Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Designing An Effective Electronic HR System

Law360, New York (April 16, 2009) -- As employee electronic signatures and records become more prevalent in the work place, employers are more likely to face challenges to these signatures and records by their employees.

Our work with clients, and our analysis of the court decisions that follow, demonstrate that, through the use of a well thought out eletronic human resources system, companies can actually design and implement a system, whereby the employment notices, policies and agreements that employees sign, review and store electronically are as enforceable, if not more so, than those signed in wet ink.

As discussed more fully below, the key to creating admissible and enforceable electronic documents is to ensure that the electronic HR system can demonstrate, conclusively, that an employee received notice of and consented to the electronic notice, policy or agreement.

Lessons Learned from Campbell v. General Dynamics: Provide Adequate Notice of Changes to Terms and Conditions of Employment

While this may seem obvious to an employer, as the Campbell v. General Dynamics Government Systems Corporation[1] case teaches, what seems obvious is not always followed. In that instance, the employer's failure to provide adequate notice resulted in an unenforceable binding arbitration agreement.

Nevertheless, while the court in General Dynamics did not enforce the binding arbitration agreement, the court did provide a roadmap for employers on how to design an e-mail process, or, for that matter, an entire electronic HR system, that can bind employees to electronic notices, policies and agreements in the employment context.

In that case, General Dynamics sought to require all of its employees, as a condition of their continued employment, to resolve all of their employment disputes or claims through binding arbitration.

General Dynamics probably decided that the best, and cheapest, way to notify all of its employees of this change was through e-mail.

The company designed a process whereby each employee received an e-mail with links connecting the employee to the new policy. The actual policy and the revised employee handbook were not, however, contained in the text of the e-mail.

When Mr. Campbell attempted to litigate his discrimination on the basis of disability claim in court, General Dynamics argued that the new policy required Mr. Campbell to litigate the dispute in binding arbitration, and moved to compel arbitration.

Mr. Campbell opposed the motion by arguing that the e-mail sent from General Dynamics provided insufficient notice of the policy change, and, therefore, he was not bound to it.

The District Court and the First Circuit Court of Appeals agreed with Mr. Campbell, both holding that General Dynamics' e-mail did not constitute sufficient notice to Mr. Campbell so that his continued employment would constitute a waiver of his right to bring his employment claims in court.

The courts found General Dynamics' notice insufficient for a number of reasons, each of which should be instructive to any employer looking to design such a system for its employees:

- In instituting the employment policy change, General Dynamics failed to follow its typical procedure used to communicate to employees significant changes in the terms of their employment, e.g., by memorializing such significant changes in writing, requiring the employee's "wet ink" signature and then placing the signed writing in the employee's personnel folder.

- General Dynamics failed to elicit a response or acknowledgment from the employees that they had read the e-mail, such as requiring employees to acknowledge receipt or to click a box on a computer screen indicating that the employee had read the policy.

- General Dynamics failed to state in the substance of the e-mail that the new arbitration policy had contractual significance.

- General Dynamics failed to state in the substance of the e-mail that the policy contained an arbitration provision that would waive the employee's right to bring work place disputes in court.

Based on these failures, the court held that, "a reasonable employee could read the e-mail announcement and conclude that the Policy presented an optional alternative to litigation rather than a mandatory replacement for it."[2]

Notwithstanding the court's decision not to enforce the arbitration agreement against Mr. Campbell, the court did explicitly recognize, an "e-mail, properly couched, can be an appropriate medium for forming an arbitration agreement."[3]

The lesson of General Dynamics to employers is simple: design and implement an electronic HR system that clearly and explicitly delivers to employees the terms, conditions or changes in their employment, allows the employer to prove that its employees received notice of these terms, conditions or changes through the system and, therefore, binds the employee to these terms, conditions or changes.

Kerr v. Dillard: The Arbitration Agreement Was Signed ... Or Was It?

That is seemingly what Dillard Stores must have thought it did when implementing its electronic HR system, but the court in Kerr v. Dillard disagreed.[4]

Starting in October of 2005, Dillard began to require all of its store associates to memorialize their employment arbitration agreements by executing electronic arbitration agreements through an intranet computer system, mydillards.com. Dillard gave each of its associates a unique, confidential password that was created by and known only to the associate.

Once on mydillards.com, an associate would execute his or her arbitration agreement by: (1) entering his or her social security number or associate identification number (AIN); (2) entering his or her secure password; and (3) clicking the "accept" option at the bottom of the arbitration agreement screen.

An e-mail would then be immediately sent to the associate's Dillard e-mail account, confirming that the associate had signed the arbitration agreement.

Notwithstanding these security features, Dillard also gave store supervisors the ability to log in to an associate's account by resetting the associate's confidential password and logging in under the associate's default password.

Once Dillard implemented its electronic HR system, store personnel repeatedly asked Ms. Kerr, who worked at a Dillard store in Oak Park, Kan., to log on and electronically execute her arbitration agreement, but she refused.

Ms. Kerr believed that agreeing to arbitrate employment disputes had not been a requirement when she was first employed at Dillard, and she was concerned about "giving up any legal rights."

Approximately five months later, Ms. Kerr missed a day of work. Ms. Kerr attributed this absence to not knowing how to access her work schedule through mydillards.com.

Following this absence, on April 28, 2006, Ms. Kerr's supervisor showed Ms. Kerr how to access her schedule on mydillards.com through a computer kiosk in Dillard's employee break room.

Dillard's IT records show that it was at or near this time that Ms. Kerr's employment arbitration agreement was signed and the confirmation e-mail sent to Ms. Kerr's e-mail account with Dillard was opened.

Dillard's IT records also showed that the e-mails on the plaintiff's intranet account were opened on only three occasions: Feb. 10, April 28 and Aug. 24, 2006. Ms. Kerr denied ever having signed the arbitration agreement or having received the confirming e-mail.

Following Ms. Kerr's termination, she brought race discrimination claims against Dillard. Dillard moved to compel arbitration.

While the court recognized the validity of electronic signatures under Kansas' version of UETA, the court also held that Dillard could not meet its burden of proof at trial to show, by a preponderance of the evidence, that Ms. Kerr knowingly and intentionally executed the arbitration agreement.[5]

While not accusing Ms. Kerr's supervisor of signing the arbitration agreement on April 28, the court recognized that such a scenario was at least possible, or even that Ms. Kerr may have accidentally executed the arbitration agreement herself, thereby not knowingly and intentionally signing it.[6]

Thus, Dillard could not meet its burden of proof at trial, and so the court dismissed its application to compel Ms. Kerr to arbitrate her employment clams.

Bell v. Hollywood: Evidence of Knowing & Voluntary Consent Binds Employee

In contrast to General Dynamics and Dillard is Bell v. Hollywood Entertainment Corporation, a case where the court held that Hollywood had effectively communicated to Ms. Bell through an electronic HR system the requirement that she arbitrate all employment disputes.[7]

In that case, Ms. Bell completed her employment application process electronically in one of two ways, either at a Hollywood in-store kiosk or over the Internet through Hollywood's Web site.

During that application process, and as a condition to her employment, Ms. Bell agreed to submit all claims involving work place disputes to binding arbitration.

Ms. Bell later sued Hollywood for maintaining a hostile work environment, allowing sexual harassment to occur in the work place and for civil battery.

As Mr. Campbell had argued against General Dynamics, and Ms. Kerr against Dillard, Ms. Bell argued that she had received inadequate notice from Hollywood concerning the requirement that all of her work place employment claims be resolved through binding arbitration.

Unlike in General Dynamics and Dillard, however, the court in Hollywood found Ms. Bell had agreed to arbitrate her work place disputes because her employer could show, conclusively, that Ms. Bell had received information about the arbitration policy, provided evidence that she read and understood the terms and conditions of the policy and that she had agreed to be bound to them as a condition of her employment.

The appellate court affirmed the lower court's decision to compel arbitration because it found that Ms. Bell "had the legal capacity to contract, signed the agreement and was sufficiently informed regarding the program.

She was informed on how to obtain additional information, confirmed that she understood how to obtain additional information, and knowingly and voluntarily consented to arbitrate her employment claims against [Hollywood]."[8]

The court relied primarily on the following factors:

- Hollywood, in its electronic application process, presented Ms. Bell with a screen that informed her that all claims would be submitted to arbitration pursuant to Hollywood's Employment Issue Resolution Program ("EIRP");

- Hollywood provided Ms. Bell with a link to a summary of the EIRP Rules or, if Ms. Bell desired, a link to a Web site containing a full copy of the rules;

- Ms. Bell had to either acknowledge or deny that she knew how to access the connecting links;

- Hollywood required Ms. Bell to answer whether she agreed to arbitrate any and all disputes with Hollywood and she was required to choose "yes" or "no". Because Ms. Bell selected "yes," the court found that she confirmed her agreement to arbitrate any employment-related disputes; and

- Ms. Bell also confirmed that she knew how to access Hollywood's Web site to obtain the complete arbitration policy (even though there was no apparent evidence she actually reviewed such policy).

The Bell v. Hollywood court even quoted from Campbell v. General Dynamics, in noting that a "signature may not be denied legal effect or enforceability solely because it is in electronic form ... [and a] contract may not be denied legal effect or enforceability because an electronic record was used in its formation."[9]

The lesson of Bell v. Hollywood is the same as that discussed above, in connection with Campbell v. General Dynamics and Kerr v. Dillard: employers must design and implement an electronic HR system that delivers clearly and explicitly to its employees the terms, conditions or changes in their employment, allows the employer to prove that its employees received notice of these terms, conditions or changes through the System and, therefore, binds the employees to the terms, conditions or changes.

Verizon v. Pizzirani: Regardless of Actual Knowledge of Terms, Opportunity to Review and Assent is Enough to Bind

Such was the result in Verizon Communications v. Pizzirani, a case that further demonstrates that, with the proper design, an electronic HR system can bind employees to terms, conditions or changes in their employment.[10]

In that case, Plaintiff Verizon sued Mr. Pizzirani, a former highly compensated executive in Verizon's broadband division who had resigned to work for a Verizon competitor, Comcast.

Verizon sought enforcement of a 12-month noncompetition restrictive covenant that Mr. Pizzirani had received in an e-mail as a participant in Verizon's Long Term Incentive Plan, which awarded Verizon employees with both Restricted Stock Options and Performance Stock Units.

Mr. Pizzirani, as an award recipient, had been advised in bolded language through e-mails from Verizon's human resources department in 2005 and 2006 of the following terms and conditions relating to his acceptance of the awards:

As you access you [sic] award online, it is important that you read and understand the terms and conditions of the award agreements.

When accepting your award online, you acknowledge that you have read both the award agreements and plan document, including the terms [and] conditions regarding vesting, restrictive covenants and the provisions concerning award payouts.[11]

On March 17, 2005, Mr. Pizzirani clicked on the "I ACKNOWLEDGE" button on the bottom of the e-mail, whereby he acknowledged that he understood that, in accepting such award, he would be bound by the noncompetition restrictive covenant.

In 2006, however, Mr. Pizzirani did not click on the "I ACKNOWLEDGE" button, which resulted in human resources contacting him.

In response to the contact, Mr. Pizzirani drafted and sent the following e-mail to an employee in the human resources department: "John I will read and agree to the terms and conditions of the award agreement and plan documents."[12]

After Verizon's human resources department received the certification that Mr. Pizzirani understood the terms of the award, that department granted Mr. Pizzirani access to the agreement online.

In his defense, Mr. Pizzirani did not contest that he had executed the award agreements by electronic signature, but instead claimed that he did not read the contracts prior to electronically signing them and asserted that he was completely unaware of the restrictive covenants contained in them until October 2006.

In a decision governed by New York law, the court enforced the noncompetition agreements and barred Mr. Pizzirani from accepting Comcast's offer of employment.

The court noted that, under "New York law, a valid contract is formed by manifestation of assent, including checking a box or clicking a button on a computer screen, as in this case"[13], and that "parties are bound by the contracts they sign, whether or not the party has read the contract so long as there is no fraud, duress or some other wrongful act of the other party."[14]

The court also found that Mr. Pizzirani had a reasonable opportunity to know the essential terms and character of the agreements, Verizon encouraged him to read them, and he was adequately warned by e-mail that, through his acceptance, he certified that he had read, understood and agreed to be bound by the agreements and restrictive covenants.

Mr. Pizzirani also complained that he was only able to view the document in a small box on the computer screen, but Verizon demonstrated that he had the ability to print the agreements, save them to his hard drive or expand the default size viewing screen.

The court also found it compelling that Mr. Pizzirani had no time pressure to read and sign the agreements. Verizon gave him more than a month to read and electronically sign the documents.

Because Verizon went to great lengths to ensure that its employees understood the importance of reading the documents, the court found little evidence that Verizon intended to misrepresent the terms of the award agreements.

To Design and Implement an Electronic HR Systems that Meets the Admissibility and Enforceability Challenge, Learn the Lessons

As demonstrated by the Campbell v. General Dynamics, Kerr v. Dillard, Bell v. Hollywood and Verizon v. Pizzirani, and the knowledge we have gained from our own experience with our clients, we believe companies can, through the use of a well thought out electronic HR system, actually design and implement a system that equates with, and in many cases reduces, the risks associated with having employees continue to sign notices, acknowledgements or agreements in wet ink, and then storing those documents in hard copy.

--By Gregory T. Casamento, Patrick J. Hatfield and Brian Casey, Locke Lord Bissell & Liddell LLP

Greg Casamento is a partner with Locke Lord Bissell & Liddell in the firm's New York office. Patrick Hatfield is a partner with the firm in the Atlanta office and co-chair of the firm's technology transactions group. Brian Casey is a partner in the firm's Atlanta office.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] 407 F. 3d 546 (1st Cir. 2005).

[2] Id. at 558.

[3] Id. at 555.

[4] 2009 U.S. Dist. LEXIS 11792 (D. Kansas 2009).

[5] Id.

[6] Id.

[7] No. 87210, 2006 Ohio App. LEXIS 3950 (Ohio Ct. App., 8th App. Dist. Aug. 3, 2006).

[8] Id. at 12.

[9] Id. at 9.

[10] 462 F. Supp. 2d 648 (E.D. Pa. 2006).

[11] Id. at 652.

[12] Id. at 653.

[13] Id. at 655 n.3.

[14] Id. at 655.