

Electronic Signatures: The Next Battleground for Employee Arbitration Agreements With Class Action Waivers

Contributed by **Michael S. Kun**, Epstein Becker Green

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Since the US Supreme Court's seminal decision in *Epic Systems Corp. v. Lewis* (2018) 584 U.S. ___, an increasing number of employers have implemented arbitration agreements with class and collective action waivers. Those agreements have been effective in convincing courts to dismiss class or collective actions brought by plaintiffs who have signed such agreements.

While a well-written arbitration agreement with a class and collective action waiver should be enforceable so long as interstate commerce is involved, thus triggering application of the Federal Arbitration Act (FAA) and *Epic Systems*, employers have learned that there is a new battleground in enforcing these agreements—whether the employee signed the agreement in the first place.

That issue may give employees a way of escaping their arbitration agreements—and give those judges who do not enjoy the way employers use arbitration agreements a way to avoid enforcing them. At the crux of this dispute is technology. Or, more specifically, electronic signatures.

Not too very long ago, employees typically signed their pre-hire documents by hand, including arbitration agreements. If an employer wanted to enforce an arbitration agreement, it attached a copy of the hand-signed agreement to an affidavit or a declaration. Except in somewhat rare circumstances where employees claimed those signatures were forged or traced, there typically was little dispute about whether employees had actually signed the agreements. The battle was over whether the arbitration agreement was enforceable.

That is not the case with electronic signatures, which more and more employers use in having employees complete pre-hire documents, including arbitration agreements. Electronic signatures are easier to obtain, particularly with remote workers. And electronic signatures are easier to store, particularly as employers move to paperless workplaces. But electronic signatures are more difficult for employers to establish and, therefore, to enforce.

Technically, electronic signatures are to be given the same weight as handwritten signatures. **15 U.S.C. § 7001(a)(2)**. But how does an employer establish that the electronic signature on an agreement was actually entered by the employee against who it is trying to enforce the agreement – particularly if the employee denies signing it or does not recall doing so? Unlike their own handwritten signatures, employees are highly unlikely to recognize an electronic signature as their own.

As employers in some jurisdictions know (such as California), when faced with motions to enforce arbitration agreements and to strike class claims, employees (and their counsel) are regularly asserting that they never electronically signed arbitration agreements or do not recall doing so. When that happens, the employer has to convince the court that the employee in fact signed it—and that the electronic signature was not the act of someone other than the employee.

Generally, an employer need only establish by a “preponderance of the evidence”—that is, that it is more likely than not—that the employee was the one who electronically signed the arbitration agreement. Practically, however, some courts are holding employers to a much higher standard, essentially asking the employer to prove that it was not possible for anyone else in the world to have accessed the arbitration agreement and signed it on behalf of the employee.

Employers would be wise to put systems in place to bolster their arguments that a particular employee—and only that particular employee—could have electronically signed the arbitration agreement. These would include the following:

- Asking the employee to confirm that his or her personal email address is not a shared email address before sending a link to pre-hire documents to the employee's personal email address
- Sending a link to the employee's personal email address to access pre-hire documents
- Allowing the employee to establish his or her own unique username
- Allowing the employee to establish his or her own unique password
- Ensuring that no one else in the company has access to the employee's link, username or password
- Ensuring that no company employee sits with an employee while he or she is completing pre-hire documents online, and not allowing company employees to complete those online documents for the employee
- Tracking the URL of the computer being used to access and complete the documents
- Having the employee complete a form confirming his or her agreement to use an electronic signature
- Tracking the date and time each pre-hire document is electronically signed

- Sending the employee a confirming email identifying the documents he or she signed – or sending the employee copies of all of those documents
- Retaining records of all of these activities

Even with these security precautions in place, employees may still contend that they did not sign their arbitration agreements or do not recall doing so. And when that occurs, employers should consider asking the court to conduct an evidentiary hearing to assess the employee's credibility, particularly if the employee also electronically signed other documents containing private information at the same time that only he or she would know, such as a Social Security number, bank routing information, and contact information for friends and family.