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EMPLOYMENT LAW

Contractual Limits on Limitation Periods: Employers Battle Back

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It is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitation, provided the shorter period itself shall be a reasonable period." *Order of United Comm. Travelers v. Wolfe*, 331 U.S. 586, 608 (1947). New Jersey, like most states, is in accord with this general principal. *Eagle Fire Prot. Corp. v. First Indem. of Amer. Ins. Co*., 145 N.J. 345, 354 (1996).

Some employers routinely require their employees to enter into such agreements. Surprising? It shouldn't be. As one court explained: "[G]iven the fact that an individual can agree to give up the right to sue, such as by agreeing to arbitrate, then certainly an individual can agree to limit the period in which to sue."

Notwithstanding the general practice, can employers *in New Jersey* lawfully limit employees from taking full advantage of the statutes of limitations in employee-friendly legislation like the Law Against Discrimination (two years) and the Conscientious Employee Protection Act (one year)?

This past August, in an unpublished District of New Jersey decision, Judge Freda L. Wolfson indicated they can.

In *Smith v. TA Operating LLC*, 2011 WL 3667507 (D.N.J. Aug. 19, 2011), the plaintiff truck service advisor signed an employment application which provided:

> READ CAREFULLY BEFORE SIGNING – I agree that any claim or lawsuit relating to my service with TA or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitation to the contrary. I have read and understand the contents of this employee application and am fully able and competent to complete it.

Smith was terminated on Aug. 28, 2009, the day after she complained to the state police, and her supervisor, of a co-worker's assault. On April 14, 2010, a little less than eight months after her termination, Smith filed a lawsuit under the Conscientious Employee Protection Act (CEPA), alleging that TA Operating fired her in retaliation for reporting her co-worker's illegal conduct.

TA Operating filed a motion for summary judgment, arguing that the plaintiff's CEPA claim was barred by the six-month limitation period contained in the employment application. The court disagreed, *but not because such a limitation is unenforceable*.

Rather, the court found that the language of the employment application made the otherwise enforceable agreement to curtail the limitations period unconscionable. The court held that, while the agreement need not mention CEPA, it must provide that the employee agrees "to waive statutory rights arising out of the employment relationship or its termination," and should reflect the types of claims included in the waiver, e.g., workplace discrimination claims. The TA Operating employment application failed to meet this threshold.

Judge Wolfson explained that contractual limitation periods for employment claims are enforceable if: (1) the shorter period is reasonable; and (2) the statute(s) sued under does not prohibit the contractual limitation.

Smith, citing *Plitsas v. Fed. Express, Inc*., 2010 WL 1644056 (D.N.J. April 22, 2010), argued that CEPA did not permit TA Operating to contractu-

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ally shorten the one-year limitation period. In *Plitsas*, like *Smith*, the employee signed an agreement that required all claims against the employer to be brought within six months from the date of the actionable event. However, unlike Smith, Plitsas sued under the Family and Medical Leave Act (FMLA), which has a two-year statute of limitations (three years for willful violations). 29 U.S.C. § 2617(c)(1). More importantly, the FMLA's regulations specifically prohibit employers from "interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act." 29 C.F.R. § 825.220. Citing the regulation and *Grosso v. Fed. Express Corp.*, 467 F. Supp.2d 449, 456-57 (E.D.P.A. 2006), the *Plitsas* court struck down the six-month limitation period, reasoning that "[a] limitation on the time in which a plaintiff may recover is a restraint upon access to rights under the FMLA." There is a split of authority among the federal courts as to whether or not parties can contractually reduce the FMLA statute of limitations, with the weight of authority prohibiting the practice.

Judge Wolfson disagreed that the *Plitsas* court's treatment of FMLA claims controlled the result in *Smith*, stating: "Clearly, the import of *Plitsas* has no application in this case because [notwithstanding the legislative intent in strengthening the remedial purposes of CEPA] there is no explicit regulation or statutory language in CEPA that would prohibit an employer from limiting CEPA's statute of limitations."

In so holding, Judge Wolfson referred to several other cases where New Jersey district courts have permitted the contractual shortening of limitation periods. For example, in *Aull v. McKeon-Grano Assoc., Inc.*, 2007 WL 655484 (D.N.J. Feb. 26, 2007), the court granted the defendant's motion to dismiss a claim filed by a veteran of Operation Iraqi Freedom under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The claim was filed 10 months after the plaintiff's termination. The employee had signed an employment agreement providing that any claim or action against his employer would be brought within six months from the date of termination. At the time of the events, USERRA carried a four-year statute of limitations. The *Aull* court found persuasive USERRA's failure to expressly declare that private contracts creating their own statute of limitations were forbidden. Of course, although not mentioned in *Smith*, contractual limitation periods on USERRA claims are likely no longer enforceable following passage of the Veterans' Benefits Improvement Act of 2008, which amended USERRA to provide that "there shall be no limit on the period of time for filing" a complaint or claim pursuant to USERRA. 38 U.S.C. § 4327(b).

Judge Wolfson also cited with approval *Rubano v. Jersey City Mun. Util. Auth.*, 2008 U.S. Dist. LEXIS 17719 (D.N.J. Feb. 28, 2008). In *Rubano*, the issue was an arbitration provision contained in a policy and procedure manual that required employees to submit a demand for arbitration to the director of human resources within 30 days. Rubano signed an acknowledgment of receipt of the manual, as well as a separate acknowledgment regarding alternate dispute resolution procedures. Rubano sued pursuant to the Law Against Discrimination (LAD) and CEPA. In enforcing the motion to compel arbitration, the court citied *Eagle Fire* and noted that the plaintiff did not contest the reasonableness of the 30-day limitation period. In the absence of fraud, duress or unconscionability, the court found the limitation to be reasonable.

Similarly, in *Pyo v. Wicked Fashions, Inc.*, 2010 WL 1380982 (D.N.J. March 31, 2010), also cited by Judge Wolfson, the issue, similar to *Rubano*, was a motion to compel arbitration of claims under LAD, Title VII and the Fair Labor Standards Act (FLSA). There, the arbitration agreement and policy provided, in part, that the employee agreed to submit for arbitration any dispute or claim within one year of when the claim or dispute arose. The *Pyo* court upheld the one-year limitation period.

So, where does this leave us? It appears that the District of New Jersey would likely not permit contractual curtailment of the limitation periods on FMLA and USERRA (and perhaps FLSA and ERISA) claims, but would be open to the reasonable contractual shortening of other employment statutes. Importantly, *research did not uncover a New Jersey state court decision addressing the enforceability of contractual limitations periods on statutory employment claims*. Therefore, it is an open issue.

However, given the New Jersey Supreme Court's decision in *Eagle Fire*, coupled with the New Jersey federal court decisions referenced above, employers would certainly have a strong argument that such agreements are enforceable, with six-month limitation periods generally considered acceptable. If the limitation is set forth in an employment application, an employer would want to ensure that any offer letter and/or handbook repeats and/or does not contradict that language.

One open issue is whether or not employees can make use of the continuing violation doctrine, discovery rule or equitable tolling, notwithstanding any private agreement shortening the limitations period. Another is the impact an equal-employment or civil-rights charge might have on the contractual limitations clause, and whether the filing of such a charge would toll the contractual limitation period on the filing of a lawsuit, or whether the filing of the administrative complaint would satisfy the filing requirement independent of the timeliness of any subsequent lawsuit. Courts in the Third Circuit and elsewhere have expressed concern regarding the interplay between the jurisdictional requirements of the Equal Employment Opportunity Commission and private contractual limitation periods for claims under Title VII and the Americans with Disabilities Act.

This is all food for thought in this interesting, and largely unexplored, area of employment law. ■