



## Agreement To Arbitrate Acknowledged, Not Accepted, Eighth Circuit Says

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Recent workplace arbitration jurisprudence from the Supreme Court of the United States has drawn quite a bit of attention in the employment arena, and rightfully so. In *Lewis v. Epic Systems*, the Supreme Court [approved class action waivers](#) in arbitration agreements, and in *Lamps Plus, Inc. v. Varela*, the Court held that an [ambiguous arbitration agreement](#) cannot provide the basis for concluding that the parties agreed to class arbitration.

Despite these landmark decisions, the Eighth Circuit recently highlighted that the mere presence (in an employee handbook) of an arbitration provision with class and collective action waivers may not be enough for an employer to compel individual, bilateral arbitration of employment disputes.

In *Shockley v. PrimeLending*, the Eighth Circuit agreed with the district court that the applicable arbitration and delegation provisions contained in the employee handbook were not enforceable contracts under Missouri state law.

The plaintiff employee brought suit alleging that the defendant employer violated the Fair Labor Standards Act (FLSA) by failing to properly pay her earned wages and overtime. The defendant thereafter moved to compel arbitration based upon the arbitration and delegation provisions. The arbitration provision provided that the employer and employee would resolve disputes arising under the FLSA through arbitration, and that the ability to initiate a class or collective action was waived. Similarly, the delegation

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provision stated that arbitrator had the sole authority to interpret the arbitration provision.

Agreements to arbitrate are a matter of contract law. While it was undisputed that these arbitration provisions were contained in the electronically-accessible employee handbook, the court found that no contract had been formed under Missouri contract law. On two separate occasions, the plaintiff had been electronically presented with the employee handbook containing these provisions. And on each occasion, the plaintiff clicked on an acknowledgement of review. However, she did not recall actually reviewing the employee handbook, and there was no evidence that she ever reviewed its text.

On these facts, the court held that, at best, the defendant could only show that the employee acknowledged the existence of the provisions. Applying Missouri contract law, the Eighth Circuit held that the plaintiff's "mere review of the subject materials did not constitute an acceptance on her part." Without the plaintiff's acceptance, no contract had been formed, and thus arbitration could not be compelled.

This case provides an important reminder to employers: even though workplace arbitration agreements can be a useful litigation management tool, the manner in which an arbitration program is implemented and maintained is of critical importance. Even with the recent pro-arbitration decisions from the Supreme Court, employers would do well to remain mindful that arbitration agreements are a matter of state contract law, and thus require valid contract formation.