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Client Advisory

Another Hoop to Jump Through When Drafting Arbitration Agreements in New Jersey

Adding yet another hurdle that parties in New Jersey must overcome to ensure New Jersey courts enforce their arbitration agreements, the New Jersey Appellate Division invalidated an otherwise binding arbitration clause because it did not specify which company (or "process") would conduct the arbitration. *Flanzman v. Jenny Craig, Inc.*, ___ N.J. Super. ___ (2018) (slip op. at 1). Because an arbitral forum (such as the American Arbitration Association) or some other method to select the arbitration setting was not detailed in the arbitration clause, the *Flanzman* court held that the parties did not have a "meeting of the minds."

The relevant portion of the arbitration clause stated:

Arbitration Agreement

Any and all claims or controversies arising out of or relating to [plaintiff's] employment, the termination thereof, or otherwise arising between [plaintiff] and [defendant] shall, in lieu of a jury or other civil trial, be settled by final and binding arbitration. This agreement to arbitrate includes all claims whether arising in tort or contract and whether arising under statute or common law including, but not limited to, any claim of breach of contract, discrimination or harassment of any kind.

... [Plaintiff] will pay the then-current Superior Court of California filing fee towards the costs of the arbitration (i.e., filing fees, administration fees, and arbitrator fees) ....

Flanzman, ___ N.J. Super. ___ (slip op. at 1) (alterations in original).

Notably, the arbitration clause in *Flanzman* satisfies the requirement established in the New Jersey Supreme Court's decision in *Atalese v. U.S. Legal Services Group*, 219 N.J. 430, 445 (2014), that a valid arbitration agreement must contain "clear and unambiguous" language that disputes will be resolved in arbitration and not in court. That is, the *Flanzman* arbitration clause clearly and unambiguously provided that the disputes will be settled by final and binding arbitration "in lieu of a jury or other civil trial."

Atalese and *Flanzman* appear to depart from New Jersey's professed "public policy that encourages the use of arbitration proceedings as an alternative forum." *Fawzy v. Fawzy*, 199 N.J. 456, 468 (2009). The *Atalese* Court attempted to address those public policy concerns when it stated that arbitration agreements need not include "magic words" to be upheld. Similarly, the *Flanzman* court stated: "We do not mean to imply that there must be certain 'talismanic words' in the agreement as to the rights that replace the right to judicial adjudication," "but to understand the ramifications of a waiver of a jury trial, the parties must generally address in some fashion what rights replace those that have been waived." *Flanzman*, ___ N.J. Super. ___ (slip op. at 6).

The practical implication of *Atalese*, however, is that the arbitration clause does need certain magic words - words that state that disputes will be resolved in arbitration and not in court. And the practical implication of Flanzman is that some talismanic words are required. Now arbitration clauses must specify the forum in which the arbitration is to be held. And based upon another recent Appellate Division decision that invalided an arbitration clause, there should be a "back-up" arbitration forum or process in case the specified forum is no longer available. *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545, 552-53 (App Div. 2016) (invalidating arbitration clause when the specified arbitration forum was not available at the time the clause was executed).

Drafting enforceable arbitration clauses is becoming more complex in New Jersey. Be sure to choose your (magic) words wisely.

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