The New Jersey Legislature Tried To Carve Out NJLAD Claims From Mandatory Employment Arbitration Agreements: State Courts Said "Not So Fast"

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Finding the right language and terms to draft an enforceable employment arbitration agreement has been a moving target in the last decade. While that challenge likely will continue, there has been a good deal of legislative and judicial activity so far in 2022 pertaining to employment arbitration agreements that is decidedly more employer-friendly. It is important for employers to understand how that activity will affect drafting arbitration agreements going forward.

Since 2019 and until recently in New Jersey, any type of employment agreement that contained a provision purporting to waive an employee's right to "any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment" or any "right or remedy under the Law Against Discrimination" ("NJLAD") was deemed against public policy and unenforceable as a matter of law (N.J.S.A. § 10:5-12.7) (amendment enacted in 2019). Generally, an employee could not be forced to submit claims arising under the NJLAD to binding arbitration. Although the 2019 amendment to the NJLAD does not expressly state "arbitration," the plain language of Section 12.7 prohibits all pre-dispute agreements if those agreements prospectively waive the right to file a court action for a claim arising under the NJLAD, including arbitration agreements. Not only have such agreements been unenforceable, employers who brought actions to attempt to enforce the agreement provisions could be held liable for the employees' attorneys' fees (N.J.S.A § 10:5-12.11).

There has been a sea change in those statutory prohibitions through a number of recent Appellate Division cases decided in early 2022. These cases have held that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 to 16 preempts Section 12.7 -- the section of NJLAD that prohibits enforcement of agreements to arbitrate claims arising under the statute.

In a case of first impression, *Antonucci v. Curvature Newco, Inc.*, 2022 WL 453465 (N.J. Super. Ct. App. Div. Feb. 15, 2022), the Appellate Division explained "a state law that conflicts with the FAA or frustrates its purpose violates the Supremacy Cause of the United States Constitution." The court held that even when the state law "does not expressly single out arbitration agreements, it will be pre-empted if its application covertly accomplishes the same objective by disfavoring contracts that ... have the defining features of arbitration agreements."

Similarly, in *Salters v. Brinker Int'l*, 2022 WL 729801 (N.J. Super. Ct. App. Div. March 11, 2022), the plaintiff sued his employer in Superior Court asserting claims under the NJLAD for hostile work environment, racial discrimination,

retaliation, and aiding and abetting. In affirming the lower court's order to arbitrate, the Appellate Division held that Section 12.7 was preempted by the FAA and the plaintiff's NJLAD claims must be adjudicated via binding arbitration.

In *Aguirre v. Conduent Patient Access Sols., LLC*, 2022 WL 893636, at *4 (N.J. Super. Ct. App. Div. Mar. 28, 2022), the Appellate Division reversed the lower court's ruling that the arbitration agreement was unenforceable because it was not entered into knowingly and voluntarily. There, the arbitration agreement provided that all questions of the arbitrability of disputes and claims were to be delegated to the arbitrator. Noting the preemption of the FAA over Section 12.7, the Appellate Division remanded the case for an order that compelling the plaintiff's NJLAD claims to arbitration.

Agreements Should Be Expressly Governed By The FAA, And Include The Arbitral Forum And Applicable Rules

In each of the foregoing cases, the arbitration agreements found to be enforceable contained an express notice provision that the terms of the agreement were governed by and subject to review under the Federal Arbitration Act. The *Antonucci* court expressly stated that its decision does not "address the question whether Section 12.7 is enforceable when applied to an arbitration agreement governed by the New Jersey Arbitration Act." The NJAA is a default statute that will apply absent an express reference to the FAA, its federal counterpart. In our opinion, it is not likely that agreements governed by the NJAA would be enforceable with respect to NJLAD claims as courts strive to harmonize conflicting state laws so that one does not nullify another.

Although arbitration agreements in New Jersey need not set forth the forum, rules, or procedures to be followed for adjudication of employment disputes, it is a best practice and we recommend employers include these items in their agreements. This ensures that a determination of the enforceability of the agreement in any other jurisdiction will pass the *knowing and voluntary* test. The parties to the agreement should have a clear understanding not only of what rights they waive by virtue of their agreement, but also what procedures and rules will supplant the court proceedings should there be a dispute. The agreement may designate one of the national alternative dispute resolution providers such as the American Arbitration Association (AAA), Judicial Arbitration and Mediation Services ("JAMS"), and the National Arbitration and Mediation ("NAM"), and their respective rules and procedures, or it can name regional or local ADR providers.

Agreements Must Clearly Carve Out Certain Claims

2022 brings us changes to arbitration agreements at the federal level as well. In March 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Harassment Act of 2021 (U.S.C. § 402). As the name implies, the law renders invalid a mandatory arbitration agreement, at the employee's option, for claims of sexual assault and sexual harassment. The law does not apply to agreements to arbitrate other employment-related claims including sex discrimination or harassment claims based on any protected characteristic other than sex.

Include A Robust Severability Clause And Do Not Truncate NJLAD's Two-Year SOL

Arbitration agreements must contain a robust severability provision, which is a general savings clause to preserve the intent of the parties if one or more provisions of the agreement are found to be unenforceable. Failure to include a severability clause cannot be cured after the fact. Absent such a clause, courts will decline to rewrite the offensive portions of the parties' arbitration agreement to render it enforceable. Such was the case in *Guc v. Raymours Furniture Co., Inc.*, 2022 WL 729539, at *5 (N.J. Super. Ct. App. Div. Mar. 11, 2022). There, the arbitration agreement stated that any claims against Raymours must be made within the 180-day deadline by filing those claims with the arbitration administrator or they would be forever waived. This provision violated a 2018 amendment to the NJLAD which provides: “It shall be an unlawful employment practice to require employees or prospective employees to consent to a shortened statute of limitations or to waive any of the protections provided by the [LAD].” N.J.S.A 10:5-12(a).

Noting that the employer's arbitration agreements did not contain a severability clause in *Guc*, the Appellate Division declined to blue pencil the unconscionable and unenforceable truncated two-year statute of limitations period to

commence suit under the NJLAD. The court explained "[t]o sever the time-limitation provision from the arbitration provisions would involve a judicial rewrite of the parties' agreements, and courts do not rewrite contracts." Accordingly, arbitration agreements must provide a two-year window for employees to bring employment claims arising under the NJLAD,

An Offer of Employment Or Continued Employment Is Sufficient Consideration

It is settled that an offer of employment is sufficient consideration to render an agreement to arbitrate enforceable. In *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020), Pfizer emailed an agreement to arbitrate to an existing employee. The agreement informed the employee that by continuing to be employed for sixty days, she would waive her right to pursue employment claims against Pfizer in court. Pfizer also provided an online training module and requested the employee click a box to electronically acknowledge the arbitration agreement. There, the New Jersey Supreme Court held that an arbitration agreement, electronically sent to an employee, which unambiguously explained that her continued employment would be deemed assent to the agreement, was sufficient consideration to render the agreement enforceable.

Other Considerations

An agreement to arbitrate employment disputes should be a stand-alone document for which the employee must acknowledge his or her receipt and review either in writing or by electronic capture means. Employees must be given time to review the agreement and to ask questions -- a training module or FAQ document is best practice and a potent defense against allegations that the employee was confused and/or did not "knowingly" waive rights to a court adjudication of his or her employment claims. And for businesses with multi-state operations or that are geographically near to other states, the agreement should contain both a choice of law provision and a venue provision to ensure the employer is not forced to adjudicate employment claims in a foreign jurisdiction or applying foreign law.

While we anticipate the laws governing employment arbitration agreements will continue to evolve, now is a good time for employers to have counsel review and update their existing employment arbitration agreements. For employers considering whether employment arbitration agreements are appropriate for their workforce, Porzio's Employment Team is available to discuss the benefits and protection that such agreements can provide to their business model.