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9th Circuit continues to enforce well-crafted arbitration agreements

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The 9th U.S. Circuit Court of Appeals continues to provide guidance on how to craft enforceable arbitration provisions in California. In *O'Connor v. Uber Technologies, Inc.*, 2018 DJDAR 9663 (Sept. 25, 2018), the 9th Circuit issued another important decision on this issue. The court heard the consolidated appeals from four class actions in which Uber drivers allege they were misclassified as independent contractors. *O'Connor* reversed the district court's orders certifying a class and denying Uber's motion to compel arbitration. This is an important decision for California employers, particularly amidst the shifting landscape of independent contractor law in the state following *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (June 20, 2018), and is instructive for companies with California employees and workers who use arbitration agreements.

O'Connor is the second ruling out of the 9th Circuit recently to uphold Uber's arbitration provisions, following *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016). A review of the arbitration provisions at issue in those cases provides guidance on key features companies may wish to consider when crafting or reviewing arbitration agreements. In *O'Connor*, the 9th Circuit addressed two particular elements found in certain arbitration agreements: (1) the assignment of the question of arbitrability and (2) opt-out provisions.

Assigning the Question of Arbitrability

Often, the first step in enforcing an arbitration agreement is determining whether the claims at issue are covered by the agreement. Uber's arbitration clause sidesteps this issue by designating the arbitrator as the appropriate party to resolve any disputes arising out of the arbitration agreement, including any disputes related to the "enforceability, revocability or validity" of the arbitration agreement. The relevant portion of the provision follows:

"Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.

"Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge."

The 9th Circuit reviewed two aspects of this provision in *Mohamed*. First, the court determined that the language "clearly and unmistakably delegated the question of arbitrability to the arbitrator." Thus, at least for the 9th Circuit, the language Uber used in its arbitration agreements sufficiently overcame the presumption that courts should decide in the first instance whether the issues presented are subject to arbitration. Second, the court found that the drivers' ability to opt out of the arbitration agreement precluded a finding of procedural unconscionability. The 9th Circuit ultimately concluded that because of this language, "[t]he district court should have ordered the parties to arbitrate their dispute over arbitrability." It should be noted that this view is not universally held. *See, e.g., Herrington v. Waterstone Mortg. Corp.*, 17-3609 (7th Cir. Oct. 22, 2018) ("Determining whether the agreement reflects the parties' consent to class or collective arbitration requires the decisionmaker to determine whether the parties agreed to arbitrate those disputes as well. And that is a gateway matter for the court to decide.").

O'Connor also addressed how a delegation provision can be important not only in compelling arbitration, but also in defining the scope of potential classes. Relying on *Mohamed*, the *O'Connor* panel determined that the district court's class certification orders "must be reversed" because certification was premised on the notion that the arbitration agreements were not enforceable, a question that was supposed to be decided by the arbitrator. As a result, the 9th Circuit held that the underlying class certification order could not survive because drivers "who entered into agreements to arbitrate their claims and to waive their right to participate in a class action with regard to those claims" were encompassed by the class definition.

Proper Opt-Out Procedures

Opt-out procedures also played an important role in the

9th Circuit's decision to uphold the enforceability of Uber's arbitration agreement. Uber's arbitration agreements provided drivers with a 30-day window to opt out by sending an email or letter clearly indicating an intent to opt out of the arbitration agreement. As the 9th Circuit ruled in *Mohamed*, this provision gave drivers a "meaningful right to opt-out" and rendered the arbitration agreement "procedurally conscionable as a matter of law." Although not all courts agree on the utility of opt-out provisions, at least the 9th Circuit has concluded that a meaningful opt out process supports a finding of procedural conscionability.

The *O'Connor* plaintiffs advanced a new theory, claiming the lead plaintiffs, who did opt out of the arbitration agreement, had "constructively opted out of arbitration on behalf of the entire class." The plaintiffs asserted that because "the entire purpose of a class action is for lead plaintiffs to take action on behalf of absent class members," the lead plaintiffs' decision to opt out should permit them to file suit on behalf of a class that includes individuals who had and had not opted out themselves. The plaintiffs cited a single case to support this argument, *Bickerstaff v. Suntrust Bank*, 299 Ga. 459 (2016), where the Georgia Supreme Court held that because the lead plaintiff filed suit before the opt-out period for the arbitration agreement at issue had closed, the complaint tolled the period for putative class members to opt out. The *O'Connor* court squarely rejected this argument and the Georgia Supreme Court decision, emphasizing that "[n]othing gave the O'Connor lead plaintiffs the authority to [opt-out] on behalf of and binding other drivers."

District courts in California already are following the 9th Circuit's lead. Just a week after the 9th Circuit decided *O'Connor*, the Northern District of California relied on the decision in considering — and ultimately granting — a motion to compel arbitration in a misclassification case against DoorDash, *Magana v. Door-Dash Inc.*, 4:18-cv-03395. A week later, in a misclassification case against Postmates, the Northern District of California rejected the notion that a lead plaintiff could opt out of an arbitration agreement on behalf of other employees, citing *O'Connor. Lee v. Postmates Inc.*, 18-CV-03421-JCS. These decisions confirm that putting forward a lead plaintiff who opted out of an arbitration agreement does not create an end-run around the agreement.

Conclusion

O'Connor and the district court decisions relying on it demonstrate the utility of clear, unambiguous language designating the question of arbitrability to an arbitrator, along with a meaningful opt-out provision, at least within California. Companies in California may wish to review their arbitration provisions accordingly.

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