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ARBITRATION AGREEMENTS

California appellate court examines authenticity of physician's e-signature

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A hospital group petitioned to compel a physician to arbitrate his wrongful termination and retaliation claims based on an arbitration clause in his electronically signed employment documents. The physician denied signing the arbitration agreement and challenged the authenticity of the e-signature. The trial court denied the petition, but the California Court of Appeal reversed, finding that the hospital group submitted sufficient factual information to authenticate the physician's e-signature.

Suing physician resists arbitration

Jay Espejo is a board-certified family medicine physician who worked for Southern California Permanente Medical Group (SCPMG). SCPMG contracts with Kaiser Foundation Health Plan, Inc., and Kaiser Foundation Hospitals (collectively, "the hospital") to provide medical services to plan members in Southern California. Espejo sued the hospital, claiming he was wrongfully terminated in retaliation for reporting "inappropriate prescribing practices" by another physician. The hospital asked the court to compel Espejo to arbitrate his claims and attached to its arbitration petition his

employee physician contract and the associated dispute resolution procedure (DRP).

The hospital contended that both documents were provided to Espejo with his employment offer and that he electronically signed them within minutes of each other from the same IP address. It also submitted a declaration from Julie Tellez, a consultant who maintained SCPMG's online contract system, explaining the method by which hospital physicians, including Espejo, electronically sign employment documents.

Espejo opposed the hospital's petition to compel arbitration, arguing that the electronic signature on the DRP was not authentic. He recalled reviewing and electronically signing the physician contract, but he did not recall signing the DRP. He further stated that his "custom and practice" was to review documents before signing them, and he therefore did not believe he would have signed the eight-page DRP one minute after signing the physician contract.

In response, the hospital filed a supplemental declaration from Tellez in which she provided additional details regarding the extensive electronic review and signature process for and stringent privacy protections concerning SCPMG's employee documents. Specifically, she stated that Espejo's

name could have been placed on the electronic signature pages only by someone using his unique username and password at the date, time, and IP address listed on the documents. Tellez therefore concluded that the physician contract and the DRP attached to the petition were accurate copies of documents electronically signed by Espejo and maintained in SCPMG's records.

The trial court disregarded the supplemental Tellez declaration as untimely and denied the hospital's petition, finding no enforceable arbitration agreement between the parties. The hospital appealed. The California Court of Appeal reversed and sent the case back to the trial court.

Court of appeal allows supplemental declaration

As a preliminary matter, the hospital charged that the supplemental Tellez declaration was timely and crucial to the authentication of Espejo's electronic signature and therefore should not have been disregarded by the trial court. On appeal, the issue of timeliness turned on whether the law required the hospital to authenticate Espejo's electronic signature as part of its initial petition.

A party attempting to compel arbitration must prove the existence of an arbitration agreement by a preponderance of the evidence. Similarly, a party opposing the petition must establish any enforcement defense by a preponderance of the evidence. The trial court then weighs any affidavits, declarations, oral testimony, or other evidence to determine if there is an enforceable agreement to arbitrate.

The hospital argued that it was not required to authenticate Espejo's electronic signature on the DRP unless and until Espejo challenged the authenticity of the arbitration agreement. The court of appeal agreed. The hospital met its initial burden to show an agreement to arbitrate by attaching to the petition a copy of the DRP purportedly bearing Espejo's electronic signature. Only after Espejo challenged the validity of that signature was the hospital required to establish by a preponderance of the evidence that his signature was authentic, which it did by submitting the supplemental Tellez declaration. The court of appeal therefore held that the trial court should have considered the supplemental declaration.

Electronic signature properly authenticated

The court of appeal next examined whether the supplemental Tellez declaration sufficiently authenticated Espejo's electronic signature on the DRP. An electronic signature has the same legal effect as a handwritten signature, but like any writing, it must be authenticated before it can be used as evidence in court. An explanation of applicable security procedures can show that an electronic signature is, in fact, the result of "an act" of the alleged signatory.

In this case, the supplemental Tellez declaration detailed SCPMG's online document security precautions as well as the process involved in the electronic signing of documents. In light of her technological knowledge and experience, Tellez was able to logically conclude that Espejo's name could have been added on the signature pages of the employment documents only by someone using his unique username and password at the date, time, and IP address listed on the documents. These factual details established that the electronic signature on the DRP was "the act of" Espejo and therefore authentic.

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Accordingly, the court of appeal concluded that the hospital had proven the existence of an agreement to arbitrate, and it sent the matter back to the trial court to determine whether the arbitration agreement was valid and enforceable. *Espejo v. Southern California Permanente Medical Group, et al.* (California Court of Appeal, 2nd Appellate District, 4/22/16).

Bottom line

Technology has dramatically altered the way employment agreements and other contracts are reviewed, executed, and retained. Companies using high-tech document signature software such as DocuSign, Adobe Document Cloud, and HelloSign should ensure that HR professionals are trained in and familiar with the software and practice the proper maintenance of electronic records. In the event of an employee lawsuit, the availability of knowledgeable and trained personnel may mean the difference between your ability to rely on an authenticated signed employment agreement or having no enforceable document to rely on at all.

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