

Alert | Labor & Employment



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New Jersey District Court Declares NJLAD’s Ban on Employment Arbitration Agreements Preempted by Federal Arbitration Act, Permanently Enjoins Enforcement

On March 25, in *New Jersey Civil Justice Institute et al. v. Grewal*, a New Jersey district court ruled that the Garden State is barred from enforcing a recently enacted provision prohibiting employers from requiring workers to arbitrate discrimination and harassment claims, finding the measure is preempted by federal law. As background, on March 18, 2019, Gov. Phil Murphy signed into law a series of amendments to the New Jersey Law Against Discrimination (LAD). Among these were two provisions, codified at N.J.S.A. § 12.7, that impacted mandatory arbitration agreements between employers and their (non-unionized) workforce:

- “A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.”
- “No right or remedy under the [LAD] or any other statute or case law shall be prospectively waived.”

In its accompanying statement, the Assembly Appropriations Committee commented on the intended scope and impact of these amendments:

[T]his bill would bar provisions in employment contracts that waive certain rights or remedies. ...

Under the bill, a provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment would be deemed against public policy and unenforceable.

On Aug. 30, 2019, the New Jersey Civil Justice Institute and the Chamber of Commerce of the United States of America filed suit in the District of New Jersey challenging these provisions. Plaintiffs argued that because their cumulative effect was the imposition of a “complete ban on pre-dispute employment arbitration agreements” these amendments ran afoul of the Federal Arbitration Act (FAA) and were thus preempted under the Supremacy Clause of the U.S. Constitution. Plaintiffs sought a declaration of such preemption, and a permanent injunction prohibiting the Attorney General from taking any actions to enforce the amendments.

On March 25, 2021, U.S. District Judge Anne E. Thompson granted the plaintiffs’ motion for summary judgment and declared the LAD amendments unenforceable. Specifically, Judge Thompson held that the FAA preempted Section 12.7, and that the Attorney General should be permanently enjoined “from enforcing Section 12.7 with respect to arbitration agreements between employers and employees that are governing by the FAA.”

Citing the U.S. Supreme Court’s decision in *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S.Ct. 1421 (2017), Judge Thompson held that, although Section 12.7 does not expressly mention arbitration, its prohibition on the waiver of “any substantive or procedural right or remedy” effectively “singles out arbitration agreements for disfavored treatment.” Thus, Section 12.7 “contravenes the FAA” because “it subjects arbitration agreements to uncommon barriers and fails to put them on an equal plane with other contracts.”

Judge Thompson observed that the Attorney General had “not argued at any point throughout the litigation that Section 12.7 survives a preemption challenge.” She further noted that “Federal Courts in New York and California have also found state laws similar to Section 12.7 to be preempted by the FAA.”

It is not yet clear whether the Attorney General may seek to appeal Judge Thompson’s decision, or whether the legislature may attempt to otherwise limit the enforceability of employee arbitration agreements. For the time being, however, New Jersey employers can continue to utilize their arbitration agreements with employees.

Authors

This GT Alert was prepared by:

- [Michael J. Slocum](#) | +1 973.443.3509 | slocumm@gtlaw.com
- [Ryan P. O’Connor](#) | +1 973.443.3563 | occonnor@gtlaw.com

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