New Jersey Courts Provide Further Rules Regarding Arbitrability Of Employment Matters

October 29, 2018 | by Alex Lee

In two recent decisions, New Jersey courts provided further guidance regarding the arbitrability of claims in the employment context. The below cases once again highlight the broad deference of courts in favor of arbitration agreements, while also reminding us that there are certain requirements to agreements that are so essential, that a failure to include them will render any such agreement invalid.

On October 15, 2018, in the case of *Schmell v. Morgan Stanley & Co., Inc.*, Civ- No. 17-13080, Judge Anne E. Thompson in the U.S. District Court of New Jersey, granted Morgan Stanley's motion to compel arbitration of Plaintiff's discriminatory and wrongful termination claims based on a finding that Plaintiff had sufficient notice of an Arbitration Agreement with his employer and had failed to opt out of the agreement. Schmell who had been terminated by his employer Morgan Stanley, filed discrimination and wrongful termination claims against Morgan Stanley in State Court. Morgan Stanley responded by first removing the matter to Federal Court, and later moving to compel arbitration based on the arbitration agreement that it argued was binding on Schmell.

This matter was unique in that there was a genuine dispute of fact as to whether the employee had actually agreed to an Arbitration Agreement. What is more, this question did not turn on whether the employee had affirmatively agreed to arbitration, but merely whether the employee received notice of the employer's arbitration policy. Morgan Stanley's default procedure in having employees agree to arbitration was to issue emails to its employees informing them that the arbitration agreement was mandatory unless they opted out. The agreement was then made available for employees to view on its internal human resources portal. Thus, if the employee received notice of the agreement, and continued to work without taking action to opt out, this was sufficient to serve as acceptance of the agreement.

In this case, the parties did not dispute that an email had been sent, but Schmell did not recall reviewing the arbitration agreement or the email informing employees of the policy, noting that he received possibly hundreds of emails in the course of a work day. Schmell further noted that the email was sent after normal working hours during the week before Labor Day weekend, when few employees were in the office. Morgan Stanley also had no way to confirm definitely whether Schmell had reviewed the email or not.

Nevertheless, the Court found that because Schmell had been working on the day the email was sent, had read and responded to other emails on that same day, and was required to review all emails as a condition of his work, it was likely that Schmell had seen the email, and therefore had sufficient notice of the requirement to opt out.

This case is a reminder of how arbitration agreements in the employment context continue to be favored and strictly enforced by New Jersey courts. Even in light of an employer policy that was designed to lean heavily towards a default acceptance by employees, with the employer only required to meet the low burden of providing notice to the employee of the ability to opt out, the Court in this case did not require a 100% definitive finding of notice before concluding that the agreement was valid and enforceable. Schmell's attorneys have vowed to appeal this decision, and it remains to be seen how the Appellate Division will rule on this issue.

On October 17, 2018, in the matter of ***Flanzman v. Jenny Craig, Inc., et al.***, A-2580-17T1 the Appellate Division found that an arbitration agreement was found to be invalid based on the failure of the agreement to identify the arbitration forum and the process for conducting the arbitration.

Marilyn Flanzman, a former employee of Jenny Craig had signed an arbitration agreement in 2011 that gave up her give up a jury trial for any and all claims arising out of or relating to her employment or termination. The arbitration agreement made clear that Flanzman as the employee was giving up her right to a jury trial. 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 as a twenty-six year employee of the company, was terminated at the age of eighty-two, and subsequently brought age discrimination claims against Jenny Craig in Superior Court. Jenny Craig promptly moved to compel arbitration based on the arbitration agreement, and the motion was granted.

On appeal, Flanzman argued that based on the lack of a designated forum in the terms of the arbitration agreement, the agreement was invalid as it lacked mutual assent by the parties. The Appellate Division agreed with Flanzman and reversed the trial court order to compel arbitration, explaining that this requirement was not an issue of addressing mere formalities: "We 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 Court provided guidance towards the minimum standards stating that

> "Selecting an arbitral institution informs the parties, at a minimum, about that institution's arbitration rules and procedures. Without knowing this basic information, parties to an arbitration agreement will be unfamiliar with the rights that replaced judicial adjudication. That is, the parties will not reach a 'meeting of the minds.'
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> For example, AAA uses certain procedures for arbitrating employment disputes. AAA adheres to due process safeguards, which at a minimum meet the standards outlined in the National Rules for the Resolution of Employment Disputes…Picking AAA, for example, helps the parties reach a 'meeting of the minds' as to the rights that replace the right to a jury trial in court."

As noted in previous postings, employees should be reminded from these decisions that valid arbitration agreements in the employment context are difficult to bypass, and employers may even use default opt out procedures in order to have employees agree to such terms. However, employers who wish to arbitrate matters should be reminded that despite the general judicial preference for arbitration, a poorly drafted arbitration agreement that lacks essential requirements including a specific indication of what forum and procedures will replace a jury trial, will be ineffective to compel arbitration of claims.