

CLIENT ALERT

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New Jersey Supreme Court Provides Guidance on Implementing Arbitration Program

In a significant decision for every employer interested in implementing a mandatory arbitration program, the New Jersey Supreme Court issued a unanimous decision in *Leodori v. CIGNA Corporation* last month which spells out what an employer must do to obtain the knowing and voluntary assent of employees to arbitrate employment-related claims. The Supreme Court's decision is critical to understanding how New Jersey courts treat arbitration and, in particular, whether an employer can implement an arbitration program through an arbitration provision contained in the handbook it distributes to its employees.

Background

Plaintiff Paul Leodori was an in-house attorney for an insurance company who, during the course of his employment, became aware of actions by certain company officers that he believed were illegal or improper. After Leodori reported the alleged wrongdoing to the general counsel and others, he was suspended with pay. The company then hired a retired judge of the United States Court of Appeals for the Third Circuit to investigate the merits of Leodori's charges. After the retired judge determined that neither the law nor facts supported Leodori's claims of misconduct, Leodori was fired.

Leodori then commenced an action in the Superior Court of New Jersey, which was dismissed after the trial court found that the parties had a binding agreement to arbitrate. The Appellate Division reversed the trial court, holding that any enforceable waiver of the right to trial by jury must be shown to be knowing and voluntary, and that the record did not support such a finding.

The Facts Relating to the Employer's Attempted Arbitration Program

Following the commencement of Leodori's employment, the company adopted a policy that all employment-related disputes were to be arbitrated and distributed that revised policy to its employees, including Leodori. Thereafter, Leodori received a handbook containing a similar arbitration clause and signed an acknowledgment that he had received the handbook. The acknowledgment, however, did not specifically refer to the arbitration provision. The employer later distributed another handbook containing a broadly worded arbitration provision. Again Leodori signed an acknowledgment that he received the handbook, but the acknowledgment did not specifically refer to the arbitration provision. Leodori did not sign the separate "Employee Handbook Receipt and Agreement" form which accompanied the second acknowledgment. That form specifically stated that the arbitration agreement was a term of employment and that the employee agreed to it.

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The Supreme Court's Analysis

Consistent with its earlier decision in *Garfinkel v. Morristown Obstetrics & Gynecology Associates*, the Court's analysis began with the proposition that, under New Jersey law, the employer must show that an employee clearly and unambiguously agreed to arbitrate a disputed claim. More precisely, where a state statute creates an employment right that is subject to trial by jury, the employer must affirmatively show an agreement that unmistakably reflects the employee's assent to arbitrate that claim, thereby waiving trial by jury. Given this stringent requirement, the Court went on to find that the mere receipt of a handbook containing an arbitration clause was in and of itself insufficient to show employee assent.

Moreover, the Court opined that although contracts generally do not need to be in writing to be enforceable, the absence of the other party's signature is a significant factor in determining whether the parties have reached an agreement. In the absence of a signature, the employee's intent to be bound has not been unmistakably shown. Without Leodori's signature, there had to be some other explicit indication that he intended to be bound to arbitrate. The Court went on to say that the record contained no such indication, but rather showed that although Leodori was aware of the employer's arbitration policy, he did not unmistakably assent to it.

Further, after using language that appears to impose heightened barriers to the enforceability of

employer-employee arbitration clauses, the Court disavowed such an intent: "We do no more than conclude that an arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it." Thus, an employer desiring to implement an arbitration program through its employee handbook can do so if the employee signs an acknowledgment of receipt which includes language evidencing a knowing and voluntary acceptance of arbitration. Without expressly addressing the issue, the Court appears to have accepted the notion that continued employment is sufficient consideration for the agreement to arbitrate.

Dealing with the Recalcitrant Employee

If an employer chooses to implement an arbitration program, *Leodori* instructs that mere distribution of a handbook containing such a program will be insufficient to create a binding agreement to arbitrate. By distributing the handbook with an acknowledgment agreeing to arbitrate employment-related claims, the employer can bind those employees who choose to participate in the program. However, not all employees will participate, those who choose not to participate may be those more likely to engage in employment litigation.

An employer can, under *Martindale v. Sandvik*, require a new employee to agree to arbitration as a condition of accepting employment. Given the New Jersey Supreme Court's acceptance in *Martindale* of such pre-employment agreements, an

employer should prior to hiring, obtain the prospective employee's agreement.

Although an arbitration program can be implemented with those employees who assent to it, New Jersey law is unclear whether the employer can *require* a current employee to execute an arbitration agreement as a condition of continued employment. A published New Jersey trial court decision – cited favorably by the New Jersey Supreme Court in *Garfinkel* – holds that an employer who terminates an employee for refusing to execute such an agreement has violated the Law Against Discrimination. Plainly, in light of that case, a prudent employer should not terminate a current employee for refusing to execute an arbitration agreement.

Conclusion

Under *Leodori*, the mere distribution of a handbook containing such a policy is insufficient to create an enforceable arbitration agreement even if the employee acknowledges its receipt. *Leodori*, however, provides guideposts for the employer seeking to implement a program through an appropriately worded acknowledgment.

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