

Class Action Litigation Employment Counseling & Litigation

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New Jersey Supreme Court Clarifies Procedures for Implementing Employee Arbitration Agreements

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What You Need To Know:

- The New Jersey Supreme Court handed down a company-friendly decision this week clarifying New Jersey law on employers' implementation of arbitration agreements for disputes with employees, even without the employee's affirmative consent.
- The Court's guidance is also applicable to other changes in the terms of employment of current employees.

This week, the New Jersey Supreme Court issued a decision clarifying the steps that employers must take to implement arbitration agreements with current employees, even absent affirmative employee consent. Our firm appeared on behalf of the New Jersey Civil Justice Institute as *amicus curiae* in support of the employer.

Skuse v. Pfizer, Inc. involved an employee who alleged she had been subjected to religious discrimination under New Jersey's Law Against Discrimination. The employer sought to enforce an arbitration agreement with a class action waiver that it had distributed to employees via email and through a company "training module." The agreement stated that employees would be deemed to have consented to arbitration if they continued working 60 days after receipt of the agreement. The Appellate Division refused to enforce the agreement because the company had distributed it, in part, through a training module that asked employees only to "acknowledge" the agreement and not to accept its terms.

In a 5-1 decision, the New Jersey Supreme Court reversed and enforced the agreement. In so doing, the Court reiterated three core components to any arbitration agreement in New Jersey: (1) it must be the result of mutual assent under customary principles of contract law; (2) the party's waiver of its rights must be knowing and intentional; and (3) the waiver of rights must be clear and unmistakable. Ultimately, "[i]n an employment setting, employees must at least know that they have agree[d] to arbitrate all statutory claims arising out of the employment relationship or its termination."

The agreement was enforceable because the employee assented to the agreement in accordance with the agreement's "designated method of expressing assent" –that is, remaining employed for 60 days after she received it via email. Additionally, the agreement clearly specified the rights that the employee would be surrendering, such as the right to have his or her claim heard in court by a jury. As such, the agreement left no confusion for a layperson as to what it meant and how it became effective.

That said, the Court criticized the employer's use of the word "acknowledge" instead of "accept" as potentially "vague or misleading in a different setting," and it said that the use of a "training module" to solicit acceptance was not "an optimal method of conveying" the policy to employees. But the agreement was enforceable notwithstanding these shortcomings because of the clear language that the company included in the agreement communicating the arbitration requirement and what it meant in clear and unmistakable language.

Overall, the decision provides a road map of best practices for employers to follow when implementing arbitration agreements applicable to current employees, including the key language that should be included in those agreements and how such an agreement can be rendered binding on an employee through passive continuation of employment rather than active acceptance of the new terms.

The Court's opinion, however, will not be the final word on the question. In a concurring opinion, Justice Albin warned that while he found this particular arbitration agreement enforceable, there may come a tipping point at which "[i]ndustry-wide contracts of adhesion" compelling arbitration may be unenforceable if they effectively force waivers of rights that "render[] the right to a civil jury an anachronism." Additionally, the Chief Justice dissented and would not have enforced the agreement because it lacked an "explicit indication of assent" other than the employee's "continuing to show up for work."

Employers should consider the advantages and disadvantages of entering into arbitration agreements with their employees. Lowenstein Sandler's Employment Counseling & Litigation Group would be pleased to answer any questions you may have about this important topic.

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