



Gig Employers, Arbitration Agreements, and the Power of the “Click”

Insights

9.08.17

How important is your businesses’ terms of service (TOS) agreement, usually presented to users of your business model through a process requiring them to click “I agree” before they can access your platform? A recent case illustrates that your TOS could be a vital tool to help you navigate difficult legal challenges. In the *Meyer v. Uber Technologies, Inc.* case, the 2nd Circuit Court of Appeals decided that an Uber rider manifested his assent to be bound by an arbitration agreement despite the fact he claimed he never read the TOS where the agreement was located.

The case started when a rider, on behalf of a putative class of riders, alleged Uber allowed drivers to fix prices in violation of the Sherman Act. Uber moved to compel arbitration and the lower court denied its motion, holding (under California law) that the rider did not have “reasonably conspicuous notice” of Uber’s arbitration agreement, and did not manifest assent to it. The 2nd Circuit disagreed, however, holding in its August 17 decision that the rider did have notice and manifested his assent by the power of the “click.” The decision is a reminder to gig businesses of not only the utility of arbitration agreements, but also why on-demand businesses should carefully consider the way these agreements are electronically presented, whether to your customers or gig workers.

Before deciding it was time to bring suit, the rider took 10 Uber rides in various locations, including Washington D.C. and Paris. Of course, prior to taking these joyrides, the rider downloaded the Uber App and registered for an account via his Samsung Galaxy S5. The second screen displayed during the registration process, labeled “Payment,” and allowed the user to select a payment option (e.g., credit card, Paypal, or Google Wallet). At the bottom of the Payment Screen was text reading: “[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.” Bright blue and underlined, the capitalized phrase was a hyperlink that, when clicked, displayed a third screen with a “button” that, when also clicked, revealed Uber’s Terms of Service Policy. This Policy contained the arbitration provision at issue. The user could, of course, ignore the link and simply click the “Register” button.

In finding the rider had notice of the policy, the 2nd Circuit looked to the design of the screen and the language utilized. Specifically, the court noted the Payment Screen was not cluttered. Moreover, the hyperlink was blue and underlined, appearing directly below the registration button. It was also visible at first glance without the need to “scroll” to find it. As to mutual assent, the court recognized that “courts around the country have recognized that an electronic ‘click’ can suffice to signify acceptance of a contract – as long as the layout and language of the site give the user reasonable

acceptance of a contract...as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.” Here, “the Payment Screen not only included a hyperlink to the Terms of Service, but expressly warned the user that by creating an Uber account, the user was agreeing to be bound by the linked terms.” Thus, the court concluded that the rider manifested his assent to the arbitration agreement by “clicking” the “Register” button.

Interestingly, while finding mutual assent, the court remanded the case to the lower court to determine whether Uber waived its rights to arbitration. The opinion notes the parties exchanged discovery before Uber filed its motion to compel arbitration, which could constitute a waiver of the arbitration process. Whichever way the court rules on that issue will not impact this decision, however. If your TOS includes an arbitration provision, you should read this case thoroughly to make sure you comply with the latest word from the courts on how to properly build a case for mutual assent through the power of a simple click.