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APPELLATE DIVISION DOES NOT "WAIVER"

Recent Decision Provides Guidance on the Enforceability of Jury-Waiver Agreements in New Jersey

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Jury trials are both expensive and unpredictable. To avoid the unnecessary exposure and expense that result from such trials, many employers require their employees to sign agreements that include a waiver of their right to a jury trial (instead, requiring the dispute be decided by a judge or arbitrator). In response, courts have struck down such provisions when they are overly broad or lack specificity. A recent Appellate Division decision, *Noren v. Heartland Payment Sys., Inc.*, No. A-2651-13T3 (N.J. Super. Ct. App. Div., Feb. 6, 2017) ([available here](#)), provides further guidance on the enforceability of jury-waiver provisions.

BACKGROUND

Greg Noren had been employed by Heartland Payment Systems since 1998. In 2002, he signed an agreement that included a jury-waiver provision, which provided that both Noren and Heartland "irrevocably waive any right to trial by jury in any suit, action or proceeding under, in connection with or to enforce this Agreement" (emphasis added). Following his termination in 2005, Noren sued Heartland for breach of contract and violation of New Jersey's whistleblower statute ("The Conscientious Employee Protection Act" or "CEPA"). *N.J.S.A. 34:19-1, et seq.*

As part of his complaint, Noren demanded a jury trial, which the trial judge denied based on the jury-waiver provision. Following a 22-day bench trial, the trial judge dismissed Noren's complaint and awarded Heartland over \$2 million in attorney's fees and costs.

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APPELLATE DIVISION

The Appellate Division reversed the trial court's decision, instead finding that Noren had been erroneously denied his right to have a jury decide his CEPA claim. Importantly, the right to a jury trial is guaranteed under the New Jersey Constitution and CEPA (which holds that upon request "a jury trial shall be directed to try the validity of any claim under this act"). Therefore, to waive this constitutional and statutory right, the jury-waiver must be "clear" and "unambiguous."

While the court found that no "magical language" is required, a jury-waiver must be written in plain language that would be clear and understandable to an average person. The waiver must also:

1. Explain what right is being surrendered; and
2. Describe the nature of the claims covered by the waiver.

In reaching its decision, the Appellate Division reviewed case law that analyzed similar language found in mandatory arbitration provisions. For example, in one case it analyzed, the New Jersey Supreme Court determined that an arbitration clause requiring the parties to arbitrate "any controversy or claim that arises from the agreement or its breach," only applied to an employee's breach of contract claim because there was no express or general reference to statutory claims. Therefore, the employee was not required to arbitrate his discrimination claim against the employer. *Garfinkel v. Morristown Obstetrics & Gynecology Assoc., P.A.*, 168 N.J. 124 (2001). Comparatively, in another case, the Appellate Division determined that an arbitration clause requiring the parties to arbitrate all "claims based on state statutes and local ordinances, including state and local anti-discrimination laws" did clearly and unambiguously include the employee's discrimination claim against his employer. *Jaworski v. Ernst & Young US LLP*, 441 N.J. Super. 464 (App. Div.), *certif. denied*, 223 N.J. 406 (2015).

Reviewing the jury-waiver provision signed by Noren, the Appellate Division concluded that it was limited to only claims arising under "this Agreement" (i.e. the breach of contract claim). Because the waiver failed to mention statutory claims, Noren had a right to have a jury decide whether his employer unlawfully violated the whistleblower statute. Therefore, the Appellate Division overturned the trial court's decision, including dismissal of Noren's claims and the \$2 million award for attorney's fees, and ordered a new trial to be decided by a jury.

TAKE AWAY

New Jersey courts are likely to enforce a jury-waiver provision, provided it is clear, unambiguous, written in plain English, and encompasses all of the claims the employee is surrendering. To that end, the court made clear that "when the waiver is intended to include statutory rights," it should "explicitly state so." For example, employers that wish to ensure that discrimination claims are encompassed should confirm that any jury-waiver clause presented to its employees includes "claims based on federal statutes, federal regulations, state statutes, state regulations, and/or local ordinances, which shall include, but are not limited to, state and local anti-discrimination laws, including the Law Against Discrimination."

Therefore, to avoid unnecessary risk or litigation over the applicability of a jury-waiver

provision, it is advisable that employers review their employment agreements in light of this new guidance from the Appellate Division.

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