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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GREGORY ANTONIONO, Plaintiff and Respondent, v. ELEVANCE HEALTH, INC., et al., Defendants and Appellants.	B327595 (Los Angeles County Super. Ct. No. 22STCV26362)

APPEAL from an order of the Superior Court of Los Angeles County, Holly J. Fujie, Judge. Affirmed.

Constangy, Brooks, Smith & Prophete, Steven B. Katz, Thy B. Bui, and Deepa Kollipara for Defendants and Appellants.

Helmer Friedman, Gregory D. Helmer, Erin M. Kelly, Andrew H. Friedman; Carr Law Group and James C. Carr for Plaintiff and Respondent.

Gregory Antoniono worked for Anthem, Inc. and its predecessors and successors (collectively, Anthem)[1] from December 2002 through August 2006, and again from February 2007 until he was terminated in September 2021. After his termination, Antoniono filed the present action for wrongful termination and retaliation, among other claims. Anthem removed the action to federal court and, when the matter was remanded to state court, filed a petition to compel arbitration. Anthem conceded that Antoniono had never signed an arbitration agreement, but urged that its mandatory arbitration policy was a condition of employment to which Antoniono assented by his conduct—that is, by accepting Anthem's offer of employment and then working for Anthem for nearly 15 years. The trial court denied the petition.

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[1] Anthem, Inc. merged with WellPoint Health Networks Inc. in 2004. The merged entity was named WellPoint, Inc. until it was renamed Anthem, Inc. in November 2014. Anthem, Inc. was then rebranded as Elevance Health, Inc. as of June 2022. The Elevance Health Companies, Inc. (formerly The Anthem Companies, Inc.) and The Elevance Health Companies of California, Inc. (formerly The Anthem Companies of California, Inc.) are both wholly-owned subsidiaries of Elevance Health, Inc. The Anthem Insurance Companies, Inc. is a wholly-owned subsidiary of Elevance Health and an insurance corporation that offers Blue Cross and Blue Shield insurance products. Because the distinction between these entities is not relevant to our analysis, we will refer to them individually and collectively as Anthem.

We affirm. While a signed contract is not necessary to create an arbitration agreement between an employer and an employee, an implied-in-fact agreement requires, at a minimum, that the employer clearly communicate to the employee *both* that assenting to arbitration is a condition of employment *and* what the terms of the employer's arbitration policy are. Anthem did not do so here, and thus the trial court did not err by denying the petition to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

I. Background.

A. Antoniono's employment with Anthem.

Antoniono, an attorney, began working for Anthem in December 2002. He was laid off in August 2006.[2]

On February 7, 2007, Anthem offered Antoniono a position as a Strategic Sourcing Manager. Anthem's two-page offer letter described Antoniono's salary, benefits, start date, and incentive plan. It also said: "[A]s an associate of [Anthem], you will be subject to the Company's binding arbitration policy, as more fully described on the Human Resources Intranet Site, Arbitration." The offer letter did not attach a copy of Anthem's arbitration policy, and there is no evidence that Antoniono had access to the

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[2] Anthem devotes a portion of its appellant's opening brief to discussing documents Antoniono signed between 2002 and 2006, when he was first employed by Anthem. Anthem cites no authority for the proposition that these documents bound the parties after Anthem rehired Antoniono in 2007, and thus we do not discuss them.

company's intranet site at that time. Antoniono signed the letter indicating his acceptance of the offer on the same day.

On February 19, 2007, Antoniono's first day of work, Antoniono signed an "Associate Handbook/Policy Acknowledgement Statement." In full, the statement said: "I recognize that I have access to a copy of the Associate Handbook ('the Handbook') via [Anthem's] internet web site and understand that I am responsible for reading and abiding by the policies and procedures in the Handbook. I agree to review the Handbook from time to time, and direct any questions I have about the Handbook or its contents to my manager or to Human Resources. I understand that the Handbook does not alter my at-will employment relationship with [Anthem] as defined in the Work Environment section of the Handbook. I further understand that [Anthem] reserves the right to modify, delete or add to, as it deems appropriate and at any time, the policies, procedures, benefits and other general information in the Handbook."[3]

Antoniono completed annual online privacy, ethics, and compliance trainings each year from 2013 to 2021. At the conclusion of each of these trainings, he signed certifications that stated: " 'I have read the Code of Conduct . . . . I understand that strict adherence to Anthem . . . policies and procedures is a condition of employment . . . [and] I acknowledge that I have access to Human Resources policies via the Anthem . . . intranet site and understand that I am responsible for reading and

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[3] Anthem has not provided the court with a copy of the Associate Handbook referenced in plaintiff's 2007 associate acknowledgement.

abiding by the policies and procedures listed therein and as amended from time to time.' "[4]

B. Anthem's human resources portal and arbitration policies.

Since 2005, Anthem employees had access to the company's human resources polices, including its arbitration policy, through an internal online portal initially called WorkNet and later renamed Pulse. Anthem submitted a screenshot of the "Introduction" page of the WorkNet site, which showed an "HR Policies" tab, under which there was a link to an "Arbitration" page.[5] The Introduction page stated: "The HR policies on this intranet site supersede and replace any inconsistent policies or practices and replace any past handbook or HR policies. These policies are not intended to be a contract (express or implied), nor are they intended to otherwise create any legally enforceable obligations on the part of the company or its associates. As a growing and changing company, our HR policies and procedures are continually evaluated and may be amended, modified, or terminated at any time, without notice." The page also stated: "You are responsible for knowing, understanding and complying

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[4] Anthem's appellant's opening brief asserts that Antoniono "affirmed in writing at least 14 times [that] he had access to its mandatory arbitration policy, and was bound by it." This misstates what the certifications said—i.e., that Antoniono acknowledged his access " 'to Human Resources policies.' " The certifications contained no references to Anthem's arbitration policy.

[5] The screenshot is undated. It states: "This document was last updated on 11/20/2012. Previous update 6/26/2010."

with [Anthem] policies, including the HR policies, the Standards for Ethical Business Conduct, and others that are found on the company Intranet. You will see as you review the HR policies that wherever possible, the company has built in flexibility (see, for example, the Attendance and Dress Code policies). For some policies, like those that are designed to assure our compliance with laws and regulations (examples are the EEO/Affirmative Action and Harassment Free Work Environment policies), there is no flexibility and the policies are intended to be administered as written. [¶] In conjunction with Human Resources, management retains the discretion to administer and interpret policies to meet business needs and consistent with the flexibility and guidance built into the policies. The company retains the discretion to interpret and implement all HR policies."

Anthem also submitted a screenshot of the Pulse "Arbitration" page, which could be accessed through "HR Policies: My Job."[6] The Arbitration page stated: "Our Human Resources policies support our company's purpose, values and behaviors. Anthem is committed to providing you with a work environment where you are treated with respect and dignity. These policies do not imply continued employment or otherwise limit in any way the at-will employment policy. Policies are continually evaluated and may be amended, modified or end at any time, without notice. You are responsible for knowing and complying with all company policies, using good judgment, acting with integrity, and obeying all laws. Managers and HR may exercise discretion in policy application as necessary." The page also stated: "It is the

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[6] This screenshot is also undated. It references a September 28, 2016 update.

company policy to resolve all legal disputes arising from or relating to an associate's employment (including, but not limited to, the termination of employment) through binding arbitration. Arbitration is the referral to an impartial person for final and binding determination of a legal dispute, and is used in lieu of a jury trial. Arbitration provides both the company and the associate with the benefits of a speedy and impartial resolution procedure while preserving the right to obtain any remedies that are available in court."

Anthem updated its arbitration policy five times during the period of Antoniono's employment. After 2005, the policy was available on the WorkNet and Pulse intranet sites. The version effective when Antoniono was hired in February 2007 stated in relevant part as follows:

"Policy Statement: It is the policy of [Anthem] to resolve disputes arising from or relating [to] the termination of an associate's employment (or for associates commencing employment in 2001 or later, all legal disputes) through binding arbitration. Arbitration is the referral to an impartial person for final and binding determination of a legal dispute, and is used in lieu of a jury trial.

"Rationale: Arbitration provides both the Company and the associate with the benefits of a speedy and impartial resolution procedure while preserving the right to obtain any remedies that are available in court.

"Applies to: All associates working in California. . . .

"Claims Covered by the Agreement: By entering into the employment relationship, the Company and its associates subject to the policy consent to the resolution by binding arbitration of all claims arising out of or related to the termination of that

relationship (and for associates commencing employment in 2001 or later, all legal disputes). This includes claims the Company may have against the associate and claims the associate may have against any of the following: . . . the Company, . . . its officers, directors, associates or agents, . . . the Company's parent, subsidiary and affiliates and agents, and/or . . . all successors and assigns of any of them. By agreeing to be bound by this Policy, the Company and its associates waive the right to a jury trial."

The version of the arbitration policy in effect when Antoniono filed the present action contained similar, but not identical, language.

II. The present action.

Antoniono filed the present action against Anthem in August 2022. The operative first amended complaint alleged six causes of action: retaliation, wrongful termination, violation of Business and Professions Code section 17200, failure to supply wage statements, and intentional infliction of emotional distress.

Anthem removed the action to federal court in September 2022. The district court remanded the action in December 2022, and Anthem filed an appeal of the remand order.[7]

On February 6, 2023, the superior court set the case for trial in May 2024. Two days later, Anthem filed a petition to

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[7] In February 2023, the Ninth Circuit issued an order to show cause stating it may lack jurisdiction over the appeal because an order remanding a removed action to state court is not appealable. Anthem filed a response, urging that the Ninth Circuit had jurisdiction to consider its appeal. The Ninth Circuit dismissed the appeal on April 21, 2023.

compel arbitration and a motion to stay the action. Anthem contended that its February 7, 2007 offer letter expressly stated that Antoniono would be subject to the company's binding arbitration policy and advised Antoniono how he could access that policy. Then, from 2007 to 2021, Antoniono annually acknowledged his ability to access Anthem's human resources policies, which included the arbitration policy, and his agreement to abide by all human resources policies as a condition of his continued employment. Anthem urged that "Plaintiff's myriad signed acknowledgments are sufficient to establish the existence of an arbitration agreement," the terms of which encompassed Antoniono's claims. Anthem further contended that it had not waived its right to arbitrate, the arbitration policy satisfied the arbitrability requirements of *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, and its arbitration policy was neither substantively nor procedurally unconscionable.

Antoniono opposed the motion to compel arbitration and request for stay. Antoniono noted that he had never signed an arbitration agreement, and while the February 7, 2007 offer letter referenced an arbitration policy posted on Anthem's intranet site, the site stated that Anthem's policies were not intended to form a contract and could be modified by Anthem without notice at any time. He urged that Anthem's unfettered right to terminate or modify the arbitration policy was fatal to contract formation, and thus there was no enforceable agreement to arbitrate. Antoniono further contended that Anthem had waived the right to compel arbitration by actions inconsistent with an intent to arbitrate, including opposing remand to the state court and pursuing a federal appeal, and the arbitration agreement was substantively and procedurally unconscionable.

The trial court denied Anthem's petition to compel arbitration. Citing *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 788 (*Esparza*), the court found that Anthem failed to demonstrate that Antoniono agreed to submit his claims to binding arbitration as a condition of his employment. The court explained: "Here, as in *Esparza*, the initial form acknowledging receipt of the Handbook includes language suggesting that Plaintiff had not yet read its terms. Moreover, the homepage of the online Handbook includes language stating that the policies stated therein do not create legal obligations between Moving Defendants and their employees. [Citation.] The evidence that Plaintiff acknowledged that he was required to read and abide by Moving Defendants' [human resources] policies is also insufficient to demonstrate he agreed to arbitrate claims related to his employment, since none of the training certifications expressly provide that Plaintiff assented to an arbitration policy and the homepage of the online Handbook states that the policies do not create legal obligations."

Anthem timely appealed from the order denying the petition to compel arbitration.[8]

DISCUSSION

Anthem concedes that Antoniono never signed an agreement to arbitrate, but it urges he nonetheless should be compelled to arbitrate because his actual or constructive knowledge of the company's mandatory arbitration policy gave

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[8] Concurrently with his respondent's brief, Antoniono filed a request for judicial notice. We grant judicial notice of the Ninth Circuit's April 21, 2023 order dismissing the federal appeal, and otherwise deny the request.

rise to an implied-in-fact contract. Specifically, Anthem contends that Antoniono had notice that agreeing to arbitrate disputes was a condition of his employment, to which he assented by his conduct.[9] Anthem urges: "The question in unilateral contract cases such as this [one] is not whether a party 'agreed to arbitrate,' since 'no [verbal or written] notice of acceptance . . . is required.' All that is required is '[p]erformance of the conditions of a proposal.' Civ. Code[,] § 1584. '[M]utual *expression* of consent is not required.' [Citation.] The question is simply whether the party to be bound had *notice* of the proposal." For the following reasons, we do not agree.

I. Arbitration principles and standard of review.

Code of Civil Procedure[10] section 1281.2 provides in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner

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[9] Anthem also contends that Antoniono was equitably estopped to deny that he consented to the arbitration policy because he signed annual certifications stating that he had access to Anthem's human resources policies and agreed to be bound by them. Anthem did not raise this contention in the trial court, thus forfeiting it. (*In re Marriage of Moore* (2024) 102 Cal.App.5th 1275, 1289 ["The failure to raise an issue in the trial court forfeits the claim of error on appeal"]; *Cook v. University of Southern California* (2024) 102 Cal.App.5th 312, 325 [same].)

[10] All subsequent undesignated statutory references are to the Code of Civil Procedure.

and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists."

" 'The trial court may resolve motions to compel arbitration in summary proceedings, in which . . . "the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." ' " (*Mendoza v. Trans Valley Transport* (2022) 75 Cal.App.5th 748, 763 (*Mendoza*).) The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense. (*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1106; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).)

An order denying a petition to compel arbitration is an appealable order. (§ 1294, subd. (a).) Ordinarily, we review a denial of a petition to compel arbitration for abuse of discretion; but where the trial court's denial of a petition to arbitrate presents a pure question of law, we review the order de novo. (*State ex rel. Cisneros v. Alco Harvest* (2023) 97 Cal.App.5th 456, 459; *Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534, 541.)

II. The trial court correctly concluded that no implied-in-fact contract to arbitrate was formed.

A. Express and implied agreements to arbitrate.

"The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract." (*Engineers & Architects Assn. v.*

Community Development Dept. (1994) 30 Cal.App.4th 644, 653; see also *Nelson v. Dual Diagnosis Treatment Center, Inc.* (2022) 77 Cal.App.5th 643, 653.) Thus, " '[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.' " (*Pinnacle*, *supra*, 55 Cal.4th at p. 236; *B.D. v. Blizzard Entertainment, Inc.* (2022) 76 Cal.App.5th 931, 943.)

"Generally, an arbitration agreement must be memorialized in writing. [Citation.] A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a party's acceptance may be implied in fact." (*Pinnacle*, *supra*, 55 Cal.4th at p. 236.)

Implied-in-fact contracts are defined in Civil Code section 1621: "An implied contract is one, the existence and terms of which are manifested by conduct." An implied contract " ' " ' ". . . in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being the mere mode of proof by which they are to be respectively established." ' [Citation.] . . . Although an implied in fact contract may be inferred from the 'conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an *intent* to promise.' [Citation.]" (*Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 887, italics added; see also *Truck Ins. Exch. v. Amoco Corp.* (1995) 35 Cal.App.4th 814, 824–825.)' (*Zenith Ins. Co. v. O'Connor* (2007) 148 Cal.App.4th 998, 1010.) 'Accordingly, a contract implied in fact "consists of obligations arising from *a mutual agreement and intent to promise* where the agreement and promise have not been expressed in words." [Citation.]'

(*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1178, italics added.)" (*Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1507–1508; see also *Berlanga v. University of San Francisco* (2024) 100 Cal.App.5th 75, 82.)[11]

California law permits employers to implement policies, including arbitration policies, that may become unilateral implied-in-fact contracts when employees accept them by continuing their employment. (*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 11; *Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, 130 (*Diaz*).) Whether employment policies create implied-in-fact contracts is "a factual question in each case." (*Asmus*, at p. 11.)

B. Cases addressing purported implied-in-fact arbitration agreements.

The Court of Appeal enforced an implied-in-fact arbitration agreement in *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416 (*Craig*). There, 12 years after an employee began working for the defendant employer, the employer adopted an arbitration policy that purported to apply to all employee disputes. The employer twice mailed to the employee's home a brochure explaining the employer's arbitration policy and a memorandum that stated as follows: "The enclosed brochure explains the procedures as well as how the Dispute Resolution Program works

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11 Anthem asserts throughout its appellate briefs that consent is not an element of an implied-in-fact contract. Not so. As discussed above, an implied-in-fact contract requires the consent of the parties, but the consent is manifested by conduct, rather than by a written or oral agreement.

as a whole. Please take the time to read the material. IT APPLIES TO YOU. It will govern all future legal disputes between you and the Company that are related in any way to your employment." (*Id.* at p. 419.) When the employer terminated the employee's employment several years later, the plaintiff sued. (*Ibid.*) The trial court granted the employer's petition to compel arbitration, and the employee appealed. (*Id.* at p. 420.)

The Court of Appeal affirmed. It explained that an employee's acceptance of an arbitration agreement may be implied where "the employee's continued employment constitutes her acceptance of an agreement proposed by her employer." (*Craig*, *supra*, 84 Cal.App.4th at p. 420.) In the case before the court, substantial evidence supported the trial court's conclusion that the employee continued working for the employer after receiving the memorandum and brochure explaining the employer's arbitration policy. Accordingly, the employee "thereby agreed to be bound by the terms of the Dispute Resolution Program, including its provision for binding arbitration." (*Id.* at p. 422.)

The court similarly concluded in *Diaz*, *supra*, 34 Cal.App.5th 126. There, the plaintiff and her coworkers received notice at an in-person meeting that the employer was adopting a new dispute resolution policy requiring arbitration of all claims. (*Id.* at p. 128.) All employees received a copy of the agreement to review at home and were told that continuing to work constituted acceptance of the agreement. (*Ibid.*) The plaintiff subsequently sued her employer for workplace discrimination, and the employer filed a motion to compel arbitration. The Court of Appeal held that the plaintiff was

bound by the arbitration agreement because she impliedly consented to it by continuing her employment after being notified that the agreement was a condition of employment. (*Id.* at pp. 130–131.)

The court reached a contrary result in *Esparza*, *supra*, 2 Cal.App.5th 781, concluding that an employee's continued employment did not create an implied-in-fact agreement to arbitrate. There, an employee was given an employee handbook on her first day of work with the defendant hotel. The first page of the handbook (which the court referred to as the " 'welcome letter' ") purported to give " 'both an overview and a better understanding of [the hotel] and the core policies by which we operate,' " but said it was " 'not intended to be a contract (express or implied), nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees.' " (*Id.* at p. 784, italics omitted.) The welcome letter further noted that the hotel " 'reserves the right to revise, modify, delete, or add to any and all policies, procedures, work rules, or benefits stated in this handbook or in any other document at any time (except as to its at-will employment policy) without prior notice. . . .' " (*Ibid.*) The handbook included a section titled " 'Agreement to Arbitrate,' " which was written in the first person and began: " 'I further agree and acknowledge that the company and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Both the company and I agree that any claim, dispute, and/or controversy that either I may have against the company . . . or the company may have against me . . . shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act. . . .' " (*Id.* at pp. 784–785.) The section discussed the scope of disputes

subject to the agreement and procedural issues relating to arbitration. It continued: " 'I understand and agree to this binding arbitration provision, and both I and the company give up our right to trial by jury of any claim I or the company may have against each other.' " (*Id.* at p. 785.)

The last two pages of the 52-page employee handbook was a " 'policy acknowledgement,' " which stated: " 'This handbook is designed to provide information to [hotel] employees . . . regarding various policies, practices and procedures that apply to them including our Arbitration Agreement. [The hotel] and its employees acknowledge that their relationship is "at will" and that either party can terminate that relationship at any time for any reason. [The hotel] reserves the right to modify, alter or eliminate any and all of the policies and procedures set forth herein at any time, for any reason, with or without notice. Neither this manual nor its contents constitute, in whole or in part, either an express or implied contract of employment with [the hotel] or any employee.' . . . [¶] . . . [¶] 'I acknowledge that I have [the hotel's] Employee Handbook. I also acknowledge that I am expected to have read the Employee Handbook in its entirety no longer after one week after receiving it, and that I have been given ample opportunity to ask any questions I have pertaining to the contents of the employee handbook.' " (*Esparza*, *supra*, 2 Cal.App.5th at p. 785, italics omitted.)

The employee signed the policy acknowledgement on her first day of work. After her employment ended about nine months later, she filed a complaint against the hotel for sexual harassment and sex discrimination, among other things. The hotel filed a petition to compel arbitration, which the trial court denied. (*Esparza*, *supra*, 2 Cal.App.5th at pp. 785–786.)

The Court of Appeal affirmed the order denying the petition to compel arbitration. The court noted, first, that the welcome letter expressly stated that it was not intended to establish an agreement. The reasonable interpretation of this language "is that it meant exactly what it said—that the handbook was not intended to create 'any legally enforceable obligations,' including a legally enforceable obligation to arbitrate." (*Esparza*, *supra*, 2 Cal.App.5th at p. 789.) Further, the policy acknowledgement did not say that the employee agreed to abide by the arbitration policy—instead, it said that the handbook " 'is designed to provide information to employees . . . regarding various policies, practices and procedures that apply to them including our Arbitration Agreement.' " (*Id.* at p. 790.) This language, the court said, suggested that the employee handbook was "merely informational." (*Ibid.*) Finally, the policy acknowledgement "explicitly recognized that [the employee] had not read the handbook yet. Presumably, therefore, [the employee] would not know the contents of the handbook or the arbitration provision at the time she signed the form. We have no basis to assume that [the employee] agreed to be bound by something she had not read." (*Ibid.*)

In so concluding, the court rejected the hotel's contention that because the employee was expected to read the handbook within a week, she impliedly agreed to the arbitration provision by continuing to work for the hotel. The court explained: " 'To support a conclusion that an employee has relinquished his or her right to assert an employment-related claim in court, there must be more than a boilerplate arbitration clause buried in a lengthy employee handbook given to new employees. . . . [The hotel] argue[s] that because the policy acknowledgement

referenced the arbitration agreement, it was binding on [the employee]. However, the policy acknowledgement only referenced the arbitration agreement as one of the 'various policies, practices, and procedures that apply' to employees. It did not indicate that [the employee] agreed to be bound by it. Rather, the end of that paragraph stated, 'Neither this manual nor its contents constitute, in whole or in part, either an express or implied contract of employment,' which, along with the language in the welcome letter discussed above, suggested that nothing in the handbook was legally binding on the parties." (*Esparza*, *supra*, 2 Cal.App.5th at p. 791.)

The court similarly concluded in *Mendoza*, *supra*, 75 Cal.App.5th 748. There, the defendant hired the plaintiff as a seasonal truck driver. (*Id.* at p. 754.) The plaintiff could not read or speak English. (*Ibid.*) The defendant's director of human resources attested that it was his practice to meet with new employees to go over the company's employee handbook, including the arbitration provision; if the employee did not speak English, another employee translated. (*Ibid.*) The human resources director then had the employee sign forms acknowledging that the employee was required to abide by all applicable rules and policies, including those set forth in the employee handbook; had received a copy of the handbook; agreed to " 'read, observe, and abide by the conditions of employment, policies, and rules contained in this Handbook;' " and understood that the employee handbook did not create a contract of

employment and could be amended or modified by the employer at any time, with or without prior notice. (*Id.* at pp. 756–757.)[12]

The employee handbook contained an arbitration policy, compliance with which was defined as a " 'condition of employment with the company.' " (*Mendoza*, *supra*, 75 Cal.App.5th at p. 755.) The arbitration policy described the kinds of claims subject to arbitration and the procedures by which arbitration would proceed. (*Id.* at p. 756.) It concluded: " 'Employee understands by being employed by the Company, as a condition of employment, the [employee] agrees to this binding arbitration policy . . . .' " (*Ibid.*, italics, underscoring and capitalization omitted.)

After the plaintiff sued the defendant for employment-related claims, the defendant filed a petition to compel arbitration, which the trial court denied. (*Mendoza*, *supra*, 75 Cal.App.5th at p. 758.) The Court of Appeal affirmed. It concluded that the acknowledgement forms signed by the plaintiff did not constitute an agreement to arbitrate because nothing in the forms alerted the plaintiff either that the handbook contained an arbitration clause or that his acceptance of the handbook constituted a waiver of his right to a judicial forum. The court noted that the plaintiff's agreement "*to read*" the handbook made clear that the plaintiff had not yet read it when he signed the acknowledgment forms, and "[t]here is 'no

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[12] The human resources director said it was his practice to give Spanish-speaking employees a Spanish-language version of the handbook. The plaintiff denied he was ever given a Spanish-language version of the handbook, and he did not recall receiving an English-language version. (*Mendoza*, *supra*, 75 Cal.App.5th at p. 755.)

basis to assume the employee agreed to be bound by something [he] had not read.' " (*Id.* at p. 786, italics added.) Further, "[m]erely agreeing to abide by all applicable rules and policies and to 'read, observe and abide by' the contents of the Handbook that 'is designed for quick reference and general information' does not constitute a contract and does not bind the employee to arbitration. [Citation.] . . . [T]he 'increasing phenomenon of depriving employees of the right to a judicial forum should not be enlarged by imposing upon employees an obligation to arbitrate based on one obscure clause in a large employee handbook distributed to new employees for informational purposes.' " (*Ibid.*) Accordingly, the court "reject[ed] Employers' contention that [plaintiff] entered into an implied-in-fact agreement to arbitrate by simply receiving a copy of the Handbook and working for [the company]." (*Id.* at p. 791.)

We derive several principles from *Craig*, *Diaz*, *Esparza*, and *Mendoza*. As Anthem suggests, an employee may impliedly consent to an employer's arbitration policy by continuing to work for the employer after being informed that the arbitration policy is a condition of employment. But an implied-in-fact agreement to arbitrate requires, at a minimum, that the employer clearly advise the employee both of the terms of the proposed arbitration agreement and that his or her consent to the policy is a condition of employment. An agreement to arbitrate will *not* be implied if the employee is not told what the terms of the employer's arbitration policy are or if the employer's arbitration policy is "buried" among myriad other employment policies. With these principles in mind, we turn to the facts of the present case.

C. Analysis.

Citing *Craig* and *Diaz*, Anthem contends that Antoniono entered into an implied-in-fact arbitration agreement by (1) accepting employment with Anthem after being informed by his offer letter that he would be subject to the company's arbitration policy, and (2) remaining employed by Anthem while annually certifying that he had access to the company's human resources policies and that he was responsible for reading and abiding by those policies.[13] For the reasons that follow, we do not agree.

1. The February 7, 2007 offer letter.

As described above, Anthem's 2007 offer letter to Antoniono stated: "[A]s an associate of [Anthem], you will be subject to the Company's binding arbitration policy, as more fully described on the Human Resources Intranet Site, Arbitration." Anthem contends this letter provided actual notice that assenting to its mandatory arbitration policy was a condition of employment, and Antoniono impliedly agreed to arbitrate by accepting Anthem's offer of employment. But Anthem provided no evidence either that the offer letter attached a copy of Anthem's arbitration policy or that Antoniono had access to Anthem's intranet site the day he signed the offer letter—which was nearly two weeks *before*

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[13] Anthem also cites a number of unpublished federal district court cases. These opinions are not binding on this court, and thus we do not address them. (*Shaw v. Los Angeles Unified School Dist.* (2023) 95 Cal.App.5th 740, 763.)

his first day of work.[14] Anthem also provided no evidence of what information was available on the company's website in February 2007. The screenshots it offered in support of its petition to compel were undated, but were taken sometime after November 2012 and September 2016 (the "last updated" dates referenced on the screenshots). We therefore cannot discern what Antoniono would have been able to learn about Anthem's arbitration policy even if he had been able to access it on February 7, 2007.

The present case is like *Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563 (*Adajar*), in which the defendant attempted to enforce an arbitration agreement allegedly referenced by the plaintiffs' applications for warranty protection. Those applications provided that the plaintiffs acknowledged they had read the defendant's warranty booklet " 'and consent to the terms of these documents including the binding arbitration provision contained therein.' " (*Id.* at p. 569, italics & capitalization omitted.) But in support of its motion to compel arbitration, the defendant did not provide a copy of the warranty booklet referenced in the application. (*Id.* at pp. 569–570.) Under these circumstances, the court held that "no arguable presumption arises as to plaintiffs' knowledge when [defendant] failed to submit the sample warranty booklet referred to in the application. Even if all parties agreed the application incorporated a sample warranty booklet, *arbitration cannot be*

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[14] Anthem contended at oral argument that the arbitration policy in effect when Antoniono signed the offer letter was identical to the one in effect during his earlier period of employment. But of course Antoniono could not have known that when he signed the offer letter because he did not then have access to the company's intranet site.

compelled because there is no evidence of its terms." (*Id.* at p. 571, italics added.)

The circumstances present in *Adajar* are equally present here. As in that case, Anthem has presented no evidence either that Antoniono had access to the terms of the arbitration policy to which Anthem contends he impliedly assented or what those terms were. We therefore cannot conclude that the February 7, 2007 offer letter gave rise to an implied-in-fact agreement to arbitrate.

2. The February 19, 2007 acknowledgement.

As noted above, on his first day of work on February 19, 2007, Antoniono signed an acknowledgement that stated in relevant part as follows: "I recognize that I have access to a copy of the Associate Handbook ('the Handbook') via [Anthem's] internet web site and understand that I am responsible for reading and abiding by the policies and procedures in the Handbook. I agree to review the Handbook from time to time, and direct any questions I have about the Handbook or its contents to my manager or to Human Resources."

Anthem contends that this acknowledgement put Antoniono on actual or constructive notice of the company's arbitration policy, but we do not agree. Anthem has not provided the court with a copy of the "Associate Handbook" referenced in the acknowledgment, and to paraphrase *Adajar*, we "may not simply infer" that the referenced handbook contained the same language as the company's intranet site. (*Adajar*, *supra*, 160 Cal.App.4th at p. 570.) Instead, because it "was [Anthem's] burden to prove an arbitration contract, . . . no arguable presumption arises as to plaintiff['s] knowledge when [Anthem]

failed to submit the [Associate Handbook] referred to in the application." (*Id.* at p. 571.)

Moreover, Antoniono's acknowledgment did not state that he *had* read the employee handbook, but only that he would do so in the future. As in *Esparza* and *Mendoza*, Antoniono would not have known the contents of the handbook or the arbitration provision when he signed the acknowledgement on February 19, 2007. We agree with those cases we "have no basis to assume that [Antoniono] agreed to be bound by something [he] had not read." (See *Esparza*, *supra*, 2 Cal.App.5th at p. 790; *Mendoza*, *supra*, 75 Cal.App.5th at p. 786.)

Finally, while Antoniono's acknowledgement referenced Anthem's human resources policies generally, it did not specifically refer to the company's arbitration policy or say that Antoniono agreed to abide by that policy. This was insufficient to support an implied agreement to arbitrate: " 'To support a conclusion that an employee has relinquished his or her right to assert an employment-related claim in court, there must be more than a boilerplate arbitration clause buried in a lengthy employee handbook given to new employees.' " (*Esparza*, *supra*, 2 Cal.App.5th at p. 791.)

3. Anthem's intranet site and Antoniono's annual ethics and compliance certifications.

Anthem notes finally that its arbitration policy was posted on the company's intranet site, to which Antoniono had access throughout his employment, and Antoniono annually certified that he was responsible for adhering to those policies. Anthem contends that Antoniono thus was on constructive notice of

Anthem's arbitration policy and impliedly accepted its terms through his continued employment.

We do not agree that posting Anthem's arbitration policy on its intranet site and requiring Antoniono to annually certify his obligation to adhere to company policies was sufficient to create an implied-in-fact contract to arbitrate. Although the arbitration policy was accessible to employees through the intranet site, arbitration was one of more than 27 topics[15] accessible through hyperlinks on the company's "Introduction" page. Nothing in the site's language or design would have drawn an employee's attention to the arbitration policy in particular. Moreover, the Introduction page of the WorkNet site specifically stated that the policies discussed on the site "*are not intended to be a contract (express or implied), nor are they intended to otherwise create any legally enforceable obligations on the part of the company or its associates*." (Italics added.) Both the WorkNet and Pulse sites also stated that the company's policies could be changed at any time without notice.

We agree with *Esparza* and *Mendoza* that Anthem could not bind its employees to an arbitration policy merely by including a policy in its employee handbook or on its website and requiring employees to acknowledge their responsibility to comply with all company policies and procedures. (See *Esparza*, *supra*, 2 Cal.App.5th at p. 791; *Mendoza*, *supra*, 75 Cal.App.5th

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[15] Other topics, which were listed in alphabetical order, included "Attendance," "Bereavement," "Business Disruption," "Certification Awards," "Corrective Action," "Dress Code," "Equal Employment Opportunity and Affirmative Action," "False Claims and Deficit Reduction Act," "Family and Medical Leave," to name just a few.

at p. 786.) This is particularly true where, as here, Anthem's intranet site specifically advised its employees that its policies did not create legally enforceable obligations and were subject to change without notice at any time. (*Esparza*, at p. 789 [most reasonable interpretation of similar language is that it "meant exactly what it said—that [an employee handbook] was not intended to create 'any legally enforceable obligations' "].)

Our conclusion is not altered by the fact that Antoniono participated in annual compliance trainings and annually certified that he had "access to Human Resources policies via the [Anthem] Intranet site," he was "responsible for reading and abiding by the policies and procedures listed therein and as amended from time," and "strict adherence to [Anthem's] policies and procedures is a condition of employment." Neither the annual compliance training nor the certifications specifically identified the arbitration policy or differentiated that policy from others on the site. Reduced to its essence, therefore, Anthem's contention is that Antoniono was responsible for regularly wading through each hyperlink on the company's intranet site and discerning—notwithstanding the site's express disclaimer—which policies created enforceable contracts. Anthem provides no analysis or citations to authority to support such an expansive extrapolation from Antoniono's signing of the compliance certificates.

In summary, we conclude that nothing in Anthem's petition to compel arbitration demonstrated the existence of a binding

express or implied agreement to arbitrate. The trial court thus properly denied Anthem's petition to compel.[16]

DISPOSITION

The order denying the petition to compel arbitration is affirmed. Respondent is awarded his appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P.J.

We concur:

EGERTON, J.

ADAMS, J.

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[16] Because we so conclude, we need not consider whether Antoniono's claims were within the scope of the arbitration policy or were substantively or procedurally unconscionable or whether Anthem waived the right to arbitrate.