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Employee Must Arbitrate Employment Dispute Once Employer Declares that Continued Employment Manifests Assent to Arbitration Policy

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Late last week, the California Court of Appeals ruled in *Diaz v. Sohnen Enterprises* that an employee must arbitrate her discrimination suit against her employer because she consented to an arbitration agreement by continuing to work. The split, three-judge panel sent the employee's claims to arbitration even though she never signed the written arbitration agreement and verbally rejected it.

In short, the Court held that "California law in this area is settled: when an employee continues his or her employment after notification that an agreement to arbitration is a condition of continued employment, that employee has impliedly consented to the arbitration agreement."

This case is a win for employers who have mandatory arbitration agreements. It also raises the question of whether the Court's reasoning might apply in a traditional labor negotiation context where the employer and the union are at an impasse over the employer's proposal to expand existing arbitration provisions in a collective bargaining agreement to cover statutory claims, and the employer thereafter implements the proposal.

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Background and Court's Ruling

Sohnen notified its employees in person that it was adopting a new dispute resolution policy requiring arbitration of all claims, provided them with copies of the associated arbitration agreement and put them on notice that continued employment would constitute acceptance of the agreement's terms. Days later, Diaz informed Sohnen's Human Resources department that she did not wish to sign the agreement. Again, she was reminded that her continued employment constituted acceptance of the requirement to arbitrate. Subsequently, Diaz served Sohnen with a state court complaint alleging claims of discrimination, along with a letter rejecting the arbitration agreement.

The trial court denied Sohnen's motion to compel arbitration, concluding that the arbitration agreement was a "take-it or leave-it" contract of adhesion and that "there was no meeting of the minds." Sohnen appealed and, in a split opinion, the Court of Appeal reversed. It concluded there was sufficient evidence of consent to arbitration, as demonstrated by Diaz's continuing her employment status.

The Court viewed Diaz's written objection, submitted several days after the arbitration policy was announced, as an attempt to repudiate the agreement to arbitrate at most, although neither party put the issue of repudiation before the Court. As to the issue of enforceability, the Court found "no evidence of surprise nor of sharp practices demonstrating substantive unconscionability."

Employer Caution Is Warranted In Light of Dissent's Arguments

In what should serve as a word of caution for employers, the dissent expressed reservations about Sohnen's actual intent, noting that while there was some evidence that the company intended to implement arbitration unilaterally, language in the arbitration agreement referencing "mutual[] agree[ment] to arbitrate" could also be

construed as evidence that Sohnen intended to implement arbitration as part of a bilateral agreement—which here, it did not have.

NLRA Implications?

The decision presents especially interesting questions for employers with unionized workforces covered by the National Labor Relations Act ("NLRA"). Under the NLRA, an employer generally cannot make unilateral changes to employees' terms and conditions of employment without first giving the union, as the employees' representative, an opportunity to bargain over those changes. Changes may only be implemented with union agreement or if the parties reach an impasse in bargaining after sufficient good faith efforts.

When evaluated strictly under the *Diaz* analysis, an employer policy that requires employees to arbitrate workplace disputes arguably should survive a union's strong objections to that policy once impasse has been reached over this issue and employees continue their employment with the employer after the policy is announced.

However, employers and their labor counsel should not be so quick to assume that *Diaz* can be relied on to enforce such a policy in unionized workplaces. In the first place, *Diaz* applied California contract law to reach its conclusions. If the same issue were raised in a unionized workplace, the matter would be governed by federal law, and the National Labor Relations Board (the federal agency charged with enforcing the NLRA) likely would take the position that, even if bargained to impasse, an employer's arbitration policy would not be enforceable unless the union consented to the policy. This would be true even if the employees continued working for the employer after being apprised of the policy, since the union is the federally designated bargaining representative with whom the employer must negotiate on the employees' behalf.

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