NELSON HARDIMAN
HEALTHCARE LAWYERS

Take It or Leave It: A Relic in California Arbitration Provisions

Like other employers, many healthcare facilities simply hand new hires policy handbooks that obligate new employees to agree to their terms. One aspect of these handbooks that has proven to be an issue is the arbitration provision. Based on recent California cases, employers will no longer be able to take for granted the enforceability of take-it-or-leave-it arbitration policies. Two recent cases handed down in 2011 provide guidance on potential factors that could invalidate arbitration provisions.

In *Wherry, et al. v. Award, Inc.*,[1] the Court of Appeal addressed an arbitration provision in an independent contractor agreement that was handed out with the instruction that the worker was required to sign it if he wanted to work. The court found that the provision coupled with the instruction, rendered the terms procedurally and substantively unconscionable and invalidated the provision altogether. The absence of a meaningful opportunity to review or negotiate the agreement's terms was decisive as to procedural unconscionability. It was substantively unconscionable because the terms were overly harsh and unfairly one-sided when the company imposed costs of arbitration on the workers. As a result, the court invalidated the provision.

In *Zullo v. The Superior Court of Santa Clara County*,[2] another case involving a take-it-or-leave-it approach to employment terms, the Court of Appeal assessed the validity of a questionable arbitration provision. The court found that simply sticking an arbitration provision in an employee handbook created a contract of adhesion, that is, one that presented no opportunity for negotiation. In this case, the arbitration provision in the handbook required the use of American Arbitration Association (AAA) rules, but the employer did not provide the rules to the employee. Additionally, the court stated the policy was one-sided because it did not impose a mutual obligation to arbitrate. This provision was likewise invalidated.

These decisions have compelled many healthcare providers to reconsider their hiring process and company policies. There are four things employers should consider changing in 2012. First, employers must allow sufficient time for the employee to review and inquire about an agreement that contains an arbitration provision. They should tell the employee to take it home for the night and mull the terms over.

Second, the agreement must be as fair to the employee as possible. For example, the arbitrator must be neutral and separate from the company; the arbitration agreement should not limit the employee's abilities to conduct discovery of facts and evidence; it should require a written decision so that it may be reviewed by a court; it should not require the employee to pay costs or fees not normally incurred if litigated in court.

Third, arbitration provisions should be explicit and impose the same rules upon the employer as they do on the employee. The courts are likelier to invalidate agreements that are one-sided in their requirements for the employee, limiting a fair chance for employees to vindicate their rights while affording wide latitude to the employer.

Finally, when using AAA, JAMS or any other method of arbitration, the related rules must be provided to the employee with the employee handbook. This has never been a requirement but is arising because many employees are claiming unfamiliarity with the system of arbitration being imposed upon them. By giving employees the rules at the beginning of employment the employer ensures that, should arbitration be necessary, the employee understands what his rights are from the beginning.

It is important to seek advice and periodically revisit company handbooks and employment policies to make sure they are compliant with recent developments and changes in the law. Healthcare facilities should assess company policies to determine whether the desired method of resolving a dispute will be enforceable in the event of an employment dispute.

---

[1] 192 Cal.App.4th 1242 (2011)
[2] 127 Cal.Rptr.3d 461 (2011)