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Legal Issues Raised by the Electronic Delivery of Stock Award Agreements

BY MIKE S. MELBINGER AND JOHN ARENDSHORST

Each year, more companies deliver employees' equity award notices and/or agreements to them electronically. Providing these (and other) documents electronically saves the company time, effort, and money. (It saves trees too.)

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However, there is a right way and a wrong way to provide award agreements and other required documents electronically. The right way is both legally compliant and maximizes the enforceability of the provisions in these agreements. The wrong way is to just do it.

The U.S. Securities and Exchange Commission and U.S. Department of Labor impose certain legal requirements on electronic delivery, as does the U.S. Electronic Signatures in Global and National Commerce Act (''E-Sign Act'').[1] This article also will mention a few other drafting and technical issues that companies should consider to protect themselves. By creating electronic award agreements that fully inform employees of the award agreement and allow them to manifest their assent to the terms, companies can minimize the risks associated with electronic communications while enjoying the benefits.

The E-Sign Act states the basic rule that electronic documents and signatures are equivalent in validity to those in paper and ink.[2] The E-Sign Act defines ''electronic signature'' as ''an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.''[3] This definition allows for a variety of methods by which a party can manifest assent to a contract. However, companies still should be cautious in the way they present electronic documents to ensure legal compliance and enforceability. Certain traps for the unwary can be illustrated by a series of analogous cases over binding arbitration policies between companies and their employees.

[1] 15 U.S.C. §§ 7001-7031.
[2] 15 U.S.C. 7001(a).
[3] 15 U.S.C. 7006(5).

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In *Caley v. Gulfstream Aerospace Corp.*, the Eleventh Circuit Court of Appeals held that an e-mail modifying the company's dispute resolution policy constituted an ''agreement in writing,'' and was enforceable.[4] The court held that the e-mail was a binding contract because:

- the company widely communicated its content through several e-mails and supplemented the e-mails with postings on bulletin boards in its facility,
- the terms of the policy were clear and left little room for interpretation, and
- the e-mail clearly established that employees would bind themselves to the new policy by continuing to work.[5]

Importantly, the Eleventh Circuit also determined that an electronic ''click-acknowledgement'' was an effective means for employees to indicate acceptance of the new policy and, therefore, no signature was necessary to satisfy written agreement requirements.[6]

Lessons learned:

- Communicate clearly.
- Repeat the communication.
- Require an acknowledgement.

Ellerbee v. Gamestop, Inc. is another case that provides helpful standards for adequacy of electronic communications.[7] In this case, the Federal District Court for Massachusetts stated that an employer must give ''some minimal level of notice to the employee'' of a change in terms of employment, and states that the sufficiency of the notice turns on whether the employer's communication ''would have provided a reasonably prudent employee notice.'' In *Skirchak v. Dynamics Research Corp.*, the First Circuit focused on ''adequacy of notice'' when analyzing whether a waiver of rights was proper.[8] The court applied a standard unconscionability analysis, determined on a facts and circumstances basis, looking at the ''setting, purpose, and effect'' of the agreement.[9]

Campbell v. Gen. Dynamics Gov't Sys. Corp., provides an example of how a company's failure to properly draft and present electronic documents can prevent enforceability.[10] In *Campbell*, the First Circuit found that a company-wide e-mail announcement of a new, compulsory arbitration policy did not afford the plaintiff/employee, ''some minimal level of notice'' that his continued employment would effectively waive his right to pursue claims in a judicial forum.[11]

The e-mail in question described that the last step of the company's approach to dispute resolution was arbitration by a qualified and independent arbitrator, but did not indicate that (i) the policy would eliminate an employee's right to access a judicial forum, or (ii) the disputes covered by the policy included federal statutory claims.[12]

The e-mail also neglected to specify that the arbitration provision of the policy would become binding upon continued employment.[13] The company did not require employees to acknowledge that they had received, read and agreed to the embedded policy.[14] The company described the more substantive aspects of the policy in a summary document and handbook incorporated into the e-mail as embedded links, rather than detailing them in the e-mail itself.[15]

Because of these factors, the First Circuit held that the company did not provide the employee with sufficient notice for the arbitration agreement to be contractually binding.[16] In making its determination, however, the court specifically stated that its decision ''should not be read as a general denunciation of e-mail as a medium for contract formation in the workplace.''[17]

While other cases regarding binding employee arbitration agreements such as *Caley*, *Skirchak*, and *Ellerbee*[18] make clear that the holding in *Campbell* is narrow, and does not turn on whether the communication was in electronic form. Collectively, federal courts have held that so long as an employer clearly communicates in the text of an e-mail how an employee's rights are affected by a policy, and the manner of agreeing to the policy is set out in the e-mail, an employee's assent to such a policy is more likely to be held valid no matter how such assent is manifested.

Taking these cases together, it seems clear that electronically delivered documents can be enforceable even if not ''signed'' by an employee. While all these cases involved binding arbitration agreements, their holdings may be applied to any electronic communication that is intended to be enforceable as a written instrument, such as equity award notices. An employer may increase the chances of an e-mail communication being considered enforceable by:

- Requiring a recipient to acknowledge receipt of the e-mail;
- Requiring a recipient to acknowledge understanding of the contents of the e-mail and assent to the new policy, or in the alternative, clearly stating that employees acknowledge acceptance of the new policy by remaining employed;
- Emphasizing in the e-mail that the new policy is important, and if the e-mail does not contain the entire policy, that the links or attachments contain important information concerning a new and binding policy; and
- Tracking whether employees have acknowledged or assented to the policy.

In addition to the Federal E-Sign Act, every state has its own laws regarding enforceability of electronic communications. 47 states have adopted some or all of the Uniform Electronic Transactions Act (UETA), while Illinois, New York, and Washington have their own state laws pertaining to electronic transactions.[19] Employers

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[4] *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1369 (11th Cir. 2005).

[5] *Id.* at 1364-65.

[6] *Id.* at 1369.

[7] *Ellerbee v. GameStop Inc.*, 604 F. Supp.2d 349 (D.Mass., 2009).

[8] *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007).

[9] *Id.* at 59.

[10] *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005).

[11] *Id.* at 546.

[12] *Id.* at 548.

[13] *Id.*

[14] *Id.*

[15] *Id.* The federal district court deciding *Ellerbee* cited this as a critical factor distinguishing its case from the First Circuit's holding in *Campbell*.

[16] *Id.* at 557.

[17] *Id.* at 559.

[18] While this article presents them before *Campbell*, all these cases occurred subsequent to *Campbell* and specifically distinguished the First Circuit's ruling.

[19] National Council of State Legislatures: The Uniform Electronic Transactions Act, http://www.ncsl.org/default.aspx?

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should take note of the laws in their jurisdiction as well as these general principles to protect themselves when communicating award agreements electronically. If they do so, then electronic documents are equivalent in validity to those in paper and ink.

tabid=13484. Illinois, for example, requires that secure electronic signatures must be (1) created in a manner that was commercially reasonable under the circumstances; (2) be applied by the relying party (to verify the signature) in a trustworthy manner; and (3) reasonably and in good faith be relied upon by the relying party. 5 Ill. Comp. Stat. 175/10-110(a).