THERE IS NO QUESTION that the use of so-called Last Chance Agreements is on the rise. The theory behind them is simple: They prevent an employee from being terminated, giving that employee the proverbial last chance to prove his or her likelihood of remaining on the straight and narrow. At the same time, it gives the employer a limited risk in bringing that employee back and, whether the employee proves it or not, avoids the final expense associated with otherwise going through a full-blown arbitration hearing to terminate that employee.

But the increasing popularity of Last Chance Agreements has had a down side. Arguably, they have been used so often by employers that many uses of them have been abusive. Unions

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have been reluctant to combat this because the Last Chance Agreement is often the most direct way to avoid an employee termination.

When Last Chance Agreements arise from the employee’s substance abuse, other legal issues are implicated. These legal issues include, but are not limited to, the Americans With Disabilities Act, 42 U.S.C. §12111 et seq. as well as the labor organization’s statutory duty of fair representation, 29 U.S.C. §185(a). This article explores, from a union perspective, what labor arbitrators say constitutes a binding Last Chance Agreement, what courts have said constitutes a binding Last Chance Agreement, and perhaps what unions should say when confronted with the possibility of entering into a Last Chance Agreement. The impediments of the potential new legal issues, and the accompanying liability, may be so great that perhaps labor unions should refuse to sign on to the Last Chance Agreement. The advisability of that remains to be seen. However, at the very least, the short answer to what would make such an agreement bulletproof is this: Nothing!

GETTING THE ARBITRATOR TO ENFORCE THE AGREEMENT • Last Chance Agreements come with a certain presumptions:
• That there has been misconduct by the employee;
• That there is proof of that misconduct;
• That proof of that misconduct is irrefutable; and
• That the misconduct was of a type that would merit discharge.

All or some of these presumptions may be inaccurate. However, there is no doubt about one issue: The legal effect of the Last Chance Agreement. The Last Chance Agreement alters the collective bargaining agreement. Ingersoll-Dresser Pump Company, 114 Lab. Arb. Rep. (BNA) 297 (Bickner, 1999). However, along with any alteration to the collective bargaining agreement comes a necessity to review the union’s duty vis-à-vis its members. The union’s primary duty is to maintain the integrity of the collective bargaining agreement.


What Do Arbitrators Look For?

Under this umbrella then, what are the elements that arbitrators look at when determining the enforceability of such agreements? In How Arbitration Works, supra, a four-step test is outlined:
• The employee must have competent union counsel while negotiating the Last Chance Agreement;
• The employer must tender sufficient consideration;
• There must be an ending date for the last chance status;
• There must be a clear statement of what constitutes a breach of the Last Chance Agreement.

Regarding the issue of competent counsel for the employee, this raises both duty of fair representation implications as well as professional responsibility implications for the attorney retained:
• Is the attorney’s retention such that he or she can negotiate independently of the union?
• Does he or she represent the member through the union, or does he or she represent the member?
• If the attorney has a dispute with the member, can the member terminate that attorney, retain his or her own attorney, and still continue to negotiate a deal?
• If the employee can do this, would any deal be enforceable?

As discussed previously, under the NLRA, the answer to that would in all likelihood be “No.” How Arbitration Works, supra at 972; citing, James Hardie Gypsum, supra. In many states, such as Michigan, the employee is allowed to negotiate a settlement independently of the union, but that settlement may not in any way contradict the terms of the union bargained collective bargaining agreement. Mich. Comp. Laws §423.211.

Waiver Of Union Representation

Alternatively, if the member cannot terminate union retained counsel, can the union impose its will on the employee in the Last Chance Agreement? Then how legally “bound” is an employee, since a waiver of civil rights must be knowing and voluntary? Arbitrators have held that an employee can waive union representation before entering into a Last Chance Agreement. Id., citing Exxon Company, U.S.A., 101 Lab. Arb. Rep. (BNA) 997, 1103 (Sergent, 1993). Arbitrators have also held that an employee may decline union representation, even when directed to obtain it by the employer. However, if an employee does so, that employee is bound by whatever Last Chance Agreement he or she negotiates without union counsel. Id., citing Tosco Refining Company, 112 Lab. Arb. Rep. 306, 311 n. 3 (Bogue, 1999). Moreover, arbitrators have held that unions may in fact impose their will on an uncooperative member. The union may sign a Last Chance Agreement, and even if the employee does not sign it, such a document has been held to be binding. Id., citing Southwest Ohio Regional Transit Authority, 109 Lab. Arb. Rep. (BNA) 310, 314 (Murphy 1997). Arbitrators have even held that the absence of a signature by both the union and the member is not an impediment to enforcement, if knowledge and consent to the agreement can be shown. Id., citing Western Textile Products, 107 Lab. Arb. Rep. (BNA) 539, 547 (Cohen, 1996).

Is No Discharge Really Consideration?

The element that contains perhaps the largest presumption is the consideration from the employer. It is generally acknowledged that the consideration for the Last Chance Agreement is the employer foregoing a termination of the employee. Unions should be very careful before conceding this element. For example, there are numerous instances in which an employee may engage in what seems, in a vacuum, to be egregious behavior; but there are mitigating circumstances, such as seniority, provocations, or other elements that might cause an arbitrator to impose some level of discipline less than discharge. If this is the case, then by entering into a Last Chance Agreement, the union may very well be waiving that outcome and leaving its member in a worse position than if the member goes through arbitration. In any event, if discharge is not a likely outcome, then one must question the value of the consideration by the employer for entering into the Last Chance Agreement. If that consideration were not sufficient, then that too would be a basis for attacking the validity of the Last Chance Agreement.

Duration Of The Agreement

The Last Chance Agreement generally cannot last forever. There must be some period of time after which, if the employee is successful, he or she has proven (or re-proven) his or her entitlement to return to a status equivalent to that of the other members of the bargaining unit.