Decision

ARBITRATION POLICY ENFORCEABLE EVEN IF NOT SIGNED BY EMPLOYEES

By JoAnne Ray *

In a decision that simplifies a Texas employer's implementation of mandatory arbitration, the Texas Supreme Court recently ruled that employers may impose a mandatory arbitration policy merely by circulating a well-drafted arbitration policy and advising employees that mandatory arbitration is a new condition of employment.

The unanimous decision, authored by Chief Justice Tom Phillips, was handed down in the case of *In Re Halliburton*, 45 Tex. Sup. J. 720 (May 30, 2002). Halliburton, which pioneered the use of mandatory arbitration programs in Texas, had implemented one in 1993. In November 1997, Halliburton modified its arbitration policy and sent it to employees again, telling them that their continuing to work after January 1, 1998 (approximately 60 days after receipt of the policy) would constitute their acceptance of the policy.

The plaintiff, James D. Myers, was a 30-year Halliburton employee who claimed that he was demoted from his position as a welding supervisor due to his age and race. Myers brought suit in state court alleging violations of the Texas Commission on Human Rights Act. He admitted that he had continued to work after receiving a copy of Halliburton's mandatory arbitration policy, but claimed that he did not understand the document he was given describing the policy. Halliburton asked the court to compel arbitration as required by its mandatory arbitration policy.

After the district court refused to compel arbitration and the appeals courts upheld its decision, the Texas Supreme Court reversed, ordering the trial court to compel the employee to arbitrate. The Court applied the Federal Arbitration Act—which normally applies to all arbitration agreements unless they specify that state law will govern—and noted that under that Federal Arbitration Act, arbitration agreements are enforceable if they involve interstate commerce (which virtually all employment does) and are valid under principles of state contract law.

Applying Texas contract law principles, the court cited its 1986 decision in *Hathaway v. General Mills*, in which it recognized "that when an employer notifies an employee of changes to the at-will employment contract and the employee continues working with knowledge of the changes, he has accepted the changes as a matter of law." The court thus found Halliburton's arbitration policy enforceable under the basic contract law principles of offer and acceptance. The court rejected the employee's argument that the policy was unfair because the employer imposed it unilaterally and he had no opportunity to negotiate it but rather was told to accept it or leave. "[A]n employer may make precisely such a 'take it or leave it' offer to its at-will employees," the court wrote.

This decision is the latest case from state and federal courts with jurisdiction in Texas to uphold an employer's right to require its employees to forego litigation in favor of mandatory arbitration. These cases include *Circuit City v. Adams*, 532 U.S. 105 (2001) (ruling that employees who sign mandatory arbitration agreements can be forced to arbitrate under the

Federal Arbitration Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (recognizing that civil rights claims may be the subject of mandatory arbitration); *Rojas v. TK Communications*, 87 F.3d 745 (5th Cir. 1996) (the first Fifth Circuit decision ruling that an arbitration provision in a written employment contract can be enforced); and *Miller v. Public Storage Management*, 121 F.3d 215 (5th Cir. 1997) (noting that the language of the Americans with Disabilities Act encourages arbitration).

Even before the Texas Supreme Court's Halliburton decision made it easier to implement arbitration policies, they had long ago become standard at most Fortune 500 companies. In fact, a Cornell University study in 2000 found that over 70 percent of Fortune 500 companies already had such policies in place.

The benefits that mandatory arbitration policies offer to employers include:

- Prevention of "runaway" jury verdicts;
- Usually less expensive than litigation;
- More private than litigation;
- Faster than litigation;
- Saving of management time;
- Preservation of office relationships by offering informal and less-acrimonious setting for dispute resolution;
- Prevention of class action litigation, as claims generally may not be brought as class actions in arbitration.

Although in the above decisions the courts have made it clear that they will enforce mandatory arbitration policies in employment cases, that does not mean that any boilerplate arbitration clause will do. The arbitration policies enforced in these cases are well-crafted and tailored to the particular work force involved, and they cover key points such as arbitration fees, access to counsel, arbitrator selection, and pre-arbitration discovery. If you would like to discuss implementation of a mandatory arbitration program in your workplace, please contact JoAnne Ray at (713) 308-0149 or Erin Patterson at (713) 308-0106.

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ADAMS AND REESE LLP represents employers in all phases of employee relations, including defending claims arising under state and federal labor and employment laws; assisting employers in drafting and seeking enforcement of employment contracts, policies and handbooks; and providing ongoing advice, counsel and training to clients regarding employment issues.

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