

# LAST CHANCE AGREEMENTS REQUIRE CAREFUL DRAFTING TO AVOID ARBITRATION

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Last Chance Agreements (LCA) are agreements between an employer and an employee and/or a union that gives the employee who has committed serious misconduct one last chance to keep the employee's job. These agreements usually detail the employment misconduct, set forth the employer's expectations for continued job performance and define the employment consequences for failure to meet those expectations—usually termination of employment.

The concept of the LCA is to put the employee on notice that failure to abide by a certain set of employment conditions will result in some form of employment action. Most often, the violation of a LCA means that the employee will be terminated. Often, LCA's are used in the collective bargaining context by employers to avoid the potential for losing an arbitration decision over a troublesome employee. Although sometimes an LCA is used with a non-union employee, particularly where the employee has a substance abuse problem and is seeking treatment.

Where terminations are subject to a grievance and arbitration procedure, the employer may seek to address an employee's workplace problems by clearly delineating a set of rules through the LCA that the employee must follow to keep the job. The employer is using the LCA to avoid subjecting the termination to the vagaries of an arbitrator's judgment. By giving the problem employee "one last chance," the employer permits the employee to continue to work in return for the employer's right to take appropriate discipline without recourse to the grievance and arbitration provisions of the collective bargaining agreement or an employer's required policy. At least that is what most employers thought.

Recently the United States Court of Appeals for the Sixth Circuit held otherwise, ruling that an employer must arbitrate the factual guilt of an employee subject to a "Last Chance Agreement", despite the fact that the LCA stated that "neither the termination nor any issue of termination will be subject to the grievance and arbitration provisions of the collective bargaining agreement." See *United Steel Workers of America v. Century Aluminum of Kentucky*.

In *Century Aluminum*, the employer, the employee and the union signed an LCA agreeing that the employee's continued employment was subject to compliance with all of its terms. The LCA further stated that failure to comply with its conditions would allow the employer to terminate the employee at management's sole discretion. Seven months later, the employee was terminated for creating a hostile work environment based on certain alleged statements.

The union grieved the employee's termination and the employer refused to process the grievance, arguing that the LCA specifically excluded his termination from the grievance process. The union then filed a lawsuit to compel arbitration of the matter. The district court granted the union's motion to compel arbitration and the employer appealed this decision, which was affirmed by the appellate court.

In collective bargaining, there is a presumption that an employment issue is arbitrable under the collective bargaining agreement's arbitration provision. Doubts are to be decided in favor of arbitrability. Only issues expressly excluded from the arbitration process are not arbitrable.

In this case, it was clear that the collective bargaining agreement's arbitration provision only excluded denials of benefits from the pension and welfare benefit plans. However, the employer argued that the LCA expressly waived arbitrability of the employee's termination, but the court disagreed. The court held that the language did not clearly and unambiguously waive the arbitrability of guilt. Rather, it waived only the arbitration over the manner of discipline.

In making its decision, the court relied on previous court decisions that bifurcated the arbitrability of guilt from the arbitrability of punishment based on language that did not expressly remove the factual guilt of an employee from the coverage of the contractual arbitration provisions. The court also stated that Century Aluminum should have defined "any issue of termination" to include factual guilt if it did not want the issue of guilt to be arbitrable.

Accordingly, a Last Chance Agreement must be carefully drafted when the employer desires to avoid arbitration over any part of an adverse employment decision for the subject employee. The drafter should address all aspects of the employer's arbitration clause and policy. In particular, the LCA should expressly exclude findings of fact, factual guilt and manner of punishment from the grievance and arbitration provisions of the relevant collective bargaining agreement.

An additional consideration when drafting an LCA for an employee because of a substance abuse problem is the Americans with Disabilities Act (ADA). The ADA prohibits discrimination against qualified employees with disabilities. While the current use of illegal drugs is not a disability, alcoholism and drug addiction can be disabilities under the ADA. The ADA also protects employees who are perceived to be disabled.

Properly drafted, LCA's do not violate the ADA. However, at least one court has held that forcing an employee to sign an LCA after the employer learned that the employee was seeking treatment for his addiction violated the ADA. In that case, the employee had neither performance nor discipline issues. The court decided that requiring the employee to sign the LCA was a disciplinary action taken on account of his status as a recovering addict, which status is protected by the ADA. To avoid the possibility for a similar result, employers should not require an employee to sign an LCA based on the employee's status as a recovering addict.

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