Have You Really Agreed to Arbitrate?

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Your employment contracts likely already contain arbitration provisions that waive your employees' right to a jury trial. But is that provision enforceable, as written? Unless you have been careful to specify the forum for arbitration and the process by which the arbitration will be conducted, a court may find that you and your employee have not reached an agreement to arbitrate.

The New Jersey Appellate Division (the "Court") has ruled that an arbitration clause in an employment contract was not enforceable because it did not specify a "forum" or "process" for arbitrating an employee's dispute.

THE FACTS

In Flanzman v. Jenny Craig, Inc., No. A-2580-17T1 (App. Div. 2018) (approved for publication November 13, 2018), the defendant, Jenny Craig, fired the plaintiff, an 82 year-old employee that had worked for the company for 26 years. She then sued Jenny Craig for age discrimination, harassment, discriminatory discharge and/or constructive termination under the New Jersey Law Against Discrimination ("NJLAD").

Jenny Craig moved to compel arbitration under an arbitration agreement the plaintiff had signed 20 years after she was hired with the company, in order to maintain her employment. The agreement stated that any claim arising from the plaintiff's employment "shall, in lieu of a jury or other civil trial be settled by final and binding arbitration." It further specified that the plaintiff would "pay the then-current Superior Court of California filing fee towards the costs of the arbitration . . . ." The trial court granted Jenny Craig's motion to compel arbitration, having "deduced" that "California law will control the arbitration, while the arbitral forum is assumed to be California." The Appellate Division, however, reversed, criticizing the trial court for its decision to "re-write" the agreement and its "fail[ure] to clarify its inherent ambiguity."

THE DECISION

The Court's decision began with the rule that a court must first determine whether there is a valid agreement to arbitrate, an analysis the trial court overlooked. It acknowledged that, the Federal Arbitration Act requires courts to place arbitration clauses on "equal footing" with other contractual terms. This means there must be "mutual assent" and a "meeting of the minds." The Court explained that a "meeting of the minds" requires an understanding by both parties of the rights they have waived, and what will stand in their place. Here, although the arbitration clause expressly waived the plaintiff's right to a jury trial, it did not specify what forum (i.e., mechanism or setting) would substitute in place of the jury trial. The Court explained: "[s]electing an arbitral institution informs the parties, at a minimum, about that institution's arbitration rules and procedures. Without knowing this basic information, parties to an arbitration agreement will be unfamiliar with the rights that replaced judicial adjudication." Because the arbitration agreement did not identify a forum or even specify a

process for selecting a forum, the plaintiff did not know "the rights that replaced the right to a jury trial, thus the parties had no "meeting of the minds as to the arbitral forum."

The Court would "not impose any special language that parties must use in an arbitration agreement" to ensure enforceability. It required only that the language used enable the parties to "understand the ramifications of a waiver of a jury trial, and the agreement "generally address in some fashion what rights replace those that have been waived." Parties can achieve this by "generally indicat[ing] in their agreement that one or more individuals will arbitrate the case," or by identifying an arbitral institution [such as the American Arbitration Association ("AAA") or Judicial Arbitration and Mediation Services ("JAMS")] to handle the dispute."

The Court also distinguished between the failure to select an arbitral forum and the failure to select a specific arbitrator. If the parties "agree that a dispute would be arbitrated by an arbitral institution, or an arbitrator or arbitrators, then that is the agreed upon forum. And after that, if they remain unable to actually select the arbitrator . . . then the parties could arguably apply to the court under N.J.S.A. 2A:23B-11(a) and ask the judge to do so." Thus, the failure to select the arbitral forum is fatal, while the failure to select a specific arbitrator may be cured with the assistance of the court.

TAKE AWAYS

An arbitration agreement must identify a forum or general process for selecting an arbitration mechanism or setting. The failure to do so may signify a lack of meeting of the minds between the contracting parties, invalidating the arbitration provision. An employer can meet its obligation by identifying in the agreement an association—such as AAA or JAMS—to arbitrate the dispute. For added protection, an employer should also specify a process for selecting an arbitration forum if the designated institution become unavailable, as sometimes occurs.