

Lawyer Insights

Employee E-Signatures in Arbitration Agreements Under Scrutiny

A recent opinion out of the Texas 14th Court of Appeals has raised the bar for employers trying to enforce arbitration agreements electronically signed by employees.

By Holly Williamson and Marshall Horton
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A recent opinion out of the Texas 14th Court of Appeals has raised the bar for employers trying to enforce arbitration agreements electronically signed by employees. See *Houston ANUSA, LLC d/b/a AutoNation USA Houston v. Shattenkirk*, No. 14-20-00446-CV, 2023 WL 5437714 (Tex. App.—Houston [14th Dist.] Aug. 24, 2023, no pet. h.).

Walter Shattenkirk was a general manager at an AutoNation car dealership. AutoNation claimed it terminated Shattenkirk's employment for poor performance after putting him on a performance improvement plan, but he alleged that the termination was in retaliation for internally reporting alleged racist comments by other members of management. Shattenkirk subsequently filed a lawsuit against AutoNation for discrimination and retaliation. In response to his lawsuit, AutoNation filed a motion to compel arbitration under an arbitration agreement that AutoNation alleges Shattenkirk electronically executed at the time of hire using AutoNation's human resources website. That agreement required arbitration of all disputes arising from Shattenkirk's employment.

Shattenkirk admitted that he signed some on-boarding documents at the time of his hire, but denied ever electronically executing the arbitration agreement. Therefore, Shattenkirk responded to AutoNation's motion to compel, asserting that the arbitration agreement was not valid because he had not executed it, and that if it was valid, it was unconscionable due to the potential expense of arbitration.

In support of its motion to compel, AutoNation provided the purported arbitration agreement, which included attestations that Shattenkirk read and understood the agreement and a checkbox with a date and time stamp with the statement, "Checking the checkbox above is equivalent to a hand-written signature." AutoNation also attached an affidavit from its human resources representative alleging that Shattenkirk electronically signed the agreement, and explained the process through which Shattenkirk executed the agreement, including that:

- A link to onboarding paperwork was emailed to Shattenkirk;
- Shattenkirk entered a unique password after clicking on the link;
- The website provided the arbitration agreement and other onboarding paperwork to Shattenkirk and gave him three days to review it; and
- He confirmed his acceptance of the arbitration agreement by typing in the last five digits of his social security number which generated a date and time stamp.

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However, the Court of Appeals' stated, "[The] affidavit did not conclusively establish the security procedures used by AutoNation in their onboarding process[,] and, "AutoNation did not present evidence establishing security procedures that would prevent unauthorized access, or demonstrate that users were required to complete all steps before moving on." *Id.* at 4.

Further, Shattenkirk provided his own declaration to contravene the averments in AutoNation's affidavit, including that:

- He completed several onboarding documents by hand and in person in a different location than alleged by AutoNation;
- The human resources representative who executed AutoNation's affidavit was not present when Shattenkirk was onboarded;
- He did not recall ever seeing any arbitration agreement; and
- He did not recall receiving the email from AutoNation.

The trial court denied the motion to compel arbitration and AutoNation appealed. The Court of Appeals affirmed the trial court's order denying the motion to compel, noting that the trial court could have concluded the agreement was unconscionable. The Texas Supreme Court granted AutoNation's petition for review, reversed the Court of Appeals' judgment that the agreement might be unconscionable, and remanded the case back to the Court of Appeals to address the issue of whether the employee electronically executed the agreement.

On remand, the Court of Appeals held that AutoNation, as the party trying to enforce the arbitration agreement, bore the burden of establishing the agreement's existence by legally sufficient evidence, and bore the burden of negating any contravening evidence from Shattenkirk that he did not execute the arbitration agreement.

The Court of Appeals found that, although AutoNation proved that it had an electronic process for obtaining e-signatures from employees, it: (1) had not adequately proven in the trial court that Shattenkirk had actually executed electronically the arbitration agreement; and (2) had not adequately proven in the trial court that the security procedures associated with the electronic signature were sufficient to show that Shattenkirk actually provided the e-signature.

The Court of Appeals further determined that both Texas law and the Federal Arbitration Act require an evidentiary hearing at the trial court level on the issue of whether Shattenkirk electronically executed the arbitration agreement—affidavits alone are insufficient. Accordingly, the Court of Appeals reversed and remanded that issue to the trial court for an evidentiary hearing. At that hearing, AutoNation must offer evidence establishing:

- The existence of a signed arbitration agreement between AutoNation and Shattenkirk;
- The existence of a hiring and application process; and
- The efficacy of its security procedures for the electronic signatures placed on the documents.

Regardless of the ultimate outcome of the AutoNation case, one thing is clear—employers should have a hiring and application process and e-signature systems that leave little room for doubt about the efficacy of the security procedures and the resulting authenticity of an employee's e-signature. Not only does the party seeking to enforce an arbitration agreement have to adequately prove that their normal processes

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and computer records show that an e-signature occurred, but they must also show that their e-signature systems and procedures adequately protect against a third party providing the e-signature. As specified, in part, by the Court of Appeals' opinion and the Texas Uniform Electronic Transactions Act, such processes and systems should:

- Be clear and organized so that there is little room for doubt as to whether, how, where, or when an employee participated in the hiring and application process;
- Maintain a single, secure system for tracking user activities that prevents unauthorized access to electronic records;
- Require users to complete all steps in a program before moving on;
- Include security mechanisms such as algorithms or other codes, identifying words and numbers, encryption, or callback or other acknowledgment procedures for the purpose of verifying that an electronic signature is that of a specific person;
- Include security procedures that require an individual to register for an account, obtain a unique password, and provide personal identifying information;
- Assign a unique identifier to a user and then tie that identifier to the user's actions; and
- Include timestamps showing when users completed certain actions.

Alternatively, given what appears to be an onerous burden now placed on employers seeking to enforce an arbitration agreement that is electronically executed, employers may wish to have those agreements executed the "old fashioned" way—with a wet signature witnessed by someone in human resources.

Nevertheless, employers should re-examine their e-signature processes, or their arbitration and other agreements may not be enforceable.

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