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Court Supports Employer Flexibility

Arbitration and "Satisfaction" Clauses Boosted, But Beware

New Jersey courts are regarded in national employment law circles as leaning in favor of the employer. The primary reason is this State's employment-at-will doctrine. When there is no union or employment contract, this doctrine permits an employer to terminate an employee for any reason, or no reason, so long as the real reason is not one prohibited by the anti-discrimination statutes or other law. Adding to the State's reputation is the courts' willingness to enforce restrictive covenants and to prevent misuse of an employer's confidential customer information. This philosophy gives great flexibility to New Jersey employers.

Two decisions in the past twelve months from the New Jersey Supreme Court solidify the State's reputation and add flexibility to management. The first involves Arbitration, a favored form of alternative dispute resolution. The second decision involves "satisfaction" clauses in employment agreements. Both opinions, however, are minefields for the unwary. Careful legal language is critical for an employer to take advantage of the flexibility granted by these recent court decisions.

Arbitration

Arbitration clauses are typically found in employment agreements and are generally enforceable. They are also enforceable when contained in an employment application, after the New Jersey Supreme Court's decision in *Martindale v. Sandvik, Inc.*, 173 N.J. 76 (2002).

When Martindale applied for a job with Sandvik, she completed and signed an employment application that contained the following provision:

> AS A CONDITION OF MY EMPLOYMENT, I AGREE TO WAIVE MY RIGHT TO A JURY TRIAL IN ANY ACTION OR PROCEEDING RELATED TO MY EMPLOYMENT WITH SANDVIK.
>
> I UNDERSTAND THAT I AM WAIVING MY RIGHT TO A JURY TRIAL VOLUNTARILY AND KNOWINGLY, AND FREE FROM DURESS OR COERCION.
>
> I UNDERSTAND THAT I HAVE A RIGHT TO CONSULT WITH A PERSON OF MY CHOOSING, INCLUDING AN ATTORNEY, BEFORE SIGNING THIS DOCUMENT.
>
> I AGREE THAT ALL DISPUTES RELATING TO MY EMPLOYMENT WITH SANDVIK OR TERMINATION THEREOF SHALL BE DECIDED BY AN ARBITRATOR THROUGH THE LABOR RELATIONS SECTION OF THE AMERICAN ARBITRATION ASSOCIATION.

The Court found that this arbitration provision was an enforceable contract because Martindale had plenty of time to read and consider the application, to ask questions, to consult with someone else, including an attorney, and because of the explicit waiver of a jury trial. Consideration for Martindale's promise to arbitrate came in the form of Sandvik's willingness to consider her for employment.

The other significance of the *Martindale* case is the scope of arbitration. The plaintiff was suing under the New Jersey Family Leave Act and the Law Against Discrimination. The Court ruled that the

waiver of the right to a jury trial and the reference to "all disputes relating to my employment" was sufficient to encompass all statutory claims, including discrimination claims. A legislative effort to reverse this aspect of Martindale passed the Assembly, but appears stalled in the State Senate.

"Satisfaction" Clauses

It is not unusual for an employment agreement, written or oral, to state that an employee can be fired when the employee fails to perform to the employer's satisfaction. The issue for many employers is how to view "satisfaction." Is it something personal or will someone else's opinion about "satisfaction" play a role? The New Jersey Supreme Court's decision in *Silvestri v. Optus Software, Inc*, 175 N.J. 113 (2003), gives employers important guidance. But it has got to be done correctly.

There are two types of satisfaction clauses. The first is where "satisfaction" is a matter of personal taste, sensibility, judgment, or convenience. Here in evaluating the termination, a court will defer to the employer's subjective view as to what is or what is not satisfactory performance. The Court will only look to see whether the employer's views are genuine and honestly held and not a cover for what actually motivated the termination. Even if the employer's views are idiosyncratic, the court will not second-guess the reasonableness of the decision.

The second is where "satisfaction" can be measured objectively. With these types of clauses, satisfaction can be measured by some reasonable and commercially accepted manner. Here, satisfaction is usually keyed to company profitability, sales volume, marketing results or penetration, productivity, and similar phrases. If so, then objective tests, such as those used by forensic accountants or marketing consultants, will have tremendous influence on a court reviewing a termination for reasonableness.

Needless to say, a company will have far more flexibility, and less employment litigation expense, with satisfaction clauses of the first type.

What To Do To Take Advantage of This Additional Flexibility

1. Employers should update job applications and require an applicant to sign the application.
2. Employers and employees should carefully consider the wording of company policies (i.e., the policy handbook) and employment agreements.
3. Consult with your attorney to make competent changes to your employment agreements that are consistent with your objective and the law.

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