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Calling it a “close case,” the First Circuit deemed the employer’s notice of a new arbitration policy insufficient to bind the employee to arbitration when he brought a claim under the ADA. The court’s analysis, however, provides guidance to employers on providing adequate notice via e-mail.

## First Circuit Provides Guidance to Employers Who Wish to Communicate Contractual Arrangements to Their Employees

By Amy Nash

In a recent decision, the U.S. Court of Appeals for the First Circuit considered what notice is adequate to bind employees to mandatory arbitration of employment disputes, finding that an employer’s mass e-mail to its employees announcing a new mandatory dispute resolution policy and providing a hyperlink to the policy was insufficient notice.<sup>1</sup> In *Campbell v. General Dynamics Government System Corp.*, No. 04-1828 (May 23, 2005), the court found the e-mail used by General Dynamics to announce the mandatory arbitration policy inadequately notified employees that their continued employment would constitute a waiver of their right to litigate claims under the Americans with Disabilities Act (ADA). Nonetheless, the court provided ample guidance to employers seeking to use e-mail as a means of communicating mandatory policies and of entering into contracts for binding arbitration with their employees.

Employers should be aware, however, that individual state law may be different regarding the formation of a binding agreement or contract. Some states may require an employee’s express *written* agreement to an arbitration policy. A mere acknowledgment of a new employer arbitration policy may not necessarily be sufficient in all jurisdictions.

### The E-Mail In Question

In April 2001, General Dynamics sent an e-mail announcement to all of its employees entitled “New Dispute Resolution Policy” consisting of a letter from the Company’s president. In the e-mail, the Company outlined the Policy’s four-step approach to dispute resolution, listing as the last step “[a]rbitration by a qualified and independent arbitrator.” In the e-mail, General Dynamics urged employees to “review the enclosed materials carefully” because the Policy “is an essential element of [an employee’s] employment relationship.”

The “enclosed materials” apparently referred to hyperlinks within the e-mail to a short brochure about the Policy and a handbook

that included the text of the Policy, both of which were located on the Company’s intranet. Were the employee to click on the link to the brochure, they would have been directed to a document that stated that employees who “continue [their] current employment after the effective date of the [Policy’s] adoption” were “covered” by its terms and that the Policy would encompass employment discrimination and harassment claims under the law. The brochure also noted that “[t]he Company has adopted this four-step Policy as the exclusive means for resolving workplace disputes for legally protected rights. If an employee files a lawsuit against the Company, the Company will ask the court to dismiss the lawsuit and refer it to the [Policy].” Were the employee to click on the second link contained in the e-mail, they would have been directed to a dispute resolution handbook containing the full text of the Policy, a chart outlining how the Policy worked, forms for filing claims at each of the four levels and a section containing frequently asked questions about the Policy.

The Company tracked only whether employees read the initial e-mail containing the links and did not take any steps to track whether employees viewed either of the documents linked-to in the e-mail. Moreover, employees were not required to affirmatively acknowledge that they had read the e-mail or the documents linked thereto. The plaintiff contended that he never read or saw the brochure, Policy, or dispute resolution handbook.

After the plaintiff’s employment was terminated for absenteeism, he sued for disability discrimination under the ADA, claiming he suffered from sleep apnea. The employer removed the case to federal court and then moved to stay the court proceedings and compel arbitration under the Policy and the Federal Arbitration Act (FAA). The employee argued against the stay because the e-mail did not give adequate notice that the Policy was intended to form a binding agreement to arbitrate all employment discrimination matters.

<sup>1</sup> The First Circuit includes the following: Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico.

## The Court's Analysis Of The E-Mail Notice Under The ADA

The court found that General Dynamics had to show both that (1) enforcement of the waiver of the employee's right to litigate would be appropriate under the ADA; and (2) the provision for mandatory arbitration was part of a valid contract under the FAA, which analysis is governed by state contract law. Because General Dynamics could not establish the former point, the First Circuit never addressed the latter.

As a preliminary matter, the First Circuit found that a mass e-mail communication "can be an appropriate medium for forming an arbitration agreement," specifically rejecting the district court's skepticism of such a process. As support, the court noted that the Electronic Signatures in Global and National Commerce Act (the "E-Sign Act") expressly provides that the FAA's rule requiring a "written signature" does not override an agreement simply because it is made in electronic form. Thus, the court wrote, "the choice of mass e-mail is not determinative of the appropriateness of the notice."

The court noted that the ADA expressly encourages alternative dispute resolution "[w]here appropriate and to the extent authorized by law[.]"<sup>2</sup> To determine the "appropriateness" of enforcing the mandatory arbitration provision in the Policy under the ADA, the court asked the following question: "whether the e-mail provided sufficient notice to the plaintiff that his continued employment would constitute a waiver of his right to litigate any employment-related ADA claim, rendering judicial enforcement of that waiver appropriate." More specifically, the court's question was whether, "under the totality of the circumstances," the e-mail "would have provided a reasonably prudent employee notice of the waiver." The court concluded that it did not.

The court found that it was inappropriate to enforce the waiver for a variety of reasons. First, e-mail was not the usual means utilized by General Dynamics to handle personnel matters. Instead, the Company historically had made significant alterations to the employment relationship through "conventional writings that required a signature on a piece of paper," which was placed in the personnel file. The court criticized General Dynamics for failing to identify any other instance in which it "relied upon either an e-mail or intranet posting to introduce a *contractual* term that was to become a condition of continued employment." Though it stopped short of requiring an affirmative response to satisfy the ADA's "appropriateness" inquiry, the court

found it significant that the Company required no response by employees to the e-mail because such an affirmative response "would have signaled that the Policy was contractual in nature."

The court determined that the text and tone of the e-mail similarly did not provide the employee adequate notice of the waiver. "To be blunt, the e-mail announcement undersold the significance of the Policy and omitted the critical fact that it contained a mandatory arbitration agreement. The result was 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." In fact, the e-mail "did not state directly that the Policy contained an arbitration agreement that was meant to effect a waiver of an employee's right to access a judicial forum," nor did it "put the recipient on inquiry notice of that possibility by conveying the Policy's contractual significance."

Further, the court found that the language used in the e-mail belied any contractual implications. The e-mail did not state that the attached Policy contained contractually binding terms or that General Dynamics would treat continued employment as an acceptance of those terms. It used none of the language common to contracts, such as "I agree," "I accept," or "condition of employment." Most significant to the court was the fact that the e-mail simply did not state that the Policy would become the employee's exclusive remedy for all employment-related claims. Stating as General Dynamics did in the e-mail that the Policy was "an essential element of [the] employment relationship" and requesting that the employees read the enclosed materials was not enough.

Finally, the court found that the link in the e-mail to a handbook containing the Policy, which used contractual terms, did not save General Dynamics. According to the court, the Company produced no evidence that it had used personnel handbooks as contractual devices with legally binding effect in the past.

## Guidance To Employers Wishing To Use E-Mail Notices

In summarizing its decision, the First Circuit cautioned that "an employer who takes a barebones approach to affording notice runs the risk that its efforts will fall short."

While the court found that General Dynamics' efforts to use e-mail to communicate the new Policy and the waiver of an employee's right to litigate employment claims were insufficient to satisfy the ADA, the court did provide employers with helpful guidance about how to

effectively use mass e-mails to employees for such purposes.

Should an employer wish to use a mass e-mail to announce a new policy whereby an employee must waive rights to litigate employment claims, it should say so clearly in the text of the e-mail. An employer should also use language that is common to contracts, stating plainly that abiding by the new policy is a condition of continuing employment with the employer.

In addition, employers should not rely upon links within the e-mail to handbooks or other documents that contain the operative contractual language. While it is acceptable to link such documents to the e-mail to provide employees with further information, the text of the e-mail itself must place employees on notice that the new policy is a contractual arrangement that they must accept to continue their employment with the employer.

Employers should consider requiring employees to affirmatively accept the new contractual arrangement and waiver of rights to litigate. While the First Circuit stopped short of stating that the affirmative acknowledgement by employees is a requirement for a contract conveyed by e-mail to be enforceable under the ADA, it did emphasize that requiring an affirmative response to the e-mail (either by signing an acknowledgement or, in a more modern fashion, by clicking a box on the screen) is an act associated with entering into contracts, which would "spark a realization [in the employee] that the new Policy marshaled binding effects."

Also, if an employer wishes to use e-mail to convey such a Policy to its employees, it should use this medium to communicate such contractual arrangements with its employees on a regular basis. Where employees have seen the employer use the method in the past, it is less likely that they can argue that they were not familiar with email as a means of communicating such contracts.

Finally, employers who want to be able to require arbitration of state law discrimination and other employment-related claims should not assume they can rely on appropriate email notice, but should instead contact local employment counsel to determine what state law requirements exist.

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*Amy Nash is an associate in Littler Mendelson's Boston office. Ms. Nash has represented clients in connection with a variety of labor and employment matters arising under federal and state law, including matters involving claims based upon the FLSA, Title VII, the FMLA, the ADA and the ADEA. She may be reached at anash@littler.com.*

<sup>2</sup> Title VII, and more specifically, the note to section 118 of the Civil Rights Act of 1991, contains language mirroring the language found in the ADA. See 42 U.S.C. § 1981, note.