New Jersey Law Journal

VOL. CXCI– NO.13 – INDEX 1096 MARCH 31, 2008 ESTABLISHED 1878

Alternative Dispute Resolution

Insulating Your Employer Client From a Rogue Jury

Drafting an effective arbitration clause in the employment context

By Damon T. Kamvosoulis

With a recent trend of million-dollar jury verdicts in employment cases throughout New Jersey, it is becoming increasingly more important for employers to take steps to remove the randomness of juries from the equation. Fortunately for New Jersey businesses and employers, the New Jersey and federal courts have a long and established history of enforcement of arbitration agreements in contracts. (*Marchak v. Clarige Commons,* 134 N.J. 275, 281 (1993)). While arbitration does not eliminate the liability of an employer for their wrongdoing, it takes an emotional panel of lay individuals out of the equation and places the ultimate decision in the hands of an individual with experience in the subject matter, thereby eliminating the threat of a rogue jury.

It has also been long held that arbitration is generally a faster, more efficient and cost-effective means for dispute resolution than traditional litigation. For these reasons many employers are opting to include mandatory arbitration clauses as part of employment arrangements with employees. As such, it is essential for the employer to ensure the arbitration clause is proper, effective and enforceable.

In order for an arbitration clause to be enforceable in the employment context, certain requirements must be met. First, the contract must specify that the parties, employer and employee, intend to arbitrate their respective claims. Any agreement that requires the employee to resolve disputes via arbitration while permitting the employer to either seek resolution by arbitration or by litigation is likely to be held invalid for a lack of mutuality.

Secondly, as in all contracts, there must be consideration for the relinquishment of the employee's right to litigation. The New Jersey courts have found that employment itself, created or continued, is sufficient consideration to enforce an arbitration agreement in an employment application, (*Quigley v. KPMG Peat Marwick, LLP*, 330 N.J. Super. 252, 265 (App. Div. 2000); see also, *Hogan v. Bergen Brunswig Corp*., 153 N.J. Super. 37, 43 (App. Div. 1977). Therefore, the consideration issue is not usually an issue for employers, assuming an employment relationship actually forms between employer and employee.

The third requirement of an enforceable arbitration clause is a clear enunciation of the claims which will be subject to arbitration. While it would seem sufficient for one to include a catch all paragraph stating "all claims" or "any dispute" to subject any and all claims to arbitration, this language is the minimal requirement for enforcement and the courts have stated a preference for a clearer description of the claims intended for submission to arbitration (*Alamo Rent A Car, Inc. v. Galarza*, 306 N.J. Super. 384, 394 (App. Div. 1997). With this in mind, it is recommended that arbitration clauses, where appropriate, include the following language: "all claims, including but not limited to…" or preferably "any and all New Jersey and Federal statutory claims arising out of the employment relationship or termination" (*Garfinkle v. Morristown Obstetrics & Gynecology Assoc., P.A.,* 168 N.J. 124 (2001)).

The employer should be sure to specifically identify all state and federal laws that it intends to submit to arbitration, such as New Jersey Law Against Discrimination claims, the Age Discrimination in Employment Act, the Family Medical Leave Act, etc. Specifically stating which claims will be subject to arbitration demonstrates the parties' clear intention to arbitrate without leaving any doubt as to which claims the arbitration provision governs, while still allowing for the catch-

Kamvosoulis is an attorney in the Litigation Department of Cole, Schotz, Meisel, Forman & Leonard in Hackensack.

all language to apply.

Lastly, but certainly not least, the arbitration clause, to be deemed enforceable, must unequivocally state that it is the parties' intention to arbitrate and that language must be of appropriate print size, and location within the agreement to be enforceable. Therefore, in order to be enforceable an agreement to arbitrate must be clear and unambiguous (*Leodori v. Cigna Corp*., 175 N.J. 293, 302 (2003)). In reviewing enforceability, the courts will look to the print and location of the arbitration provision to determine if it's clear and obvious. Although not always necessary, it is advisable for an employer to state the terms of the arbitration clause in print size no smaller than the other provisions of the agreement and if possible utilize all capital letters and/or bold font to ensure it stands out. Further, the clause should not be buried within an agreement and should be in a conspicuous location within the agreement, such as immediately above the signature line of the employee.

Each of these enumerated factors, if followed, increase the likelihood that an arbitration provision will be found sufficient and enforceable if challenged by an employee. Although public policy generally favors arbitration, it is vital that the binding clause is clear, unambiguous and placed in such a manner as not to deceive the employee.

Once the decision is made to include the arbitration provision as a condition of employment, and a proper and effective arbitration clause is drafted, the next consideration is which document will include the paragraph. Where it was once conceivable that the arbitration clause would be exclusive to employment agreements, New Jersey courts have routinely upheld these same provisions in both employee handbooks and employment applications. *Martindale v. Sandvik, Inc.,* 173 N.J. 76 (2002); *Leodori*, 175 N.J. at 302). This allows employers to bind more than just its key employees to arbitration, as well as providing smaller entities without handbooks or employment agreements, opportunity to use applications as a means to mandate arbitration, as handbooks and employment agreements generally do not exist.

When dealing with the placement of an arbitration clause in an employee handbook or application it is particularly important to ensure that the clause is clear and of proper font and location for the employee to understand that she is waiving her rights to litigate. Generally in an employment application, the clause is included within the document itself, which is ultimately signed by the employee. As such, a clear arbitration clause in bold and all capital letters near or directly above the signature line would satisfy the court's requirements. However, in the context of an employment handbook, the employee usually signs a receipt page for the handbook and buried within the handbook is the agreement to arbitrate.

Although the courts have enforced provisions within the handbook, it is imperative that the receipt page signed by the employee contain, in clear language, a paragraph referencing the waiver of a right to litigation and the acceptance of arbitration as conditioned upon the offer of or continuation of employment. Without a clear and concise paragraph on the signature page the court could ultimately find the agreement to be invalid.

While you now have the tools to draft an appropriate arbitration clause for employer clients, it is always important to keep an eye on the future. While New Jersey and the federal courts have long endorsed a policy in favor of arbitration, there is a wind of change blowing at the legislative level and bills have been introduced to alter or limit an employer's ability to require mandatory arbitration.

Currently there are bills pending in both New Jersey and Washington to limit the enforceability of mandatory arbitration. The New Jersey bill, *S-1075*, limits an employer's ability to cause an employee to waive their rights to a jury trial. The federal bill, *S-1782*, goes one step further in changing the Arbitration Fairness Act to disallow any and all predispute arbitration agreements in employment and other contracts.

As of this writing, both bills are in committee and have not been presented for voting by the respective legislative bodies. For the time being these bills have no impact on an employer's ability to include an arbitration provision within a contract and may never make it to the floor for a vote, but it will be important to watch, for if these pieces of legislation pass they will radically alter the landscape of mandatory arbitration. ■