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New Jersey Arbitration Agreements Should Explicitly Waive the Right to Bring Claims in Court

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On October 26, 2015, in the case *Barr v. Bishop Rosen & Co.*, the New Jersey Appellate Division issued its first published decision applying the New Jersey Supreme Court's decision in *Atalese v. U.S. Legal Services Group LP* to agreements between an employer and employee. The Appellate Division found that the mandatory arbitration provision in *Barr* was not enforceable because it did not state that that the employee was waiving the right to bring his claims in court.

The *Atalese* Decision

In September 2014, the New Jersey Supreme Court in the *Atalese* case held that the arbitration provision in a 23-page contract for "debt adjustment services" was unenforceable.

The Court found that the arbitration provision did not have "clear and unambiguous" language stating that the plaintiff was waiving her right to sue in court to secure relief. The Court stated that an enforceable arbitration clause "at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." Furthermore, the waiver must "be written in a simple, clear, understandable and easily readable way."

As one example of an enforceable mandatory arbitration agreement relating to employment, the Court noted that it had previously upheld an arbitration clause explaining that (i) the plaintiff was agreeing to waive her right to a jury trial and (ii) all disputes relating to her employment would be decided by an arbitrator.

Because the arbitration provision in *Atalese* did not "clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court," it was unenforceable.

Subsequent Unpublished Decisions Regarding Employment Arbitration

Shortly thereafter, in *Kelly v. Beverage Works NY Inc.*, the New Jersey Appellate Division applied *Atalese* to decide whether the arbitration provisions in a collective bargaining agreement ("CBA") barred a plaintiff's lawsuit for wrongful termination.

The Appellate Division first declined to consider the employer's argument concerning preemption because that argument was not raised prior to oral argument.

The Appellate Division then held that "neither the arbitration provisions nor the employee handbook put plaintiff on notice that he was waiving his right to try his claims in court." Therefore, those provisions did not clearly and unambiguously waive plaintiff's right to seek a remedy in court and, thus, were unenforceable.

Furthermore, the Appellate Division stated that it was not persuaded by the argument that *Atalese* was distinguishable because it involved a consumer service agreement rather than a CBA. The Appellate Division saw no reason to conclude that "employees bound by a CBA should be charged with greater understanding of their rights than the average consumer."

Last month, in *Milloul v. Knight Capital*, the Appellate Division held that an arbitration agreement between a plaintiff and his employer was unenforceable because it did not "even mention a waiver of plaintiff's right to a trial" and, therefore, did not meet the minimal requirement of stating "in some express fashion that the employee is sacrificing his or her right to a trial." Thus, the plaintiff was free to pursue his discrimination claims in court.

Both *Kelly* and *Milloul* were unpublished decisions and, therefore, under the New Jersey Court Rules, are not binding precedent.

The Appellate Division's *Barr* Decision

However, in an October 26, 2015, decision that has been approved for publication, the Appellate Division in the *Barr* case addressed the mandatory arbitration provision in the Financial Industry Regulatory Authority's ("FINRA's") Form U-4, which encompassed disputes between the plaintiff and his employer.

The Appellate Division recognized that the U-4 provision did not state that "arbitration within the meaning of the Form U-4 includes a waiver of a judicial remedy." Therefore, relying on *Atalese*, the Appellate Division found that the plaintiff could not be compelled to arbitrate his claims against his employer.

The Appellate Division addressed the separate, written "arbitration disclosure statement" that FINRA requires its members to provide in conjunction with the Form U-4. That disclosure states that, by signing the U-4, a person is "giving up the right to sue a member, customer, or another associated person in court, including the right to a trial

by jury…." The Appellate Division stated that this "separate disclosure would likely have been adequate had Bishop Rosen simultaneously sought plaintiff's execution of a new Form U-4" when the disclosure statement was given to him.

However, the plaintiff had signed the Forms U-4 containing arbitration provisions in 1997 and 2009. The arbitration disclosure statement was provided to him separately in 2000. Because of this lengthy time gap, the documents could not be fairly read together, and the arbitration disclosure statement did not render the arbitration provisions enforceable.

What Employers Should Do Now

In light of the recent case law, New Jersey employers should strongly consider reviewing arbitration agreements to ensure that they explain that an employee is both waiving the right to bring statutory and common law claims in court and agreeing to arbitrate all claims arising out of the employment relationship.

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