

AGREEMENTS TO ARBITRATE EMPLOYMENT DISPUTES IN NEW MEXICO

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An increasing number of employers require employees to sign mandatory arbitration agreements. These agreements require that both parties give up their rights to have disputes resolved in the courtroom, in favor of having such disputes resolved by private arbitrators. This article lays out the basics of arbitration, addresses the "pros and cons" of arbitration agreements, and examines some recent New Mexico decisions regarding the enforcement of such agreements.

What is an arbitration agreement?

An arbitration agreement is a mutual agreement between an employer and an employee to have disputes resolved by an arbitrator, rather than a judge or jury.

These agreements are typically done by means of clauses in employment contracts, stand-alone agreements, provisions in employee handbooks, and even employment application forms. The language of such agreements varies from a single sentence to multi-page agreements. If drafted correctly, an arbitration agreement can cover all legal disputes (federal and state, statutory and common law) and prevent the dispute from being litigated in court, but an agreement that does not pass legal muster may not be enforceable.

How arbitration works:

A typical arbitration of a discrimination case proceeds as follows. The employer and the employee sign an agreement that any future dispute between them will be resolved through arbitration. Later, a dispute arises in which the employee claims that he has been the victim of discrimination. The employee sends a written notice of arbitration, and the employer responds. The parties arrange for the appointment of an arbitrator, who schedules a hearing date and sets forth the pre-arbitration procedures. The two parties exchange relevant information and a list of witnesses. The hearing is in a conference room. Each party makes an opening statement, and calls witnesses and, and documents are presented. At the end of the hearing, either each party makes an oral closing argument, or there will be filing of written briefs at a later date. Some time later, the arbitrator mails to each party a written opinion and award and a fee for services and expenses. The dispute is now resolved, and there is no appeal.

As arbitration agreements have become more common, there has been debate as to whether such agreements are more advantageous to one side or the other. Employers or employees considering whether or not to enter into such an agreement may want to consider the following:

Possible advantages of arbitration for an employer/disadvantages for an employee:

- An arbitrator may be less likely to award excessive damages. The danger of a "runaway verdict" may be less with an arbitrator than with a jury.
- Discovery and pre-trial litigation are more limited than in court litigation, reducing litigation expenses and demands on time. One of the common complaints about the legal system is the time and expense associated with taking a case to trial. Furthermore, because many statutory employment claims allow a successful plaintiff to recover attorneys' fees, a lengthy court process can be a "double whammy" for unsuccessful employers.

- Arbitration may provide more privacy to the parties. The court process is a matter of public record, while arbitrations are typically private.
- Arbitration is faster than the court system. While taking a case through trial may take years, an arbitration can typically be completed within several months of the initial filing, or even less in some cases.
- A well-drafted arbitration clause can keep practically every employee-employer dispute out of court. This includes cases involving federal discrimination statutes (e.g., Title VII, ADA, ADEA), federal wage and hours laws, state common law claims involving contract rights and torts (e.g., wrongful discharge), state statutes, and state constitutional provisions.
- Arbitration is a somewhat more informal process.
- The employer has input into the decision-maker. Rather than relying on a jury or a judge who may be "pro-employee," the employer can insert a clause in the agreement requiring input from both sides on who will serve as arbitrator.
- An arbitrator may be more experienced in dealing with employment disputes. Employment law is constantly evolving, and the law offers a range of defenses that are not available in other types of litigation. An arbitrator who specializes in arbitration law may be more familiar with these defenses than a judge who may or may not have presided over many employment law trials.

Possible disadvantages of arbitration for an employer/advantages to an employee:

- Discovery and pre-trial litigation are more limited than in court litigation. Thus, a plaintiff who wishes to bolster his or her case through discovery that may turn up other similar claims or a pattern and practice of bad behavior by a supervisor may be more limited in discovery than he or she would be in court.
- An easily accessible, less expensive forum for employee claims may result in an increase in the number of such claims.
- Arbitrators may be more likely to "split the baby," compromising strong cases for employers.
- Arbitrators may be less receptive than courts to technical and "procedural" defenses and rarely eliminate claims on motions to dismiss or motions for summary judgment.
- The scope of review of an arbitrator's decision is more limited than the scope of review of a decision by a judge or jury. An employer may find itself bound by an bad arbitration award, whereas if it were in court, an unfavorable decision could be appealed and possibly overturned.
- Employees or applicants may be "turned off" by such an agreement.
- Arbitration agreements do not protect employers from parallel or subsequent lawsuits by the EEOC.

Much of the litigation that has surrounded arbitration agreements in the employment context surround whether or not the agreements are enforceable as written. An arbitration agreement is a written contract, and is interpreted in court like any other contract. Many early arbitration

agreements were written in a way that was strongly in favor of the employer. Courts have been much more likely to enforce arbitration agreements if they are fair to both sides and do not unfairly restrict the legal rights of employees. Courts may consider the following factors in deciding whether or not to enforce an arbitration agreement:

- Does the agreement, or some other writing, give the employer the unilateral right to change the terms of the agreement? This may come up when an employment handbook gives the employer the right to change the terms and conditions of employment without specifically excluding the arbitration agreement.
- Was the arbitration agreement fairly explained to the employee? Conversely, was the agreement "buried" in the employment handbook or in the fine print in some other document?
- Did the employee sign a separate acknowledgement of the arbitration agreement?
- Does the agreement fairly set forth its terms, without "legalese"?
- Is the agreement binding on both the employer and employee?
- Does the agreement meet minimum fairness and due process standards? For example, does the agreement state that (1) the arbitration will be heard by an impartial arbitrator chosen by agreement of both the employee and the company; (2) there will be basic minimum standards for exchange of information; (3) the parties may have legal counsel, at their own cost; (4) the arbitrator will have the authority to award any remedy that would have been available to the employee had he or she litigated the dispute in court under applicable law.
- Is the arbitration process so expensive to an employee as to be a barrier that prevents employees from making claims?
- Does the agreement specifically state that the parties are waiving their rights to have their claims decided by a judge and jury?
- Is the agreement supported by consideration?

Significant New Mexico cases regarding arbitration in the employment context:

Piano v. Premier Distributing Co.,
2005-NMCA-018, 137 N.M. 57, 107 P.3d 11

Vickie Piano began working for Premier Distributing as an administrative assistant on October 21, 1986. During her employment, Plaintiff was presented with the Arbitration Agreement to sign with the understanding that if she did not sign it, she would be fired. Plaintiff signed the Arbitration Agreement on January 7, 1999. After she was subsequently terminated, she filed suit for wrongful termination. Premier moved to dismiss the Complaint and enforce the arbitration agreement. The district court denied the motion, and the Court of Appeals upheld the district court, finding the agreement to be unenforceable.

The Court noted that the arbitration agreement, like any contract, required valid consideration. A contract without consideration is considered "illusory" and thus unenforceable. Premier argued that either its continued at-will employment of Premier or its reciprocal promise to submit to arbitration was sufficient consideration to support enforcement of the Arbitration Agreement. The court found that neither form of consideration was sufficient. As to the continued at-will employment, the court ruled as follows:

Plaintiff was an at-will employee before she signed the Arbitration Agreement and she remained an at-will employee after she signed the Arbitration Agreement. The implied promise of continued at-will employment placed no constraints on Defendant's future conduct; its decision to continue Plaintiff's at-will employment was entirely discretionary. Therefore, this promise was illusory and not consideration for Plaintiff's promise to submit her claims to arbitration.

Id. at ¶ 8 (citations omitted). Although Defendant argued that the Court had ruled in a previous case, *Richards v. Allianz Life Ins. Co. of North America*, 2003-NMCA-001, 133 N.M. 229, 62 P.3d 320 (see below) that the continuation of an employment relationship did constitute sufficient consideration for an arbitration agreement, the Court disagreed. The Court distinguished *Richards* because it had involved a succession of employment contracts, rather than at-will employment.

As to the mutual agreement to arbitrate, the Court ruled that there was no such agreement because the language of the agreement could be read to give the employer the right to modify the terms of the agreement at its sole discretion.

Salazar v. Citadel Communications Corp.
2004-NMSC-013, 135 N.M. 447, 90 P.3d 466.

Citadel Communications provided its employee, Kathleen Salazar, with an Employment Handbook which, among other things, required binding arbitration of all disputes with the Company. According to the Handbook, the arbitration is to proceed in accordance with an Agreement to Arbitrate that is "annexed," or appended, to the Handbook. The Company simultaneously reserved the right to modify, unilaterally and at any time, any of the Handbook's provisions save the employee's at-will status. Because this reservation extended to the arbitration provision of the Handbook, it and the annexed Agreement to Arbitrate represent an illusory and unenforceable promise.

Under general New Mexico contract law, an agreement that is subject to unilateral modification or revocation is illusory and unenforceable. This principle applies equally to agreements to arbitrate. The party that reserves the right to change the agreement unilaterally, and at any time, has not really promised anything at all and should not be permitted to bind the other party.

The court relied primarily on the terms of the Employee Handbook itself. The Handbook, which covers most aspects of Salazar's employment, also provides for binding arbitration of disputes. That arbitration is to be accomplished "in accordance with the Agreement to Arbitrate Claims entered into between the Company and its employees." The "form" of this Agreement to Arbitrate is "annexed to" the Employee Handbook. The court thought it fair to say that under the common understanding of the word "annex," that which has been annexed to a larger unit has become part of that unit.

The Employee Handbook, therefore, provided for binding arbitration of disputes and annexes, or attaches, the form of an agreement which sets forth the manner in which the arbitration is to be accomplished. Because other language of the Employee Handbook gives the Company the right to modify any of its provisions unilaterally at any time, the court concluded that the Company has retained the authority to unilaterally modify both the arbitration section of the Handbook and the annexed Agreement to Arbitrate, which is merely the form of the agreement set forth in the Handbook. For that reason, the court held that the proffered Agreement to Arbitrate, when considered in the proper context of the Employee Handbook, is illusory and unenforceable.

Heye v. American Golf Corp., Inc.
2003-NMCA-138, 134 N.M. 558, 80 P.3d 495

Melissa Heye (Plaintiff) was hired for a position in the pro shop at the Paradise Hills Golf Course, a club managed by American Golf Corporation, Inc. AGC gave Plaintiff a number of documents, including the Co-Worker Alliance Handbook (the handbook). Page 20 of the handbook contained information about AGC's arbitration policy; page 23 of the handbook included an acknowledgment form with a statement that the employee agrees "to be bound by the arbitration policy set forth on page 20 of this handbook." Plaintiff signed the form. She worked for AGC until January 24, 2000. Plaintiff then filed a charge of employment discrimination with the New Mexico Human Rights Division. Thereafter, on September 15, 2000, she filed a complaint in district court against AGC and her immediate supervisor alleging sexual discrimination and hostile work environment, sexual harassment, retaliation, retaliatory discharge, negligent supervision and retention, battery, and intentional infliction of emotional distress.

AGC sought to have the matter referred to arbitration. The Court refused, and resolved the matter using basic contract law. "A valid contract must possess mutuality of obligation. Mutuality means both sides must provide consideration. Consideration consists of a promise to do something that a party is under no legal obligation to do or to forbear from doing something he has a legal right to do. Furthermore, a promise must be binding. When a promise puts no constraints on what a party may do in the future--in other words, when a promise, in reality, promises nothing--it is illusory, and it is not consideration.

The court noted that the employer expressly reserved for itself the "right to amend, supplement, rescind or revise any policy, practice, or benefit described in this handbook--other than employment at-will provisions--as it deems appropriate." The court held that the agreement, in essence, gave AGC unfettered discretion to terminate arbitration at any time, while binding Plaintiff to arbitration. AGC remained free to selectively abide by its promise to arbitrate; the promise, therefore, is illusory.

DeArmond v. Halliburton Energy Services, Inc.
2003-NMCA-148, 134 N.M. 630, 81 P.3d 573.

In late 1997, Halliburton adopted a company-wide Dispute Resolution Program (DRP) with an effective date of January 1, 1998. Thereafter, in November 1997, Halliburton mailed a notice of the DRP to all employees at their addresses of record. The mailing included a memorandum, a twenty-two-page Plan Document, the DRP Rules, a summary brochure, and a cover letter of explanation. The cover letter stated that "[t]he Halliburton Dispute Resolution Program binds the employee and the Company to handle workplace problems through a series of measures designed to bring timely resolution." The memorandum further explained that as of January 1, 1998, all "Halliburton employee disputes" would be referred through the DRP for resolution, that both Halliburton and DeArmond would be bound by the agreement, and that "[y]our decision to ... continue your current employment after January 1, 1998 means you have agreed to and are bound by the terms of this Program as contained in the Plan Document and Rules (all enclosed)." DeArmond continued employment after January 1, 1998.

After DeArmond sued Halliburton over an employment dispute, Halliburton asked the court to enforce the arbitration agreement. DeArmond said he should not be bound by the agreement because Halliburton could not prove he received it.

The Court held that the issue was whether DeArmond had actual knowledge of Halliburton's offer and Halliburton's invitation that the offer be accepted by performance. The Court observed that Halliburton did not provide an arbitration agreement for DeArmond to sign, nor is there an acknowledgment form indicating that he received or read the documents. DeArmond's argument was, in essence, that without a showing that he knew about the proposed new contract terms, there

can be no proof that he accepted the offer. The court agreed and refused to enforce arbitration.

The court did note, however, that an employer may still insist on prospective changes in the terms of employment as a condition of continued employment. Continued employment, however, will not constitute acceptance, unless the employer proves that the employee actually knew of the modification.

Richards v. Allianz Life Ins. Co. of North America
2003-NMCA-001, 133 N.M. 229, 62 P.3d 320

Stephen T. Richards was a long-time agent for Allianz Life Insurance of North America (Allianz). A dispute arose between them concerning commissions due Richards. Allianz filed a demand for arbitration of the issue. In response, Richards filed an application with the district court to stay the arbitration asserting that the agreement relied upon by Allianz was not enforceable against him. The court ruled for Allianz, finding that there was valid consideration in the continuation of the insurer/agent relationship.