Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

All in the Details: New Jersey Arbitration Agreements Must Include Forum Selection Clauses

Uncertainty around the enforcement of mandatory arbitration agreements can cause anxiety for employers, given the possibility of costly and prolonged litigation, despite the expectation of alternative dispute resolution. While arbitration clauses remain in favor as held recently by a New Jersey federal court in *Williams v. Tesla Inc*., in recent months, New Jersey state courts have raised new concerns with the terms of such agreements.

Specifically, the decision in *Flanzman v. Jenny Craig, Inc.*, issued by the Appellate Division in November, requires drafters and signatories of these agreements to ask the question, "where do I arbitrate after my arbitration agreement is enforced?" If the answer to this question is unclear, then the agreement is unenforceable and the employer is exposed to litigating claims in Court.

Flanzman v. Jenny Craig, Inc.

After an initial ruling in October, the Appellate Division has issued a more comprehensive opinion in *Flanzman v. Jenny Craig, Inc.*, which is now published and binding precedent on the lower courts. The lawsuit was brought by a Plaintiff against her former employer under New Jersey's Law Against Discrimination (LAD), asserting claims of age discrimination. Twenty years after she was initially hired, the Defendant presented the Plaintiff with an arbitration agreement, which she signed to maintain her employment. At the age of eighty-two, the Defendant reduced her hours from full-time to three hours per week, before eventually terminating her. Plaintiff brought suit and the Defendant sought enforcement of the arbitration agreement.

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The agreement in *Flanzman* broadly stated that "[a]ny and all claims or controversies arising out of or relating to [plaintiff's] employment, the termination thereof, or otherwise arising between [plaintiff] and [defendant] shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration." The fatal deficiency in the agreement was that it did not contemplate or provide any guidance on the forum the parties intended to use to arbitrate claims that were covered by its provisions. The Court defined "forum" as "the mechanism – or setting – that parties utilize to arbitrate their dispute[,]" such as "an arbitral institution (like the American Arbitration Association (AAA) or the Judicial Arbitration and Mediation Services (JAMS))[.]" The Court went as far as to state that the actual forum did not need to be specified in the Agreement, as long as the parties communicated a general method for selecting a setting for arbitration.

In so finding, the Court relied on a basic principal in New Jersey's approach to enforcing arbitration agreements; namely, that the individual executing the agreement "must be able to understand—from the clear and unambiguous language—**both the rights that have been waived and the rights that have taken their place.**" Recognizing that the available arbitration forums offer differing rules and procedures, the Court ultimately stated that the requisite "meeting of the minds" cannot exist if the executing parties are not aware of the forum that will be used or the possible forums that may result from the agreed upon selection method. Therefore, the Court voided the arbitration agreement and allowed the LAD claims to proceed in Superior Court.

Williams v. Tesla, Inc.

In light of the *Flanzman* decision, it is worth remembering that arbitration agreements remain in favor in New Jersey under both federal and state law. Not long after the state court nullified the agreement in *Flanzman*, the federal District Court of New Jersey dismissed a lawsuit and compelled arbitration in *Williams v. Tesla, Inc.* That lawsuit involved a claim under New Jersey's Conscientious Employee Protection Act (CEPA), after the Plaintiff alleged that he was twice demoted and eventually terminated after reporting illegal and fraudulent practices of his employer.

As part of an offer letter, Plaintiff agreed that "any and all disputes, claims, or causes of action, in law or equity, arising from or relating to your employment, or the termination of your employment, will be resolved to the fullest extent permitted by law by binding arbitration[.]" Unlike in *Flanzman*, the Agreement was very thorough, specifying that the parties would submit covered claims to "arbitration in San Francisco California conducted by [JAMS], or its successors, under the then current rules of JAMS for employment disputes."

Following a familiar two-step analysis, the Court had no difficulty concluding that (1) there was an enforceable agreement to arbitrate, and (2) that the Plaintiff's claims fell within the broad terms of that agreement. While the agreement in *Flanzman* failed

the first step, the agreement in *Williams* specified a forum, a geographical location, a method for choosing a forum if JAMS no longer existed in its current form, and the rules that the parties could expect to follow if they asserted a covered claim. In short, there was no uncertainty for Plaintiff to build an argument on.

Ultimately, the Court found Plaintiff's arguments regarding the ambiguity of the agreement's scope to be unpersuasive, and granted Defendant's motion to dismiss and enforce the arbitration agreement.

Employer Tips

The take-away from the *Flanzman* and *Williams* decisions boils down to the principal that mandatory arbitration agreements must be written so that the clear and unambiguous language informs the signatories of, not just the rights that are being waived, but also the rights that have taken their place.

Many prior Court decisions have emphasized the conditions in which such agreements were signed or whether the contractual terms unambiguously covered particular claims. However, the *Flanzman* ruling places renewed emphasis on what happens after such an agreement is enforced. As a result, existing arbitration agreements should be reviewed and updated to ensure that a specific forum is named or a method of forum selection is included in the agreement.

The following attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert.

David I. Rosen, Esq.
Chair, Employment and Labor Practice Group
drosen@sillscummis.com | (973) 643-5558

Galit Kierkut, Esq.
Client Alert Editor; Member, Employment and Labor Practice Group
gkierkut@sillscummis.com | (973) 643-5896

Charles H. Kaplan, Esq.
Member, Employment and Labor Practice Group
ckaplan@sillscummis.com | (212) 500-1563

Philip A. Portantino, Esq.
Client Alert Author; Associate, Employment and Labor Practice Group
pportantino@sillscummis.com | (973) 643-5661