

# New Jersey Courts Continue to Reinforce Broad Deference to Arbitration Agreements in Employment Matters

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Arbitration agreements are now recognized even in circumstances when the methods used to inform employees and to obtain consent to arbitration from employees utilize less than clear procedures.

Two recent decisions from the New Jersey Supreme Court, *Flanzman v. Jenny Craig* (A-66-18) and *Skuse v. Pfizer, Inc.* (A-86-18) both arising out of the employment context, have again reinforced the broad deference that New Jersey courts have provided to arbitration agreements. These decisions continue the trend of how far courts are willing to go to enforce arbitration agreements.

## *Flanzman v. Jenny Craig, Inc.*: Is an Arbitration Forum Required for Validity of Arbitration Agreement?

In a victory for employers, on September 11, 2020, in the case of *Flanzman v. Jenny Craig, Inc.*, the New Jersey Supreme Court ruled that an arbitration agreement would be enforceable even though the agreement does not specify an arbitration forum or describe an arbitration mechanism. In doing so, the Supreme Court found that while parties may include such information in an arbitration agreement, the lack of such information is not fatal to the enforceability of the agreement.

## **Factual Background: Employee Termination Leads to Age Discrimination Claims; Trial Court Grants Jenny Craig Motion to Compel Arbitration Due to Signed Agreement**

Marilyn Flanzman, a former employee of Jenny Craig, had signed an arbitration agreement in 2011 that was clear in its language giving up her right to a jury trial for any and all claims arising out of or relating to her employment or termination. However, the agreement said nothing about what forum replaced

the right to a jury trial, aside from a passing mention to the fact that the employee would pay the “then-current Superior Court of **California** filing fee towards the costs of the arbitration.”

Flanzman, who was a twenty-six year employee of the company, was later terminated at the age of eighty-two. She subsequently brought age discrimination claims for her alleged unlawful termination against Jenny Craig in the Superior Court of New Jersey. Jenny Craig promptly moved to compel arbitration based on the arbitration agreement, and the motion was granted by the trial court finding that California law governed and that the arbitral forum would be assumed to be California. This resulted in Flanzman’s appeal.

## **The Appellate Court Decision: Arbitration Agreement is Invalid for Failure to Identify Arbitration Forum**

On October 17, 2018, the Appellate Division ruled that the arbitration agreement in question was invalid based on the failure of the agreement to identify the arbitration forum, or at least the general process for selecting an arbitration mechanism or setting, as well as a process for conducting the arbitration.

The Appellate Division accepted Flanzman’s argument that based on the lack of such terms of the arbitration agreement, the agreement was invalid as a contractual agreement based on the lack of mutual assent by the parties. The Appellate Division declined to enforce the arbitration agreement explaining that this requirement was not an issue of addressing mere formalities. The court stated that “[w]e are not talking about insignificant aspects of the arbitration process. The associated rights connected with the selection of an arbitral forum generally establish the substantive and procedural setting for the entire arbitration process.”

## **The Supreme Court Decision: Unanimous Decision that Arbitration Agreement was Valid and Did Not Need to Identify Specific Arbitration Forum**

On September 11, 2020, the Supreme Court in a 6-0 decision written by Justice Patterson, reversed the Appellate Division's decision, and held that it was not in fact necessary for the arbitration agreement to designate a specific arbitration forum.

The Supreme Court based its reasoning on the fact that the New Jersey Arbitration Act ("NJAA") had codified the Legislature's intent that an arbitration agreement may be valid and enforceable "even if the parties have not chosen a specific arbitrator or set forth a process for the selection of the arbitrator." The Supreme Court further noted that the NJAA provided default provisions that provided guidance as to how an arbitration will proceed. Therefore in the event that an arbitration agreement lacks terms regarding the designation of an arbitration forum, the NJAA would supply terms missing from an arbitration agreement. In essence, as long as the parties agreed on essential terms of an arbitration agreement and have shown an intention to be bound by those terms, that would be sufficient to show an enforceable agreement.

### ***Skuse v. Pfizer, Inc.*: What Constitutes an Employee's Assent to Arbitration?**

On August 18, 2020, the New Jersey Supreme Court in the matter of *Skuse v. Pfizer, Inc.*, reversed an Appellate Division decision and upheld an arbitration agreement between the employer Pfizer, Inc. and its former employee Amy Skuse. In short, the court ruled that a clear affirmative assent in the typical fashion may not always be necessary in order to enforce an arbitration agreement, and in the employment context, simply acknowledging the fact that continued employment with the employer will constitute assent to arbitration may be sufficient to provide the required assent to an arbitration agreement.

### **Factual Background: Employee Termination Leads to Examination of Arbitration Agreement Presented Four Years After Hiring Date; Trial Court Upholds Agreement and Dismisses Plaintiff's Lawsuit**

The plaintiff Amy Skuse was a former employee of Pfizer who had been terminated from her position as a flight attendant following her refusal to receive a vaccine based on her religious practices. In 2016,

four years after Skuse had first been hired, Pfizer had notified her of a new arbitration policy that would become a condition of her employment. Under the terms of that policy, if an employee continued to work for Pfizer for sixty days after receiving a copy of Pfizer's "Mutual Arbitration and Class Waiver Agreement" the employee would be deemed to have assented to the agreement, and to have waived the right to litigate employment related claims in court, and instead would be agreeing to arbitrate those claims.

Skuse opened emails linking to the agreement, and completed a "training module" regarding the arbitration policy, and finally clicked on a box on her computer screen that asked her to "acknowledge" her obligation to assent to the agreement as a condition of her continued employment after sixty days. Skuse did in fact continue to work at Pfizer for more than sixty days (13 months) before the employment dispute regarding her requirement to receive a vaccine arose, and Pfizer terminated her employment. Skuse filed a lawsuit alleging that her termination was in violation of the Law Against Discrimination, and Pfizer enforced the arbitration agreement, and dismissed Skuse's claims.

## **The Appellate Division Decision: Arbitration Agreement is Invalid due to Inadequate Manner in which Employer Communicated New Agreement to Employee**

The Appellate Division reversed the trial court's determination and held that Pfizer's communications to Skuse regarding the arbitration agreement were inadequate for the purpose of showing a clear and unmistakable agreement to arbitrate and waive Skuse's right to access the courts. The Appellate Division found three issues with Pfizer's actions: (1) the use of emails to disseminate the agreement, when employees were already typically inundated with a large volume of emails; (2) the use of a "training module" or a training "activity" to explain the agreement; and (3) the instruction that Skuse click on her computer screen to "acknowledge" her obligation to assent to the Agreement in the event that she remained employed for sixty days, rather than to have her "agree" to the arbitration agreement.

## **The Supreme Court Decision: Majority Rules that Arbitration Agreement is Enforceable, and Employer's Method of Communication was Effective**

The Supreme Court in its majority opinion, issued by Justice Patterson with Justices LaVecchia, Fernandez-Vina and Solomon joining, found that each of the issues raised by the Appellate Division were not fatal to the enforceability of the arbitration agreement.

First, the Supreme Court found that as to the distribution of the agreement by email, this was effective and that even if Skuse had not read the communications as she alleged, the onus was on Skuse to review the contractual documents that she was going to agree to.

Second, the Court found that the description of its summary of the agreement as a “training module” or “activity” was a misnomer and that Pfizer should not have labeled such communications regarding arbitration as training. Nevertheless, the Court found that despite the incorrect label, the content and tone would not have been misconstrued as a training program and were sufficient to indicate inform Skuse of the need to understand and act on the new policy.

Third, the Court rejected the argument that Skuse by clicking to acknowledge the module, instead of asking her to click to agree, did not assent to the arbitration agreement. The Court rejected the Appellate Division’s prior application of *Leodori v. CIGNA Corp.* which seemed to require a signed written agreement stating that the employee agreed to arbitration. The Court distinguished that case by finding that in *Leodori*, the employer had specifically asked the employee to sign a form to assent to arbitration and that the form had gone unsigned, but that in the case at hand, Pfizer had never required Skuse’s signature as an expression of assent, and had only based assent on the employee’s decision to remain employed after the effective date of the arbitration policy.

Justice Albin issued a concurring opinion in which he agreed with the majority’s conclusion that based on the totality of the evidence Skuse had clearly and unmistakably understood that she was agreeing to arbitration. However, he noted his concerns that arbitration agreements were at risk of becoming standard or industry wide contracts that could form contracts of adhesion contrary to the fundamental public policy of the constitutional right to a civil jury trial, and therefore raised a potential future concern of being deemed unconscionable and unenforceable.

Chief Justice Rabner dissented and indicated disagreement with the fact that the “acknowledgment” of the arbitration, or the “one-sided declaration that consent would be deemed by default” would meet the standard of showing clear and unmistakable assent to arbitration.

## **In Summary, Courts Defer to Arbitration Agreements, But Boundaries May Be in Sight**

New Jersey courts continue to grant broad deference to arbitration agreements, and also continue to lower the bar as to what is required in order to obtain consent for such agreements. But the concurrence and dissent by Justice Albin and Chief Justice Rabner in the Pfizer case indicate that, even though the court has not yet been presented a specific set of facts as a reference point, foreseeable outer limits to this broad deference may be in sight.

It is advisable that employers consult with legal counsel to ensure that any agreement to arbitration meets the current standards for assent, and that any potential claims against enforcement of an arbitration agreement are identified and mitigated.