NJ Supreme Court Finds Employee Assented to Arbitration by Continuing Her Employment

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In its August 18, 2020 opinion in the case of Amy Skuse v. Pfizer, Inc., the New Jersey Supreme Court enforced an employer's arbitration agreement, finding that the plaintiff employee had effectively assented to arbitration by continuing her employment in the face of the employer's announcement of a new arbitration policy. The decision is an important victory for New Jersey employers, because it makes clear that conduct – in this case, the continuation of employment -- can constitute the employee's agreement to arbitrate employment claims.

Pfizer distributed its arbitration agreement to its employees as part of a "training module" program via multiple emails. Although each recipient was asked to click on an "acknowledgement" to show the employee received the new arbitration policy, the emails also made it clear that, regardless whether the employee clicked on the "acknowledgement", the arbitration policy would become enforceable upon the employee's continuation of employment with Pfizer for sixty (60) days after the employee's receipt of the policy.

More than a year later, plaintiff Skuse filed a lawsuit in court alleging that she was wrongfully terminated by Pfizer in violation of the New Jersey Law Against Discrimination.[1] The trial court granted Pfizer's motion to dismiss the lawsuit and compel arbitration. On appeal, the Appellate Division reversed the lower court's decision, concluding that (1) Pfizer's distribution of its arbitration policy by email, rather than in hard copy, failed to give its employees proper notice of the change in company policy; (2) Pfizer's use of a "training module" misled the employees as to the nature of the announcement; and (3) Skuse did not "agree" to the arbitration policy merely by clicking on an "acknowledgement" of that policy.

On further appeal, the New Jersey Supreme Court rejected Skuse's arguments, reversed the Appellate Division's decision, and reinstated the trial court's dismissal of the lawsuit. While the Court found that the company should not have labeled its communication explaining its arbitration agreement as a "training module", it nonetheless held that Pfizer gave proper notice of the employee's waiver of certain legal rights concerning the resolution of any employment disputes that might arise. The Court found that in addition to identifying the legal rights Skuse was waiving and exactly what arbitration entailed, the policy clearly and unambiguously explained that her continued employment after the effective date would constitute her acceptance of the arbitration agreement even in the absence of her affirmative acknowledgement of the policy. Accordingly, the Court found that Pfizer's use of an electronic vehicle to distribute its arbitration policy did not warrant invalidating that policy.

Significantly, the Court's decision holds that, under the facts presented and where clear and unambiguous notice is provided, an employer is legally entitled to rely on an employee's continuation of employment as constituting the employee's assent to arbitration as a term and condition of continued employment. In this respect, the Court distinguished Leodori v. Cigna Corp., 175 N.J. 293 (2003), in which the Court refused to enforce an arbitration agreement because the employee had not signed it.

In light of Skuse, employers seeking to implement arbitration agreements, should do so using methods that clearly and unambiguously specify:

1. the legal rights the employee is waiving by assenting to arbitration;
2. what arbitration entails (e.g., the arbitrator's role, the binding effect and general finality of the arbitrator's decision, etc.,) and how it is different from a court proceeding;
3. the scope of employment-related claims subject to arbitration;
4. the employee's understanding and agreement that arbitration of claims is a condition to continued employment, and that after the arbitration policy's effective date, continued employment is deemed to constitute the employee's express assent; and
5. the import of the arbitration agreement (as in the "Questions and Answers" format used in Skuse) and advising the employee to seek independent legal counsel if the employee has questions as to the meaning and impact of the arbitration agreement.

Employers seeking to implement arbitration agreements should consult with counsel. We are available to help employers prepare and implement procedures and policies relating to arbitration agreements.

[1] The facts of this case predate the enactment of N.J.S.A. 10:12.7 which precludes (a) the waiver of substantive or procedural rights relating to claims of discrimination, retaliation or harassment, and (b) the prospective waiver of the rights and remedies available under the New Jersey Law Against Discrimination ("LAD"). It is not clear whether this provision will be deemed preempted by the Federal Arbitration Act, a claim that is currently the subject of New Jersey Civil Justice Institute and Chamber of Commerce of America v. Gurbir Grewal, D.N.J. Civ. No. 19-17518.