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Ninth Circuit: Because of Simple Contract Oversight, Executive must Arbitrate Separation Dispute

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Most executive level employees have detailed employment agreements outlining the terms and conditions of their high-paying jobs. Putting such agreements in place is a really good idea for a number of reasons, even though it can be a cumbersome task during the "feel good" on-boarding process. But most companies work through the specifics of the agreement because certainty is better than uncertainly when it comes to contracts — especially when the relationship ends, which it always does for one reason or another (another bummer to particularize when bringing someone in). Because most of an executive's employment agreement is necessarily devoted to what happens when he or she leaves, these agreements often include a provision requiring arbitration to resolve any contract dispute (the validity of which is the subject of innumerable court opinions not tackled here). They usually also include a clause that establishes the venue of any dispute and which state law applies — or at least they should. One executive recently found out what happens if you fail to mention which state law applies — you lose.

Carey Brennan was a former executive vice president and director of strategy and corporate development for Opus Bank. He left his job voluntarily claiming that he had "Good Reason" under his employment agreement (i.e., "a material change in functions, duties or responsibilities"). Accordingly, Brennan claimed he was entitled to severance pay. Opus hired an outside lawyer to determine whether "Good Reason" existed based on the relevant facts (a good idea not often undertaken by companies), and the lawyer concluded that Brennan's departure was *not* for "Good Reason." Opus relied on that opinion and informed Brennan he was ineligible for severance pay. Brennan disagreed and sued Opus in federal court in Washington for breach of contract and wrongful termination, alleging a violation of California and Washington state law.

In the case, called Carey Brennan v. Opus Bank, a Washington federal judge sent the matter to arbitration, ruling that the Federal Arbitration Act controlled all aspects of their dispute because the parties' employment agreement failed to include a clause identifying which state law applied – a fatal error. Brennan argued California law should apply -- it would have likely made a difference as to whether the matter should have been sent to arbitration in the first place, trust me -- even though the agreement was silent on the subject. The Ninth Circuit

Court of Appeals agreed with the Washington federal judge and stated that **because the agreement was "ambiguous," federal arbitration law applies** and should be used to answer the threshold question of whether the arbitration clause in the agreement was "unconscionable."

What have we all learned from this? Details matter. But those of us in the world of human resources and employment law already knew that. As a practical takeaway, we learned that working through the painstaking process of detailing every aspect of an employment agreement is critical and should not be glossed over during the final stages of the hiring process. For both parties, there are reasons for each of these seemingly innocuous clauses in an employment agreement and a good employment lawyer knows what they are and why they need to be there.

With questions about this case or employment contracts generally, contact your Hinshaw attorney.

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