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NJ Supreme Court Approves Electronic Acceptances in Employment Arbitration Agreements

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Several recent rulings by the New Jersey Supreme Court provide important insights for employers and employees with respect to the use of employment arbitration agreements in New Jersey. Through these recent decisions, the New Jersey Supreme Court has recognized that email is an acceptable delivery method of delivering important information, given modern workplace communications, as long as the assent is clear. This is especially significant in the wake of a global pandemic that has resulted in many employees working remotely.

However, as mentioned in more detail below, these cases involve arbitration agreements that were in effect prior to the March 2019 legislation impacting arbitration agreements as to claims involving protected harassment, discrimination, and retaliation.

Skuse v. Pfizer

In ***Skuse v. Pfizer, Inc.***, 2020 WL 4760077 (Aug. 18, 2020), the New Jersey Supreme Court considered whether an employment arbitration agreement distributed via email and through a company training module was valid and enforceable. The agreement contained an automatic consent feature that would be triggered if the employee continued her employment with the company for 60 days after receiving the arbitration

agreement, and plaintiff Skuse had continued to work for the company long past that 60-day deadline.

By way of background, in 2012, Pfizer emailed all employees a link to its "Mutual Arbitration Agreement" indicating that employees would be deemed to have accepted the agreement by continuing employment with Pfizer for 60 days after receipt. The email also included a link to "Mutual Arbitration and Class Waiver Agreement FAQ," reiterating the method of assent and advising employees to seek counsel. Employees also received a second email, labeled "training module," repeating that arbitration was a condition of employment and the sole means of resolving employment disputes and indicating that employees should "CLICK HERE" to acknowledge receipt. Skuse received both emails, completed the training module, and simultaneously clicked on the box to acknowledge receipt as requested. *Id.* at *6-7.

Skuse remained employed for approximately five more years. When she was terminated in August 2017, she brought suit alleging religious discrimination. In response, Pfizer moved to dismiss the complaint on the grounds that Skuse had assented to arbitration.

The trial court enforced the arbitration agreement, finding Skuse had provided assent by clicking the "acknowledge box" in the training module and continuing employment with Pfizer for more than 60 days. However, the Appellate Division reversed, finding that Skuse had not agreed to the arbitration agreement and determining that the employer's use of a computer training module to communicate and impose the terms of a mandatory arbitration policy rendered the agreement unenforceable. The appellate court reasoned that the training module was "inadequate to substantiate the employee's knowing and unmistakable assent to arbitration and waive his or her right of access to the courts." *Id.* at *4.

•*Waiver of Rights.* On further appeal, the New Jersey Supreme Court enforced the agreement. The court relied on prior New Jersey case law in *Atalese v. US Legal Servs. Grp.,* 219 N.J. 430 (2014), maintaining that an arbitration agreement must be based on the parties' mutual assent. To be effective, a waiver of rights provision must be clear and unambiguous. The court concluded that Pfizer's arbitration agreement and related communications clearly and unambiguously informed Skuse that continued employment with Pfizer for 60 days would waive her right to pursue employment discrimination claims in court and that her decision to continue employment beyond 60 days constituted assent to arbitrate. *Id.* at *11-12.

• *Email Delivery Method.* The court further held that sending the agreement and related materials by email did not invalidate the agreement because electronic communications may be a clear and effective method of communicating proposed contract terms. Although issuing it in a "training module" was somewhat of a misnomer, Pfizer's content and tone signaled an important development. *Id.* at *15.

• *Skuse's Acknowledgment of the Agreement Via Email.* Finally, the court rejected the conclusion reached by the Appellate Division that Skuse had not assented to the agreement's terms because the training module requested that Skuse "CLICK HERE to acknowledge" at the end of the module, as opposed to requesting that she click to "agree." The court rejected the Appellate Division's reliance on *Leodori v. CIGNA Corporation*, 175 N.J. 293 (2003), in which the court refused to enforce the arbitration agreement because the employee had only signed the "acknowledgment" form indicating receipt of the agreement and not the "agreement" form to accept the agreement as the employer had specifically directed. The court distinguished the facts in *Skuse*, highlighting that there was no form or writing that Pfizer designated as the employee's expression of assent. Instead, Pfizer directed employees to provide consent by remaining employed for an additional 60 days after receiving the agreement, which Skuse had done. *Id.* at *16-17.

Flanzman v. Jenny Craig

In ***Flanzman v. Jenny Craig***, 2020 WL 5491899 (Sept. 11, 2020), the New Jersey Supreme Court considered whether an arbitration agreement was invalid because it failed to name the arbitrator, designate an arbitration organization to conduct proceedings, or set forth a process by which the parties would choose an arbitrator.

Plaintiff Flanzman began working for defendant Jenny Craig as a weight loss counselor in 1991. In 2011, she signed a document entitled "Arbitration Agreement." In 2017, Flanzman was terminated and brought various employment discrimination claims against Jenny Craig who moved to dismiss based upon the arbitration agreement.

The trial court granted Jenny Craig's motion to dismiss, ordering the parties to arbitrate, holding that California law governed the arbitration, and determining that California was the appropriate arbitral forum. *Id.* at *5.

The Appellate Division reversed, holding that the agreement was invalid because it failed to designate an arbitration forum or identify the process for selecting an arbitration mechanism or setting, which the appellate court deemed necessary for an agreement to be valid. *Id.* at *5-6.

The New Jersey Supreme Court reversed and held that the agreement was enforceable under both New Jersey and California law. The court held that it was not necessary for the agreement to designate the arbitrator, designate an arbitration organization to conduct proceedings, or set forth a process by which the parties would choose an arbitrator, because the New Jersey Arbitration Act (NJAA) provides a default procedure for these items. *Id.* at *8. Under N.J.S.A. 2A:23B-11(a), there are default provisions for the selection of an arbitrator and general guidance for the administration of the arbitration if the parties leave such issues unresolved in the agreement.

The court reasoned that the NJAA reflected a legislative intent for an arbitration agreement to be binding and enforceable even if the parties did not choose a specific

arbitrator or set forth a process for selecting one. In light of the NJAA's default provisions that supplied terms missing from an arbitration agreement, a court's enforcement of the agreement supplemented by those terms comports with the common law principles of New Jersey common law. The court also recognized that both New Jersey and federal law had a public policy favoring arbitration. *Id.* at *8-9.

The court also relied on *Atalese*, recognizing that the agreement was binding because it was the product of mutual assent, and it clearly and unmistakably informed the parties that any and all claims relating to employment or termination would be subject to binding arbitration that would take the place of a jury or trial. The parties' omission of a designated arbitration institution or process for selecting an arbitration mechanism or setting did not invalidate the arbitration agreement where the parties had expressed mutual assent. *Id.* at *11.

The court also dismissed Flanzman's argument that the arbitration agreement was unenforceable because it failed to contain a choice of law provision, noting that, where the agreement was silent on the choice of law issue, the arbitrator could resolve it. *Id.* at *12.

Stowell v. Cantor Fitzgerald

In *Stowell v. Cantor Fitzgerald*, 2020 WL 5551096 (Sept. 16, 2020), the New Jersey Supreme Court continued its enforcement of arbitration agreements by issuing a one-page order denying the plaintiff Stowell's petition to appeal. The decision of the Appellate Division compelled Stowell to arbitrate discrimination claims based on her electronic consent to a Dispute Resolution Policy and Agreement (DRPA). The Appellate Division had previously ruled that Stowell's click on the box confirming "she had read and accepted the terms of the DRPA" could be "reasonably construed as the equivalent of agreeing to its terms" and affirmatively assenting to the arbitration. *Id.* at *8.

Trends and Takeaways

These decisions are a deviation from prior New Jersey decisions. In the past, New Jersey courts often provided broad protections of individuals' rights, as evidenced in cases such as *Atalese.* Nonetheless, by enforcing the arbitration agreements at issue, the New Jersey Supreme Court rulings are in line with the national trend and the United States Supreme Court's expansive ruling in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612; 200 L.Ed. 2d 889 (2018), which permitted employment arbitration agreements to include class action waivers.

Although many see a myriad of benefits to using arbitration (i.e., more cost effective, efficient, expedient and private, and less time-consuming), there are likewise many who are skeptical about arbitration agreements and believe that the agreements are one-sided in favor of employers, especially in the wake of the #MeToo movement. To address that concern, New Jersey and many other states passed laws prohibiting employers from using arbitration, nondisclosure, confidentiality, and settlement agreements for claims involving protected harassment, discrimination, and retaliation.

On March 18, 2019, New Jersey passed an amendment to the New Jersey Law Against Discrimination (the "NJLAD March 18 Amendment"), N.J.S.A. 10:12-7, which restricted the use of employment arbitration agreements in harassment, discrimination, and retaliation cases. Even though New Jersey employees, employers and practitioners need to monitor the outcome of the challenges to the NJLAD March 18 Amendment (*see New Jersey Civil Justice Institute and Chamber of Commerce of the USA v. Grewal,* 2020 WL 4188129 (D.N.J. July 21, 2020)), the decisions discussed above demonstrate the court's willingness to enforce arbitration agreements that are the product of mutual assent, even when the assent is electronic.

Notably, the arbitration agreements at issue in these recent New Jersey Supreme Court decisions pre-date the NJLAD March 18 Amendment. Some of these key requirements applied by the court in determining enforceability are summarized below.

• A waiver of rights that is clear and in bold language and that includes:

1. A clear explanation of the specific legal rights the employee is waiving by assenting to arbitration;
2. A description of what arbitration entails and how it differs from a court proceeding, including that the employee is waiving rights to a jury trial;
3. The scope and identification of employment-related claims subject to arbitration;
4. The employee's understanding and agreement that arbitration of claims is a condition of employment; and
5. An explanation as to what actions on the part of the employee will constitute the employee's assent to the arbitration agreement.

• Suggestions that employees seek legal counsel if they have questions regarding the impact and effect of the arbitration agreement.

• Ensuring that rights and remedies permitted in court filings will be available in the arbitration forum.

• Avoiding a shortening of the statute of limitations or shifting payment of attorneys' fees and costs to claimants required to arbitrate under an Employer Promulgated Plan.

• Using clear and precise language and being careful with word choice when naming documents to avoid confusing or misleading employees.

• Providing a list of Frequently Asked Questions (FAQs) to aid employees' understanding when they are reviewing and consenting to the agreement.

• Clearly explaining what constitutes employee assent (e.g., continued employment, employee signature of the agreement).

• Enhancing the clarity of the agreement and avoiding future disputes by:

1. Providing a detailed description of the contemplated arbitration;
2. Identifying a specific arbitrator(s) or agreeing to retain an arbitrator affiliated with a specific organization who will apply that organization's rules; and
3. Designating an alternative method of choosing an arbitration organization should the parties' first choice be unavailable.

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