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NJLAD vs. Federal Arbitration Act: The Future of Employment Arbitration in NJ

The issue of whether compulsory arbitration clauses may be enforced in the future is currently pending before the United States District Court for the District of New Jersey.

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Many private-sector employers in New Jersey have for years required their employees to arbitrate claims of workplace discrimination, harassment, and the like. While employers have taken varied approaches to this practice—whether by including compulsory arbitration clauses in applications and handbooks, for example, or requiring employees to sign stand-alone arbitration program documents—among the most common approaches is to include a compulsory arbitration agreement in the employee's offer letter or employment contract. Whether such arbitration agreements may be enforced in the future, however, is the issue currently pending before U.S. District Judge Anne Thompson in *New Jersey Civil Institute et al. v. Grewal*, No. 3:19-cv-17518 ("*Grewal*").

The factual background in *Grewal* is straightforward. On March 18, 2019, Governor 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. 10:5-12.7, that impact 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.

…

The bill would take effect immediately and apply to all contracts and agreements entered into, renewed, modified, or amended on or after the effective date [i.e., March 18, 2019].

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 is the imposition of a "complete ban on pre-dispute employment arbitration agreements" these amendments run afoul of the Federal Arbitration Act (FAA) and are thus preempted under the Supremacy Clause of the U.S. Constitution. Plaintiffs seek a declaration of such preemption, and a permanent injunction prohibiting the Attorney General from taking any actions to enforce the amendments.

Their arguments echo those raised by defendants in a recent federal action in New York, *Latif v. Morgan Stanley & Co.*, 18-cv-11528 (S.D.N.Y.). Plaintiff in that case asserted a variety of employment discrimination claims against his former employers, who moved to compel arbitration pursuant to the parties' pre-dispute agreement. Plaintiff argued that the arbitration agreement was unenforceable under a 2018 amendment to the New York Civil Practice Law and Rules (CPLR 7515) declaring agreements compelling arbitration of certain employment discrimination claims "null and void." Defendants in *Latif* countered that CPLR 7515 was contrary to the terms of the FAA, and was therefore preempted.

U.S. District Judge Denise Cote agreed with defendants and on June 26, 2019, granted their motion to compel arbitration. Citing the Supreme Court's 2011 decision in *AT&T v. Concepcion*, Judge Cote observed that the "Supreme Court has repeatedly instructed that the FAA reflects 'both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.'" As a result, Judge Cote reasoned, "[t]he FAA's policy favoring the enforcement of arbitration agreements is not easily displaced by state law." Again citing *Concepcion*, Judge Cote reiterated the Supreme Court's instruction that "'[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.'" Because CPLR 7515 was thus preempted, Judge Cote referred the matter to arbitration per the parties' agreement.

The New York Supreme Court took a divergent approach in *Newton v. LVMH Moet Hennessy Louis Vuitton Inc.*, Index No. 154178/2019 (July 10, 2020). The court there, citing the State's "profound policy interest" in protecting victims of workplace discrimination and harassment, upheld CPLR 7515's bar against

arbitration and allowed plaintiff to pursue her claims in court notwithstanding the parties' arbitration agreement.

Grewal presents essentially the same issue Judge Cote faced in *Latif*. In response to the complaint in *Grewal*, the Attorney General in January 2020 moved to dismiss, arguing plaintiffs lacked standing to challenge the amendments to LAD. Plaintiffs the same day moved for summary judgment on the FAA preemption issue. Judge Thompson denied the Attorney General's dismissal motion in July 2020, and heard oral argument on plaintiffs' summary judgment motion on March 4, 2021.

Plaintiffs' summary judgment arguments in *Grewal* are uncomplicated. At bottom, they contend that the amendment's "effect—if it were enforceable—would be to invalidate all employer-employee arbitration agreements." As such, they argue, the amendment "is preempted by the FAA and therefore invalid under the Supremacy Clause of the United States Constitution."

Citing the "emphatic federal policy in favor of arbitral dispute resolution" identified by the Supreme Court, plaintiffs collected a number of decisions over the past several decades which they contend demonstrate that the court "therefore has repeatedly held that state laws disfavoring arbitration are preempted." Nor does the amendment's notable omission of the precise phrase "arbitration agreement" save it from preemption, plaintiffs argue. Invoking Justice Kagan's decision for the court in *Kindred Nursing Centers v. Clark* (2012), plaintiffs argue "a state law is invalid when it 'disfavors contracts that (oh so coincidentally) have the defining features of arbitration agreements.'" In other words, an arbitration ban by any other name is equally void.

Plaintiffs also press the public policy front. "Arbitration[,]" they assert, "is a faster, simpler, cheaper, and less adversarial mode of dispute resolution as compared to litigation in court." In support, they cite the Supreme Court's 2001 decision in *Circuit City Stores v. Adams*, which acknowledged the "real benefits to the enforcement of arbitration provisions"—and stressed the "particular importance [of these benefits] in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."

The Attorney General, notably, has not formally briefed the merits of plaintiffs' summary judgment application. In his initial opposition, filed in February 2020, the Attorney General instead attacked only plaintiffs' standing to challenge the amendments to LAD and the ripeness of their claims. Similarly, the Attorney General filed a supplemental letter brief on the eve of oral argument—at the court's invitation—which again focused solely on plaintiffs' factual assertions of organizational and associational standing.

Judge Thompson heard oral argument on plaintiffs' summary judgment motion on March 4, and (as of the writing of this article) is expected to issue a decision in the near future. The ramifications of that decision to the future of arbitration in employment disputes in New Jersey could be significant. If the amendments are declared invalid, employer-employee arbitration agreements would remain enforceable under the same long-standing principles they have been previously. If Judge Thompson allows the amendments to stand, conversely, not only would many arbitration agreements be voidable, a new host of issues would remain.

The amendments to LAD, by their terms, apply only to "any employment contract" and, as noted above, employers have utilized other means—employment applications, handbooks, and stand-alone programs among them—to implement compulsory arbitration arrangements. That said, it does not strain the imagination to think that over time, whether explicitly by further legislation or through case law broadly construing the term "employment contract," the prohibition against arbitration of employment disputes could extend to cover these as well.

Take, for example, the history of CPLR 7515, struck down in *Latif*. As originally passed, CPLR 7515 had only prohibited arbitration of sexual harassment claims. By the time of the decision in *Latif* roughly a year later, however, it was already undergoing legislative expansion to prohibit arbitration of employment discrimination claims more generally. The LAD amendments are arguably broader still, extending by their terms beyond claims of workplace discrimination, harassment or retaliation under LAD, and encompassing as well rights and remedies under "*any other* statute or case law" (emphasis added).

Uncertain, too, is the full potential of the amendments' reach to existing employment agreements. The amendments exclude application "to the terms of any collective bargaining agreement between an employer and the collective bargaining representative of the employees," and several courts have already noted in unpublished decisions that the law has no retroactive application. But as noted above, the amendments were intended to apply "to all contracts and agreements entered into, renewed, modified, or amended on or after" March 18, 2019. One might ask whether this would encompass an executive's employment agreement that automatically renews under an evergreen clause, or whether an otherwise routine annual increase in an employee's salary might constitute an amended agreement triggering the arbitration ban. However Judge Thompson ultimately rules in *Grewal*, these issues are not presented for resolution there.

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