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YOU CAN'T HAVE IT BOTH WAYS

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BACKGROUND

Grant W. Morgan was an employee with Raymours Furniture Company, Inc. ("Raymours"). He was provided with an employee handbook, which was assumed to be read and acknowledged. The employee handbook contained a provision for mandatory arbitration.

Mr. Morgan later made a complaint to his employer, alleging age discrimination in the workplace. He was given an ultimatum: he could either sign an arbitration agreement that was a stand-alone document, or he would be terminated. It is unclear why Raymours chose to present him with a stand-alone agreement, given that the employee handbook already held a mandatory arbitration provision, and that Raymours would later argue that this provision was enforceable. Regardless, Mr. Morgan chose not to sign the arbitration agreement and was thereafter terminated. He then sued Raymours and multiple representatives, claiming wrongful termination and violation of the New Jersey Law Against Discrimination, based on age.

Despite Mr. Morgan having refused to sign the stand-alone arbitration agreement, Raymours moved to compel arbitration based upon the arbitration provision in its employee handbook. The trial court denied the motion, and Raymours appealed.

THE DECISION

The New Jersey Appellate Division agreed with the trial court decision: Mr. Morgan's signed acknowledgement of his receipt of an employee handbook that provided for mandatory arbitration was insufficient to constitute a true waiver of his right to sue his employer. The Appellate Division found that Mr. Morgan "did not clearly and unambiguously waive his right to sue" Raymours in court,

and therefore, the motion to compel arbitration was denied.

The Appellate Division cited the following introduction from the company's employee handbook:

> Nothing in this Handbook or any other Company practice or communication or document, including benefit plan descriptions, creates a promise of continued employment, [an] employment contract, term or obligation of any kind on the part of the Company.

The acknowledgement signed by employees upon receipt of the employee handbook stated that the employee:

> received a copy of the Associate Handbook . . . understand[s] that the rules, regulations, procedures and benefits contained therein are not promissory or contractual in nature and are subject to change by the company.

The Appellate Division's greatest discomfort with accepting Raymours' argument to compel arbitration based on the handbook's provision was that it found it inequitable to allow an employer to enjoy the comfort of a non-contractual employee handbook, while hoping to take advantage of some of the handbook's provisions by claiming contractual obligation when it would gain benefit therefrom. Additionally, the Appellate Division noted that by simply asking employees to acknowledge that they had "received" and "understood" an employee handbook, an employer could not expect that employees had entered into a contractual agreement, that waived their rights to sue in court.

Finally, the Appellate Division cited a case from this past November, where the Fourth Circuit was faced with a similar set of facts and reached the same outcome. See *Lorenzo v. Prime Commc'ns*, L.P., 806 F.3d 777 (4th Cir. 2015). The Fourth Circuit applied much of the same rationale as the Appellate Division, additionally noting that despite the "liberal federal policy favoring arbitration," state contract law is to be applied to determine whether a contract to arbitrate existed.

RECOMMENDATIONS

Initially, we recommend that employers always include the language from *Woolley v. Hoffman-La Roche, Inc.*, 99 N.J. 284 (1985), that the handbook does not create a contract and that any provision may be changed at any time by the employer. This protects employers from employee claims that the employee handbook creates a contractual relationship between the two parties or that any implied promises have been made.

The key impact of this decision on employers is that the mere presentation of mandatory arbitration language in an employee handbook does not create a contract to arbitrate, nor does it provide any assurance that courts will enforce it. The method of presentation is what is crucial - the waiver of the employee's right to sue his or her employer in court must be clear and unambiguous. This could be the subject of a stand-alone agreement, or placed within a larger agreement. The decision only denies employers the right to place the clause in a larger document that is defined by the employer itself as non-contractual in nature.

Finally, the decision emphasizes the need for employers to revisit their employee-related documents. Employers should review their employee handbooks regularly to ensure that

the contents remain current with the law, and that any expectations from the handbook and other documents are sound and will in fact protect the employer as intended.
