New Jersey Appellate Division Ruling Invalidates Emailed Arbitration Agreement to Employee

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New Jersey courts continue to develop rules as to what constitutes a valid and enforceable arbitration agreement. In today's technology era, many employers use email and online training techniques to disseminate company policies.

However, in its recent opinion in *Skuse v. Pfizer, Inc.*, approved for publication on January 16, 2019, the New Jersey Appellate Division determined that Pfizer's mandatory Arbitration Agreement – which was emailed to employees – was not binding. The Court noted that the *Skuse* case "exemplifies an inadequate way for an employer to go about extracting its employees' agreement to submit to binding arbitration for future claims and thereby waive their rights to sue the employer and seek a jury trial."

In *Skuse*, the employee brought suit in the Superior Court of New Jersey after she was terminated for failure to follow the company's vaccination policy for flight attendants. The employee claimed that her religious beliefs precluded her from receiving vaccinations containing any animal by-products. After a leave of absence, the employee sought a religious accommodation to allow her to continue to work without getting vaccinated. Pfizer denied the religious accommodation and subsequently terminated the employee. After the employee filed her complaint, Pfizer sought dismissal, arguing that the appropriate forum was arbitration given that the employee had agreed to that forum through Pfizer's online training module.

Pfizer's training module for arbitration, which was emailed to employees as a link, contained four slides:

- The first slide provided that the employee and Pfizer "agree to arbitration as the exclusive means of resolving certain disputes." The slide used phrases such as: "It is important that you are aware of the terms of this Agreement"; "You will be able to review and print the Agreement"; and "You will then be asked to acknowledge your receipt of the Agreement."
- The second slide contained a "Resources" tab, which "allowed" the employee to click on the tab and review the agreement. It also gave the employee an "opportunity" to print the agreement.
- The third slide provided, among other terms, that the employee's assent to the terms of the Arbitration Agreement was presumed if the employee continued to work for Pfizer sixty days after receipt of the Agreement, even if the Agreement was not acknowledged, consented to, or ratified and accepted by the employee. This slide also contained a box with the words "Click here to acknowledge."

- The fourth slide stated: "Thank you for reviewing the [Arbitration Agreement]."

The Court relied on a New Jersey Supreme Court case, *Leodori v. CIGNA Corp.*, in holding that the manner in which the employee's assent to Pfizer's Arbitration Agreement was obtained was insufficient to create a binding contract to arbitrate. The Court opined that the terms "training module" or "training activity" were "prosaic labels" that did not "fairly capture the essence of the endeavor, i.e., an effort to extract an employee's knowing and voluntary agreement to waive important rights that have been bestowed upon him or her by law." The Court noted that "[o]btaining an employee's binding waiver of his or her legal rights is not a training exercise. It is not on a par with routine or mundane training subjects, such as how to obtain an assigned space in an employee parking lot or process a travel voucher." The Court explained that an "employer must do more than 'teach' employees about the company's binding arbitration policy. The employer must also obtain its employees explicit, affirmative, and unmistakable assent to the arbitration policy, in order to secure their voluntary waiver of their rights under the law." The policy itself must be presented in a manner that "produces an employee's agreement and not just his or her awareness or understanding." The Court also doubted that all employees who received the training module necessarily clicked on the "Resources" tab to access and review the actual Arbitration Agreement.

The Court found the verbiage used in the training module problematic as the term "acknowledge" rather than "agree" was used to infer assent. The Court observed that the employee was not asked to initial the policy, as they might have done for other important legal documents. The "intended meaning of the term 'acknowledge' in the click box was clouded by the opening slide explaining that the employee would be asked at the end of the presentation to 'acknowledge [his or her] receipt' of the company's form agreement – not mentioning the employee's need to also convey his or her assent to its terms." The Court also observed that the final slide of the training module "merely thanks the employee for 'reviewing' the document. The whole process is called a 'training activity.' Communications so vital to the mutual process of contract formation should not hinge upon loose and inconsistent wording that is reasonably capable of being misunderstood as something short of an agreement."

In order to cure these deficiencies, the Court suggested that "rather than euphemistically calling the process a unilateral 'training' activity, the company could identify the process with terms that more accurately convey what it actually must be: for example, an agreement and waiver of rights." The Court declined to specify the exact language that should be next to the click button acknowledging assent, "but the words used should have close proximity and prominence and contain the critical word 'agree' or 'agreement.' The weaker term 'acknowledge' does not suffice."

The Court noted that its ruling should not be construed as a prohibition on employers who routinely utilize electronic transmissions to convey company policies to employees. Nor did the Court suggest that it would be improper to seek an agreement to arbitrate through electronic means, so long as it is appropriately conducted. If assent is sought through electronic means, the employee must "manifest an 'explicit, affirmative agreement'" that reflects that he or she unmistakably assented to the terms of an arbitration agreement.

Lastly, the Court held that the sixty day consent by default provision was insufficient to satisfy the "explicit and unmistakable employee assent" requirement. The Court distinguished and refused to follow another Appellate Division opinion wherein the panel upheld an arbitration agreement containing similar language and where the employee had continued to work for the company for a number of years, thus assenting to the terms of the arbitration agreement by default. The Court opined that the sixty day provision "is the company's unilateral declaration" and in the absence of separate evidence – apart from continued employment – of the employee's affirmative assent to be bound by the arbitration policy, does not salvage [the employer's] position."

While the Appellate Division's opinion in *Skuse* is certainly not intended to discourage tech-savvy employers from continuing to utilize email transmissions to obtain an employee's assent to arbitrate, employers should nonetheless be mindful of the terminology utilized and the manner in which an arbitration agreement is transmitted when seeking the assent of their employees through electronic transmission. The language used to obtain an employee's assent should be explicit and unmistakable, and not couched as a "training." The arbitration agreement should also clearly state the rights that the employee is giving up by agreeing to arbitrate in the stated forum.

Please contact the author, **Punam P. Alam**, for additional information concerning the issues discussed in this Alert.