

CLIENT ALERT

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N.J. Supreme Court Refuses to Enforce Commonly Used Arbitration Agreement

Once again, the New Jersey Supreme Court has issued an opinion favorable to employees who sue their employers. In a unanimous decision issued last month, the New Jersey Supreme Court in *Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A.* held that a terminated physician's claims brought under the New Jersey Law Against Discrimination ("LAD"), must be litigated in the state court system rather than being arbitrated. The Court found that arbitration was inappropriate even though the physician was party to an employment contract negotiated by counsel and containing a broad form arbitration clause requiring that "any controversy arising out of, or relating to, the Agreement or the breach thereof, shall be settled by arbitration."

The Court's decision effectively voids arbitration clauses commonly found in employment contracts—the clause at issue is one that the American Arbitration Association has recommended for at least 50 years—and has important implications for New Jersey employers:

namely, that standard broad arbitration clauses may not be enforced by New Jersey courts because, despite the breadth of their language, they do not specifically apprise the employee that his/her right to a judicial or administrative forum for statutory employment claims has been waived. Accordingly, it is imperative that employers review the arbitration clauses that are used in their employment agreements to determine their compliance with the mandates of the *Garfinkel* decision.

The Court's Decision

By way of background, in August 1996, Garfinkel—a medical doctor who was represented by counsel—entered into an employment agreement with Morristown Obstetrics & Gynecology Associates, P.A. ("MOGA") containing the above-quoted arbitration clause. According to Garfinkel's complaint, in January 1998, he was told that he would not be allowed to exercise an option to become a shareholder in MOGA because "he did not attract patients well because he was male." After Garfinkel was terminated two months later, he instituted an action alleging several common law contractual contract and tort claims, as well as a statutory claim under the LAD. Both the trial court and Appellate Division dismissed Garfinkel's claim on the basis of the arbitration clause, holding that all of his claims were required to be arbitrated. The Supreme Court reversed.

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The Court's decision begins by noting that both the Legislature and the judiciary have repeatedly expressed the public policy of the state to abolish discrimination in the workplace. By enacting the LAD, the Legislature provided aggrieved employees with an election between an administrative remedy and suit in the Superior Court. The Court also noted that New Jersey has a pro-arbitration policy and that numerous decisions had found that employees may waive a judicial or administrative forum in favor of arbitration. In addition, the Court also cited New Jersey case law requiring that contractual clauses depriving access to the courts must clearly state their purpose. Finally, the Court noted with approval the Appellate Division's approach to the construction of arbitration clauses, namely that any ambiguity should be construed against the drafter—which almost always is the employer. In other words, to the extent that an arbitration clause is deemed ambiguous, it will not be enforceable.

The Federal Arbitration Act

Significantly, however, because *Garfinkel* applies New Jersey law, rather than the Federal Arbitration Act (the "FAA"), it is unclear how a court in New Jersey would view the same language under the FAA. Numerous federal courts have concluded—consistent with the FAA's pro-arbitration, policy—that because ambiguities in the *scope* of an arbitration, claim are to be resolved in favor of arbitration such clauses encompass the arbitration of statutory employment claims. By the same

token, if a New Jersey state court were asked to apply the FAA, the Supremacy Clause may require a state court to conclude that a LAD claim is required to be arbitrated.

Required Language

For present purposes, the Court's opinion provides guidance for language that will be sufficient *under New Jersey law*: "To pass muster ... a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, *e.g.*, workplace discrimination claims."

The Court also cites approvingly Appellate Division language that may impose additional requirements: "The better course would be the use of language reflecting that the employee ... knows that other options such as federal and state administrative remedies and judicial remedies exist; that the employee also knows that by signing the contract, those remedies are forever precluded; and that, regardless of the nature of the employee's complaint, he or she knows that it can only be resolved by arbitration." This latter suggestion reflects an underlying uneasiness with arbitration and in fact may compel the inclusion of incorrect information in a waiver clause: by agreeing to arbitrate employment-related claims, the employee does not agree to waive *remedies*, but rather have those claims resolved in an arbitral forum.

In any event, the additional cautionary language recommended by the Court's approving citation to Appellate Division case law can probably be implemented without using the Court's exact choice of words, inasmuch as they incorrectly imply that the employee is forfeiting a substantive—as opposed to procedural—right. Although there may be some risk to such an approach, the suggested language might be modified to state: "The employee understands that s/he is waiving the right to have his/her claim heard in a federal or state administrative proceeding or in a judicial forum with a right to trial by jury. These forums are forever precluded in favor of an arbitral forum and final and binding arbitration before a neutral arbitrator."

Conclusion

As a practical matter, *Garfinkel* requires that employers review their employment contracts and, if necessary, adjust their arbitration clauses in light of its narrow reading of the commonly used AAA clause at issue in *Garfinkel*. It remains to be seen whether agreements covered by the FAA must satisfy also *Garfinkel's* requirements.

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