

Client Alert **Employment & Labor**

New Jersey Employers: 'Tis the Season to Review Your Arbitration Agreements

The rules surrounding arbitration agreements are one of the most dynamic areas of employment law in New Jersey, requiring employers to re-evaluate their existing agreements and drafting strategies regularly.

As we [previously reported](#), a New Jersey statute enacted earlier this year provides, in part, that any provision in an employment contract (other than a collective bargaining agreement) waiving a substantive or procedural right or remedy relating to a claim of discrimination, retaliation or harassment is against public policy and unenforceable. Additionally, the law prohibits agreements incorporating a prospective waiver of rights and remedies under either the New Jersey Law Against Discrimination or other laws. But in a significant development, the New Jersey Civil Justice Institute and the US Chamber of Commerce filed suit on August 30, 2019, in the United States District Court for the District of New Jersey, alleging that to the extent this law prohibits pre-dispute arbitration agreements between employers and employees, it is preempted by the Federal Arbitration Act (“FAA”) and thus unenforceable. The lawsuit remains pending and creates further uncertainty regarding the status of employment arbitration agreements in New Jersey.

Independent of the legislature, New Jersey courts have issued several rulings within the past 14 months that employers should carefully consider when drafting and revising arbitration agreements. These decisions are largely employee-friendly.

Would your company’s agreement stand up to judicial scrutiny in New Jersey? What drafting areas should you focus on when preparing or updating your standard arbitration agreement? We address these points below.

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Include Procedural Details

An arbitration agreement's failure to include forum selection language and/or procedural rules may prove fatal to its enforceability.

On November 19, 2019, the New Jersey Supreme Court heard oral argument in *Flanzman v. Jenny Craig*, in connection with an appeal filed by the company from an Appellate Division ruling, which rendered an arbitration agreement unenforceable because of its failure to identify an arbitration forum and the procedural rules for conducting the arbitration. The Appellate Division relied on *Atalese v. United States Legal Services Group, L.P.*, a 2014 New Jersey Supreme Court decision requiring that a party to an arbitration agreement relinquishing rights "must be able to understand - from clear and unambiguous language - both the rights that have been waived and the rights that have taken their place." The New Jersey Supreme Court is examining whether the Appellate Division, by imposing the forum and procedural rules conditions on arbitration agreements, unjustifiably extended the *Atalese* requirements.

Use Simple, Clear Terms

An arbitration agreement must use plain, simple terms that put employees on notice that they are forgoing the right to file claims in court and expressly state the types of claims governed by the agreement. New Jersey courts will not tolerate intentional or unintentional use of language in arbitration agreements that fails to address these points.

The Appellate Division, in *Kiraly v. Forcepoint* (October 2, 2018), reinforced this basic tenet. There, at the outset of her employment, the plaintiff signed a document that included a two-page addendum detailing the processes and procedures for the employer's dispute resolution program. Though the addendum was executed simultaneously with the 8-page main agreement, the agreement used single-spaced, small font buried within the middle to advise that the employee was agreeing to resolve any disputes by binding arbitration in accordance with the addendum's terms. The addendum, in turn, provided that "all [a]rbitrable [d]isputes shall be resolved only by final and binding arbitration conducted privately and confidentially by a single arbitrator selected as specified in this Addendum." The Appellate Division determined that the agreement was unenforceable because it lacked the "simple language" needed to insure the employee's knowing waiver of the right to bring her claim in court. The appellate court relied on *Atalese's* admonition that an arbitration agreement "must explain that plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute."

Be Careful When Using Electronic Means to Document Employee Agreements to Arbitrate

As the United States District Court for the District of New Jersey ruled, in *Falk v. Aetna Life Ins.* (August 31, 2019), a properly executed "clickwrap" arbitration agreement is valid and enforceable under New Jersey law when properly drafted and affirmatively

accepted by the employee. But using a “click box” method (i.e., electronic signature) to evidence employee acceptance of an arbitration duty may be fraught with risk if the agreement does not plainly state that the employee agrees to arbitrate claims.

In *Skuse v. Pfizer Inc.*, the New Jersey Supreme Court granted a petition for certification on June 3, 2019 to examine a ruling that the company’s arbitration agreement was unenforceable, thereby requiring the company to defend a former employee’s religious discrimination lawsuit in court. The company presented its employees with a training module via e-mail that, on one side, asked employees to click to “acknowledge” their intention to be bound by Pfizer’s arbitration policy. The slide also stated that if the employee did not click the acknowledgement, the employee would still be “deemed” to have consented to the agreement if the employee continued working at the company for 60 or more days.

The Appellate Division held that the company was unable to show an “explicit and unmistakable voluntary” agreement by the employee to submit to binding arbitration, because, in the eyes of the court, she only was required to acknowledge her receipt of the policy rather than her knowing and voluntary agreement to submit her disputes to arbitration and waive her court rights.

Specify Whether Federal or State Law Governs the Agreement’s Enforcement

In *Colon v. Strategic Delivery Solutions, LLC* (June 4, 2019), truck drivers signed independent contractor agreements containing an arbitration provision, requiring that they arbitrate claims against the defendant company and be bound by the terms of the FAA. On appeal, plaintiffs argued that they were not required to arbitrate their claims because they were interstate transportation employees and, therefore, exempt from the FAA. The Appellate Division found that even if the trial court ultimately determined that plaintiffs were exempt under the FAA, the New Jersey Arbitration Act (“NJAA”) still applied to their claims and mandated arbitration. But in another case involving a truck driver with wage and hour claims, the Appellate Division, in *Arafa v. Health Express Corporation* (June 5, 2019), found that the arbitration agreement was unenforceable because it expressly stated that it was “governed by” the FAA, which exempts drivers who engage in interstate commerce, among others, from arbitration.

It is difficult to reconcile these cases, and the New Jersey Supreme Court has granted petitions for certification to examine these rulings. One possible explanation for the different outcomes is that the *Colon* agreement expressly stated that New Jersey law governed any disputes. The opinion in *Arafa* was very brief and did not mention whether the agreement expressly applied New Jersey law or included any choice of law provision. Incorporating a choice of law provision, and expressly stating that New Jersey law applies, may be a means to have the NJAA apply if the FAA is found

inapplicable. Employers may also consider adopting a provision expressly stating that the NJAA applies, to the extent the FAA does not apply or address an issue.

Refrain from Waiving Statutory Damage Rights and Include Severability Clauses

The Appellate Division, in *Roman v. Bergen Logistics* (September 24, 2018), determined that an “arbitration agreement’s bar of punitive damages claims under the New Jersey Law Against Discrimination (‘LAD’) is unenforceable because it violates the public policy embodied in the LAD.” The court reasoned that the right of freedom of contract must give way to the prevention of abuse and violation of public interests. *Roman* reminds drafters that remedies and rights established by LAD cannot be abridged by an arbitration agreement. The balance of the *Roman* agreement was still enforceable, however, because it included a severability clause, enabling the court to sever the shortened time limitation for filing without eviscerating the balance of the agreement. *Roman* also serves as a vital reminder of the importance of including severability clauses.

Takeaway:

Because arbitration agreements are an effective tool for avoiding judicial lawsuits of employment law claims and limiting litigation costs, it is prudent for New Jersey employers to evaluate critically whether the terms of their agreements are compliant with recent case law. Though several decisions discussed above are pending review by the New Jersey Supreme Court, employers should not delay reexamining their current agreements.

Attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

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