CLIENT ALERT TWO IMPORTANT CASES FOR EMPLOYERS: ARBITRATION AGREEMENTS AND ELECTRONIC SIGNATURES; AND COMPANY DEFEATS TRADE SECRETS CLAIM WITH ANTI-SLAPP MOTION.

June 6, 2017

Jay M. Wallace
Board Certified
Labor & Employment Law
Dir: # (214) 740-1407
E: jwallace@bellnunnally.com

Tom L. Case
Board Certified – Trial Law
Dir: (214) 740-1422
E: tcase@bellnunnally.com

Tammy S. Wood
Dir: (214) 740-1465
E: twood@bellnunnally.com

John Smart
Dir: (214) 740-1475
E: jsmart@bellnunnally.com

Sonja J. McGill
Dir: (214) 740-1497)
E: smcgill@bellnunnally.com

Mark Shoffner
Dir: (214) 740-1483
E: mshoffner@bellnunnally.com

Alana Ackels
Dir: (214) 740-1412
aackels@bellnunnally.com

3232 McKinney Avenue
Suite 1400
Dallas, Texas 75204

Website:
www.bellnunnally.com

El Paso Court Finds Electronic Signature Insufficient to Enforce Employer's Arbitration Agreement.

In *K-Mart Stores v. Ramirez* the El Paso Court of Appeals recently ruled that an electronic signature was insufficient to prove the employee received sufficient "notice" of the arbitration agreement to allow for its enforcement.

Texas law and K-Mart's electronic system Under Texas law the key to enforcement of an employer's mandatory arbitration agreement is showing that the employee had "notice" of the agreement, followed by their continued employment with their organization. Proving such notice can be accomplished several different ways, the most common and reliable is the employee's signature on the arbitration agreement. In this case, K-Mart, like many employers, secured their employees' signatures on important company documents via an electronic system. Notably, the employees entered the system using their unique user ID and password; once navigating to the documents page, the employees then clicked to the link containing the arbitration agreement. When the employee clicks on that link, the employee receives a "prompt" asking for confirmation of receipt of the arbitration agreement. The employee then clicks "yes" and "submit" buttons to clear the screen.

Employee denies using K-Mart's system The plaintiff, Ramirez, was terminated from employment and filed suit for disability discrimination. In that lawsuit Ramirez claimed she had no knowledge of the arbitration agreement and had never navigated K-Mart's portal, despite the portal reflecting otherwise. In response, *K-Mart* cited the El Paso court to several other prior cases where other courts had upheld their electronic signature system, thereby enforcing the K-Mart arbitration agreement.

What the courts said – employee's denial of electronic signature sufficient to defeat agreement

The El Paso Court of Appeals upheld the trial court's decision not to enforce K-Mart's arbitration agreement, taking the position that Ramirez denying having ever seen the agreement was sufficient to raise doubt that she had ever navigated the portal and acknowledged receipt as the arbitration agreement as K-Mart's system showed. Notably, the court said K-Mart did not show its electronic records constituted "conclusive evidence" as a matter of law. The court went on to say that "we are not unsympathetic to K-Mart's concerns that if we credit the trial court's findings here, the strength of many arbitration agreements distributed through an electronic portal can be undermined by an employee's own denial of notice…" The court then added, "*but that is a gamble every employer takes every time it foregoes an employee signature and instead hangs its hat on that finders determination whether it met 'Supreme Court's' notice requirement.*"

Although the El Paso Court of Appeals is in the minority of courts in allowing an employee to verbally deny receipt of an arbitration agreement acknowledged through electronic signature, employers need to be aware that this authority exists when determining how to secure acknowledgement of receipt of important company documents.
(*K-Mart Stores of Texas v. Ramirez*, 510 SW3d 559 Tex. App. El Paso 2016).

Austin Court of Appeals finds Trade Secrets Dispute Should be Dismissed Under Texas Free Speech Law.

In a recent Austin Court of Appeals decision, *Elite Autobody v. Autocraft Bodywerks*, the Austin Court of Appeals dismissed claims brought by Autocraft, an Austin based auto repair shop, on the novel argument that communications made by its former employees who set up a competing auto-repair business constituted protected constitutional speech. In the lawsuit, Autocraft claimed that two of its former employees took confidential proprietary and trade secret information with them to Elite Autobody, allowing it to have an unfair competitive advantage. The information allegedly taken by the former employees included personnel information, client forms, vehicle checklists, and payment sheets.

In response to Autocraft's lawsuit, Elite claimed, among other things, that the conduct of the former Autocraft employees related to their "exercise of their right of association and free speech in their pursuit of business on behalf of Elite." They asserted this creative defense based on the language in the Texas Citizens Participation Act ("TCPA") which grants individuals constitutionally protected rights of free speech and association, among other things. Also known as an anti-SLAPP defense. Specifically, their argument was that, "all of Autocraft's claims center upon their communications as they promote and pursue their common interests in developing and maintaining a competitive autobody repair business." The court also observed that because Autocraft had focused its argument on challenging whether the TCPA even applied to its claims (a very credible argument, by the way). Autocraft had failed to provide adequate proof establishing the status of its information as "trade secrets," and protectable proprietary information. Could Autocraft have prevailed in this case by proving this? Perhaps so.

This decision by the Austin Court of Appeals injects a new level of uncertainty into the broad body of case law relating to protection of proprietary and confidential information.

Elite Autobody, LLC v. Autocraft Body Works, Inc. 2017 WL 1833495 (May 5, 2017).