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# C A S E A L E R T



## Harassment Claims May Be Subject to Mandatory Arbitration

### *State and Federal Courts Strike Down Anti-Arbitration Provision of 2019 Amendment to the New Jersey Law Against Discrimination*

In March 2019 Governor Murphy signed into law Senate Bill S121, which amended the New Jersey Law Against Discrimination by (i) prohibiting non-disclosure provisions in settlement agreements; and (ii) prohibiting mandatory arbitration and jury waiver clauses in employment contracts. Management side attorneys doubted the validity of the arbitration prohibition as potentially preempted by the Federal Arbitration Act pursuant to the Supremacy Clause of the U.S. Constitution.

Two years later, both a Superior Court Judge and the U.S. District Court for the District of New Jersey have agreed that the FAA preempts the arbitration prohibition, ruling that employers and employees may legally contract to arbitrate claims of workplace harassment.

In Janco v. Bay Ridge Automotive Management Corp the plaintiff signed an arbitration agreement as part of the hiring process by Bay Ridge Automotive. The agreement provided that the "Employer and Employee mutually consent to the resolution by final and binding arbitration of all disputes, claims or controversies of any kind between them. . .," including "claims for discrimination, harassment, and/or retaliation." Janco filed a lawsuit against Bay Ridge alleging that the company had violated the NJLAD. Bay Ridge moved to dismiss Janco's complaint and compel arbitration under the agreement that she signed.

Janco argued that the March 2019 amendment to the NJLAD prohibited waiver of any rights under the NJLAD in an employment contract, including the right to a jury trial. Judge Henry Butehorn determined that the NJLAD amendment was "irreconcilable with our national policy favoring arbitration as a forum for dispute resolution. . . . under our federal system of government, national policy prevails."

Two months later, Judge Anne Thompson of the U.S. District Court addressed a head-on challenge to the NJLAD arbitration ban in New Jersey Civil Justice Institute v. Grewal, siding with the NJCI and the Chamber of Commerce to concur with Judge Butehorn that Section 2 of the FAA forecloses any state legislative effort to undermine the enforceability of arbitration agreements. The judge enjoined the Attorney General from enforcing Section 12.7 of the NJLAD as preempted by the

FAA.

These rulings mean that employers may contract with employees to arbitrate any disputes arising out of the employment relationship. Of course, savvy employment litigators will continue to scrutinize such "contracts of adhesion," focusing on the manner in which the contract was forged.

In Janco, for example, the plaintiff also argued that she should not be bound to the arbitration provision because she did not knowingly assent to it. The Court disagreed, noting that:

i. the agreement explained the differences between arbitration and a jury trial and presented this language in bold faced capital letters above the signature line;

ii. the agreement clearly stated that it included claims for discrimination, harassment, and/or retaliation;

iii. the agreement was presented as a three page document which was not buried among other orientation documents;

iv. Janco was not hurried, rushed or forced to sign the document; nor was she deprived of further time to review it;

v. Janco was not denied the opportunity to take the documents home to review them before signing, and there was no evidence that Janco asked any questions about the agreement which the employer refused to answer.

Unless and until Judge Thompson's injunction is stayed or overturned, as of March 25, 2021, employers throughout the State of New Jersey have a clear right to compel the arbitration of claims under the NJLAD pursuant to a binding, enforceable agreement to do so. The enforceability of such an agreement is often a question of fact, and questions of fact often beget litigation. With that in mind, we recommend that employers have counsel review their current arbitration agreements and consult with counsel over the manner in which the agreements are presented to current and future employees.

Questions regarding these decisions or any other employment matters should be directed to Eric Harrison or Brent Pohlman of M&W's Civil Rights and Employment Litigation Team.