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New Jersey Law Requires Designation of Forum in Arbitration Agreements

The New Jersey Appellate Division recently held that an arbitration agreement that failed to identify the forum or a process for selecting the forum was insufficient to form a contract between the parties and thus was unenforceable. Therefore, employers must review their arbitration agreements for sufficient detail to ensure enforceability.

In *Flanzman v. Jenny Craig, Inc.*, 2018 N.J. Super. LEXIS 156 (N.J. Super. Ct. App. Div. Nov. 13, 2018), 82-year-old Marilyn Flanzman sued her former employer, Jenny Craig, alleging, among other claims, age discrimination, harassment, and discriminatory and/or constructive discharge in violation of the New Jersey Law Against Discrimination (NJLAD). Jenny Craig filed a motion to compel arbitration, relying on the parties' arbitration agreement. The parties had entered into the arbitration agreement as a condition of continued employment in 2011, 20 years after Flanzman was initially hired.

The arbitration agreement included the following language:

> Any and all claims or controversies arising out of or relating to [plaintiff's] employment, the termination thereof, or otherwise arising between [plaintiff] and [defendant] shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration. This agreement to arbitrate includes all claims whether arising in tort or contract and whether arising under statute or common law including, but not limited to, any claim of breach of contract, discrimination or harassment of any kind.

The trial court granted Jenny Craig's motion to compel arbitration, finding that Flanzman had agreed to arbitration. Flanzman appealed and argued that the parties lacked a "meeting of the minds" as to the rights that replaced her right to a jury trial.

The New Jersey Appellate Division, however, overturned the trial court's ruling, stressing the need for arbitration agreements to reflect a "meeting of the minds" and emphasizing that any waiver of a jury trial should indicate clearly what remedies are included in its stead. In fact, a party to a contract "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." *Klein v. Emeritus at Emerson*, 446 N.J. Super. 545, 552-53 (App. Div. 2016).

The Appellate Division held that information such as the forum of the arbitration is a critical element to demonstrate a meeting of the minds. The Court reasoned that each forum, such as the American Arbitration Association (AAA) or the Judicial Arbitration and Mediation Services (JAMS), has its own set of rules and requirements. The differences in rules within each forum have the ability to significantly impact a party's substantive and procedural rights and even the outcomes. Consequently, without knowing where or how the dispute would be arbitrated, there cannot be a meeting of the minds between parties regarding the arbitration forum and any process for conducting the arbitration. The Appellate Division did not

indicate that the arbitration agreement has to select the actual arbitrator. Agreements should carry sufficient information to demonstrate a meeting of the minds as to the forum and process sufficient to demonstrate a meeting of the minds.

New Jersey employers should revisit their arbitration agreements in light of this very specific ruling to ensure that, at a minimum, the agreement specifies the forum for arbitration or a process for selecting the forum. Although this decision is in the employment context, its application may be more expansive, and businesses should ensure that a forum is selected in commercial arbitration agreements as well. The selection of the jury trial replacement (i.e., a specific forum and process) and other terms that establish mutual assent to arbitrate claims are essential when using such agreements.

Of course, a knowing and voluntary waiver of the right to a jury trial is only one, albeit very important element of a valid and enforceable arbitration agreement. We previously detailed certain other requirements based on a recent New Jersey case in an article that can be found here. Other important considerations when drafting arbitration agreements include, but are not limited to:

- Drafting an explicit and understandable waiver;
- Ensuring that the language indicating the agreement to arbitrate is clear and unambiguous;
- Separating the arbitration agreement from an employee handbook and avoiding burying the waiver among other terms; and
- Identifying the statutes and/or types of claims to be arbitrated.

Given the above, employers considering the implementation of arbitration agreements should seek the assistance of counsel.

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