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NEW JERSEY APPELLATE DIVISION CRAFTS ADDITIONAL HURDLE TO THE ENFORCEABILITY OF EMPLOYEE ARBITRATION AGREEMENTS

By Ian W. Siminoff

On September 1, 2015, in *Milloul v. Knight Capital Group, Inc.*, the New Jersey Appellate Division held that an arbitration agreement between an employer and its employee was not enforceable because it failed to expressly indicate that the employee was waiving his right to a trial in court. In so doing, the court adopted the holding from a 2014 New Jersey Supreme Court decision, *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014), a Consumer Fraud Act case, finding no distinction between the right-to-sue waiver language required in consumer arbitration agreements versus employee arbitration agreements.

In *Milloul*, a New Jersey Law Against Discrimination (LAD) religious discrimination case, Knight Capital Group (KCG), upon acquiring the plaintiff's prior employer (Edgetrade), required its employees to sign a Dispute Resolution Agreement (DRA). The DRA, one paragraph in length, read:

I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application for employment, my employment or the cessation of my employment with Knight Capital Group, Inc. or any of its affiliates exclusively by final and binding arbitration pursuant to the rules of the

American Arbitration Association. Such claims include but are not limited to claims under federal, state and local statutory law or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort.

Citing *Atalese*, the court found the KCG DRA was unenforceable because it did not make clear that *Milloul* was "waiving [his] time-honored right to sue." The court explained that "an average member of the public may not know – without some explanatory comment – that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." In that regard, the court specified that "[a]n employer's right to know that arbitration includes a waiver of his or her right to a trial in court is equally as important as their right to know the type of claims they are agreeing to arbitrate."

Given *Milloul*, New Jersey employers need to immediately review their arbitration agreements to ensure the agreements: (1) state that employees are waiving their right to a trial in court; (2) explain, in a

simple way, the difference between the arbitral and judicial forums; and (3) are otherwise enforceable.

As to the latter point, while arbitration agreements do not need to specifically identify each of the employment statutes at issue (although it is a good idea to do so, akin to the litany of statutes recited in an employee release), they do need to indicate that employee agree to arbitrate all statutory claims arising out of the employment relationship, or its termination, including but not limited to, workplace discrimination claims. Additionally, the agreement needs to be “written in a simple, clear, understandable and easily readable way.”

Further, to prevent any undue duress or coercion arguments, arbitration agreements should state that the employee: (1) was provided with adequate time to review the agreement, and ask questions and consult with a third-party, including legal counsel; (2) understands the agreement; and (3) voluntarily executes it. Finally, the agreement should be set forth in a stand-alone document, or if not, highlighted sufficiently to draw an average reader’s attention to it.

For more information regarding this alert, please contact Ian W. Siminoff at 973.994.7507 or isiminoff@foxrothschild.com or any member of the Labor & Employment Department.



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