

# Client Alert

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## New guidelines for using email to distribute binding policies in the workplace

The First Circuit Court of Appeals recently held in *Campbell v. General Dynamics*, 407 F.3d 546 (1st Cir. 2005), that the defendant's use of email to distribute a mandatory arbitration policy failed to communicate the policy's significance. The email also failed to put employees on notice that they were being asked to waive a substantive legal right. The arbitration agreement, therefore, was unenforceable. The court recognized though, that arbitration policies distributed by email could be enforced, provided appropriate steps were followed. This decision should be read carefully by employers who rely on email to communicate policy changes in the workplace.

When Roderick Campbell was fired by General Dynamics for tardiness and absenteeism, he filed suit under the Americans with Disabilities Act alleging that his infractions stemmed from a medical condition that should have been accommodated. In response, General Dynamics sought to compel the arbitration of his claims in accordance with a new policy that had been delivered to all employees solely via email. Campbell argued that this policy was inapplicable to him because he had not willfully entered into a binding agreement to arbitrate his claims. This oversight, he offered, was mainly due to the plethora of emails he received daily which made it difficult for him to read all of them. He also did not anticipate that General Dynamics would use email to significantly alter the terms of his employment.

The court determined that General Dynamics did not provide sufficient notice to Campbell that his continued employment would result in the waiver of his right to pursue claims in a judicial forum. The court concluded it was therefore not appropriate to enforce the arbitration agreement.

In reaching its decision, the court verified that the use of email to create an enforceable contract was legitimate according to the E-sign Act, which states that "a contract may not be denied legal effect, validity or enforceability solely because it is in electronic form." 15 U.S.C. §§ 7001. General Dynamics was thus within the purview of the law in their use of electronic mail to distribute employment policies. Nonetheless, the potential legitimacy of the email was undermined because this particular use of email was not customary at General Dynamics. The history of past communications in this workplace showed that significant employment decisions and contractually binding policies not only came in writing but also required hand-written signatures. Such a sudden departure from protocol was substantial enough for the court to decide that the notice provided was insufficient to create a binding contract.

Perhaps the most significant factor for the court however, was the content of the communication. The text of the email described the policy in only vague terms and undersold its significance by omitting the crucial fact that it contained a mandatory arbitration agreement. The court reasoned that a rational employee reading this email could have viewed the policy (*continued . . .*)

as an optional *alternative* to litigation rather than a *mandatory* replacement for it. Since arbitration is a matter of contract, the ambiguous nature of the email eliminated any chance of creating an enforceable contractual agreement to arbitrate disputes.

In light of this decision, employers should take deliberate steps to avoid the pitfalls that can invalidate arbitration agreements distributed by email:

- *First*, employers should have a sense of how often email is used to communicate significant personnel matters to their employees. In *General Dynamics*, the First Circuit looked unfavorably on the sudden change from written documents to email when dealing with employment policies. While this does not necessarily restrict the employer to the traditional use of written documents for important contractual changes, it does entail the employer to emphasize any such changes in a manner that captures the full attention of the employees.
- *Second*, employers should be forthright and explicit about the terms of the arbitration policy in the email communication. Such transparency may not be all it takes to achieve sufficient notice but it does go a long way towards meeting the employer's burden.
- *Third*, employers should require employees to signify receipt and acceptance of the arbitration policy by using electronic signatures or sending a return email. Merely opening the email is not enough to acknowledge the enclosed policy. In this day and age, email is sophisticated enough to incorporate acceptance and refusal as part of the communication, and employers should use voting options and other available technical devices to effectively distribute and receive substantial employment policies.

Altogether, these steps serve as a useful guideline for employers wishing to create binding policies that are distributed electronically. A concerted effort should be made to adopt these steps as they are simple and readily available.

If you have any questions concerning the use of email in your workplace, or the enforceability of your arbitration agreement, please contact David Morrison at 312.201.3972 or david.morrison@goldbergkohn.com.

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