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Employer-Employee Arbitration Agreements and New Jersey's Clearly Written Provision

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One of the first documents a new employee often signs is a binding arbitration agreement. Many employees sign the document without understanding, or even reading, the agreement. Typically, the employee then forgets about the agreement until an adverse employment action forces them to pursue litigation against their employer (or former employer). At that time, they are instructed either by their attorney, the employer, or the court that their dispute must be heard in binding arbitration. *Is the agreement really enforceable? Should a judge or a jury hear their dispute?*

Those questions, as with other questions regarding binding arbitration in the employment context, are viewed differently by various state courts. This article will explore the development of employment-related arbitration in the judicial system, and analyze current trends and limitations of arbitration in both the private and non-union workforces. In addition, the article provides a look into New Jersey's "clearly written" provision, which is a higher standard than seen in many other states.

What is Binding Arbitration?

Binding arbitration is one form of Alternative Dispute Resolution ("ADR"), and is a common forum to resolve disputes between an employer and employee.[1] Courts encourage ADR to help reduce the number of cases on their dockets, while many employers favor ADR to trials because of the decreased litigation costs, removal of cases from risky jury trials, and the benefit of confidential proceedings. Likewise, some claimants prefer ADR for its lower fees, confidentiality, and expedient resolutions.

In arbitration, the case is submitted to an independent third party. The parties select an arbitrator, or panel, by mutual agreement or from a predetermined list of arbitrators. After hearing arguments and reviewing evidence in a manner similar to, but less formal than a trial, the arbitrator

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[1] Another form of ADR is mediation; however, mediation is generally optional by the parties and not binding.

renders a decision. Naturally, in binding arbitration, the parties are bound by the arbitrator's decision.[2] The use of mandatory binding arbitration agreements in the private employment sector is a common business practice.[3] Despite this apparent popularity, the question remains: is it appropriate for an employer to have the power to force employees to sign an arbitration agreement, and thus, waive their right to a trial by jury?

Historical Perspective on Arbitration

Prior to the Federal Arbitration Act ("FAA"), passed in 1925, courts hesitated to enforce arbitration agreements. Congress enacted the FAA "to reverse the long-standing judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."[4,5] Although Congress endorsed arbitration, courts continued their resistance to compel arbitration for claims stemming from the employer-employee relationship. For example, in the Supreme Court decision *Alexander v. Gardner-Denver Co.*, the employee filed a race discrimination charge in district court under Title VII of the Civil Rights Act of 1964 ("Title VII") after he lost in arbitration.[6] The Supreme Court's decision focused on the purpose and procedures of Title VII, instead of the FAA.[7] The Court reasoned that the collective-bargaining agreement's grievance arbitration provision covered only the employee's contractual claims, and not his independent statutory claims.[8] Moreover, the Court raised skepticism about the arbitrator's ability to determine the facts and interpret statutory law.[9] Thus, *Gardner-Denver* set a judicial structure that allows an employee to pursue both courses of action: one under the collective-bargaining agreement's grievance arbitration clause, and one under a statutory right such as Title VII.[10] Further, the Court even proclaimed that the arbitration decision can be admitted as evidence in the trial court and "accorded such weight as the court deems appropriate."[11]

The hostility of the Supreme Court towards arbitration in employment contracts continued, exemplified by the 1991 decision *Gilmer v. Interstate/Johnson Lane Corp.* As part of the New York

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[2] Although non-binding arbitration exists, it is not a common form of arbitration used in the employment context. Thus, this article does not discuss non-binding arbitration.

[3] Arbitration is also used in the public sector or in a union company. These arbitrations generally are in place for grievances and contract disputes.

[4] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

[5] 9 U.S.C. § 2 (2006). The full text of Section 2 is:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

[6] Alexander v. Gardner-Denver Co., 415 U.S. 36, 39-43 (1974). Title VII allows for a course of action for an unlawful employment practice due to of such individual's race, color, religion, sex, or national origin. 42 U.S.C.§ 2000e-2 (2006).

[7] *Gardner-Denver Co.*, 415 U.S. at 48-49.

[8] *Id.* at 50-51.

[9] *Id.* at 52-54.

[10] *Id.* at 59-60.

[11] *Id.* at 60.

Stock Exchange ("NYSE") registration application, Gilmer agreed that all controversies arising out of his employment would be decided by the NYSE-sponsored arbitration.[12] After Interstate terminated Gilmer, he filed an age discrimination claim with the Equal Employment Opportunity Commission ("EEOC"), and later filed a similar claim in district court.[13] The Court held that age discrimination claims, among other statutory claims, are "subject[] to compulsory arbitration pursuant to [an] arbitration provision [or agreement] in [a] securities registration application."[14] However, notwithstanding the Court's enforcement of Gilmer's arbitration provision, it failed to take the opportunity to endorse arbitration in individual employment contracts.

Although *Gilmer* may appear to contradict *Gardner-Denver*, it does not overrule *Gardner-Denver*. Rather, the Court distinguished the cases based on the two different types of contracts. Specifically, the Court noted that *Gilmer* "involve[d] the issue of the enforceability of an agreement to arbitrate statutory claims" in an industry-wide registration application.[15] On the other hand, *Gardner-Denver* "involved the quite different issue [of] whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims."[16] Thus, the Court's limited focus on securities registration application in *Gilmer*, and the collective-bargaining agreement in *Gardner-Denver*, left questions on the enforceability of arbitration provisions in private employment contracts. However, in 2001, 76 years after the FAA, the Court answered this question in *Circuit City Stores, Inc. v. Adams*.

When Adams applied for a job at Circuit City, he signed an employment application that included an arbitration agreement.[17] Two years later, Adams filed an employment discrimination complaint in state court.[18] Pursuant to the FAA, the district court granted Circuit City's motion to compel arbitration.[19] While that decision was pending appeal, the Ninth Circuit held in another case, *Craft v. Campbell Soup Co.,* that the FAA does not apply to employment agreements.[20] Based on *Craft*, the Ninth Circuit likewise held that Adams' agreement was an employment contract and unenforceable under the FAA.[21] However, in a 5-4 ruling, the Supreme Court reversed the Ninth Circuit's decision.[22] The Court concluded that it was Congress's intent, based on the text of the FAA and sparse legislative history, that the only workers exempt from the FAA are those in transportation.[23] In its strongest endorsement of an arbitration provision in the employee-employer relationship, the Court stated, "there are real benefits to the enforcement of arbitration provisions."[24]

Like *Gilmer*, *Circuit City* does not overrule *Gardner-Denver*. Thus, a general arbitration clause in a collective-bargaining agreement does not preclude an employee's right to file a statutory claim in court. Further, although the Supreme Court endorsed arbitration provisions in private employment agreements in *Circuit City*, the Court left the interpretation of the provisions to state and federal

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[12] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).
[13] *Id*.
[14] *Id*.
[15] *Id.* at 35.
[16] *Id.*
[17] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109-10 (2001).
[18] *Id.* at 110.
[19] *Id.*
[20] *Id.; see also* Craft v. Campbell Soup Co., 177 F3d 1083 (9th Cir. 1998).
[21] *Circuit City*, 532 U.S. at 110.
[22] *Id.* at 109.
[23] *Id.* at 114-15.
[24] *Id.* at 122-23.

courts.

Validation and Limitations of Arbitration Provisions: Public Policy, Contract Law, Unconscionable Provisions, and the Third-Party Plaintiff

Generally, state and federal courts review the enforcement of arbitration agreements under the principles of public policy and contract law. In *Lagatree v. Luce, Forward, Hamilton & Scripps LLP*, a California state court reviewed whether a pre-dispute binding arbitration agreement is valid when "(1) an employer insists on such an agreement as a condition of employment, and (2) an employee signs the agreement to avoid being discharged."[25] Relying heavily on *Gilmer*, California concluded that it is not a violation for an employer to insist on a fair arbitration agreement as a condition of employment because arbitration is "generally regarded neutral and fair," and does not put the employer at an unfair advantage.[26] Further, the court held: (i) public policy favored resolution of disputes through arbitration,[27] (ii) the employee's rights to a jury trial could be waived as a condition of employment,[28] and (iii) the termination of an employee for refusing to sign a pre-dispute arbitration agreement did not violate public policy.[29]

In 2002, the Supreme Court of Texas decided whether the court should enforce an unsigned arbitration provision between an employer and an at-will employee in *In re Halliburton Co.* Here, Halliburton notified all employees that the company was implementing a "Dispute Resolution Program", and binding arbitration was the selected "method for resolving all disputes between the company and its employees."[30] As part of the notice, Halliburton informed their employees that they accepted the new program by continuing to work.[31] The court found the arbitration clause was enforceable under Texas' general contract principles, because the employee had notice of the proposed changes to the conditions of employment, and accepted those changes by continuing to work.[32] Thus, the decision in *Halliburton* validated arbitration agreements even without an employee's written acknowledgment.

Georgia courts have been similarly favorable to arbitration agreements. In *Caley v. Gulfstream Aerospace Corp.*, the employees of Gulfstream's Savannah facility received, via regular mail, a copy of the company's dispute resolution policy and cover letter.[33] In addition, Gulfstream posted the policy and letter on the company's intranet and distributed the policy by e-mail.[34] The policy stated that it was a contract and that an employee accepted the terms with continued work.[35] Georgia's appellate court noted that the FAA does not require an arbitration agreement to be signed, and the distribution of the policy was considered a written agreement pursuant to the FAA.[36] The court also stated that the employees did accept the policy by their continued employment, and that the policy

[25] Lagatree v. Luce, Forward, Hamilton & Scripps LLP, 88 Cal. Rptr. 2d 664, 673 (Ct. App. 1999).
[26] *Id.* at 680.
[27] *Id.* at 681.
[28] *Id.* at 672.
[29] *Id.* at 681.
[30] In re Halliburton Co., 80 S.W.3d 566, 568 (Tex. 2002).
[31] *Id.*
[32] *See id.* at 572-73.
[33] Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1364 (11th Cir. 2005).
[34] *Id.*
[35] *Id.* at 1364-65.
[36] *Id.* at 1368, 1370.

was not procedurally or substantively unconscionable.[37]

Unconscionable Provisions

Although some states adhere to a liberal policy when enforcing arbitration agreements, they can be found unenforceable when the agreement is unconscionable, or when the suit is brought by a third-party plaintiff. For example, the arbitration agreement in *Hooters of America, Inc. v. Phillips* was so one-sided that the court had no choice but to find it unconscionable. Here, Phillips signed an agreement to arbitrate employment-related disputes in accordance with company rules and procedures, but she was not provided with a copy of those rules and procedures.[38] According to the procedures, each party would select one arbitrator, then those two arbitrators would select a third.[39] However, the employee's arbitrator and the third arbitrator could only be selected from a pre-determined list of arbitrators provided by Hooters.[40] Further, the rules required the employee to state all claims, but Hooters was not obligated to provide any responses or defenses.[41] Additionally, the employee was required to provide a list of witnesses and a summary of the facts known by each witness, but the rules did not require Hooters to provide such information.[42] Finally, the rules granted Hooters a number of rights which were not granted to the employee, including: (i) the ability to add new claims at any time, (ii) the right to move for summary judgment, (iii) the right to record the arbitration, (iv) the right to appeal to a court to overturn or modify the decision, (v) the right to cancel the agreement upon thirty-day notice, and (vi) the right to change the rules and procedures.[43]

The Court of Appeals found that Hooters' rules were so one-sided, and "egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith."[44] After the court's review of the list of unfair, one-sided rules, it was clear the Hooters' arbitration agreement violated the covenant of good faith implied in every contract.[45] Thus, the decision made it clear that the agreement was unenforceable because it was clearly unconscionable.[46]

Third-Party Plaintiffs

In addition to unconscionable provisions, the Supreme Court, in *EEOC v. Waffle House*, examined whether an employer-employee arbitration agreement bars a third-party plaintiff from pursuing a charge against the employer. On behalf of an employee, the EEOC filed suit against Waffle House under the American with Disabilities Act ("ADA").[47] Waffle House petitioned the court to compel arbitration based on the arbitration agreement in the application of employment,

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[37] *Id.* at 1374, 1377-79.
[38] Hooters of America, Inc. v. Phillips, 173 F.3d 933, 936 (4th Cir. 1999).
[39] *Id.* at 938.
[40] *Id.* at 938-39.
[41] *Id.* at 938.
[42] *Id.*
[43] *Id.* at 939.
[44] *Id.* at 938.
[45] *Id.* at 940.
[46] *Id.*
[47] EEOC v. Waffle House, 534 U.S. 279, 283 (2002).

signed by the employee.[48] The Supreme Court reasoned that the EEOC was not a party to the arbitration agreement, and had never agreed to relinquish its statutory authority to file a suit on an employee's behalf.[49] Thus, an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief.[50] Further, there is no language in the statute that suggests an arbitration agreement alters the EEOC's statutory function.[51]

New Jersey's Hesitation: The Clearly Written Provision

Rendering the agreement unconscionable and filing a suit as a third-party plaintiff are two generally accepted principles within the context of employment disputes, but some states, like New Jersey, have implemented stricter standards regarding the enforceability of arbitration provisions. Specifically, New Jersey courts utilize contract principles to resist the enforcement of arbitration provisions. In the discrimination case of *Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A.*, the employment agreement between the parties provided: "[A]ny controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration . . . in accordance with the rules . . . of the American Arbitration Association . . . ."[52] Even though the Supreme Court of New Jersey's majority opinion acknowledged that settled New Jersey law allowed "parties to an agreement [to] waive statutory remedies in favor of arbitration", the court focused its discussion on the clear policy of New Jersey to abolish discrimination.[53] Accordingly, the court purported that the arbitration language of "any controversy or claim" was intended to mean only disputes arising from a contract term or condition of employment.[54] Therefore, Garfinkel did not waive his right to file a statutory claim in court.[55] Additionally, the court held that in order to enforce an arbitration clause waiving statutory rights, there must be a showing of an employee's clear intent "in the text of the agreement itself."[56]

One year later, the Supreme Court of New Jersey revisited its strict standard in *Martindale v. Sandvik, Inc.* In *Martindale*, the court further discussed the enforceability of an arbitration agreement with clear intent.[57] Martindale signed an employment application that included the following arbitration agreement:

> 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

[48] *Id.* at 284.
[49] *Id.* at 297-98.
[50] *Id.*
[51] *Id.* at 287; *see* 42 U.S.C. 2000e-5 (2006).
[52] Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A., 773 A.2d 665, 668 (N.J. 2001).
[53] *Id.* at 669-670.
[54] *Id.* at 671-672.
[55] *Id.* at 672.
[56] *Id.*
[57] Martindale v. Sandvik, Inc., 800 A.2d 872, 875 (N.J. 2002).

> decided by an arbitrator through the Labor Relations Section of the American Arbitration Association.[58]

The logic in the Court's decision in *Martindale* is familiar. First, relying on *Gilmer* and *Circuit City Stores*, the court validated the "well-recognized national policy and the established State interest in favoring arbitration."[59] Next, the court found the contract was clear and unambiguous, a valid consideration of employment,[60] not a contract of adhesion, and binding.[61] The dissenting opinion, like most arguments in opposition to mandatory arbitration provisions, discusses the vast disparity in bargaining power between the employer and employee.[62] However, the Supreme Court of New Jersey upheld the validity of a "clearly written" arbitration provision in an employment application.[63]

The "clearly written" provision is a higher standard than we see in other states. For example, New York enforced the following arbitration agreement:

> THE PARTIES AGREE THAT ANY DISPUTE OR CONTROVERSY ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE INTERPRETATION THEREOF, AND/OR THE EMPLOYMENT RELATIONSHIP SHALL BE SETTLED BY ARBITRATION . . . .[64]

In New York, an arbitration agreement may be found unenforceable "on any basis that could provide a defense to or grounds for the revocation of any contract, including fraud and duress."[65] However, the "courts look only to whether the arbitration clause itself was induced by fraud or duress," including "representation of a material existing fact, falsity, scienter, deception, and injury."[66] Additionally, an agreement may be found unenforceable as an adhesion contract, but that requires a showing that "the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and [that] there is inequality of bargaining power between the parties."[67]

Today, New Jersey continues to use its "clearly written" provision. The Supreme Court of New Jersey demonstrated this in *Leodori v. CIGNA Corp*. Like *Halliburton* and *Gulfstream*, *Leodori* reviews the validity of an unsigned arbitration agreement.[68] CIGNA mailed its employees a new dispute resolution policy, which stated that arbitration was the final method to resolve an employment dispute.[69] CIGNA also distributed a handbook to its employees with this dispute resolution policy.[70] Included with the handbook, CIGNA distributed an acknowledgment form to be signed by the employee:

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[58] *Id.*
[59] *Id.* at 877.
[60] *Id*. at 879-80.
[61] *Id.* at 881, 882.
[62] *Id*. at 884.
[63] *Id*.
[64] Tong v. S.A.C. Capital Mgmt., LLC, 835 N.Y.S.2d 881, 884 (2007) (capitalization in original).
[65] *Id.* at 888.
[66] *Id.* at 888-89.
[67] *Id.* at 889.
[68] Leodori v. CIGNA Corp., 814 A.2d 1098 (N.J. 2003).
[69] *Id* at 1100.
[70] *Id.*

> I understand this handbook includes information on division policies and programs and that I am responsible for knowing the policies and information. I further understand any of the policies and programs are subject to change at the discretion of senior management and that the handbook and its contents are not a contract of employment.[71]

The employees also received an "Employee Handbook Receipt and Agreement," which contained very specific language stating that the employee will use the dispute resolution process outlined in the handbook.[72] In this case, the claimant did not sign the "Employee Handbook Receipt and Agreement."[73] Thus, the Supreme Court of New Jersey held that the arbitration agreement was unenforceable.[74]

The court, relying on *Garfinkel* and *Martindale*, clarified its policy on arbitration agreements.[75] First, it noted that a state is permitted to regulate agreements, but cannot hold a higher standard for arbitration agreements than other types of contracts.[76] Second, to be enforceable, a waiver of rights provision must "clearly and unambiguously" show that the employee agreed to arbitrate the claim.[77] In review, these decisions turn on two questions: (1) is there clear and unambiguous language to arbitrate the claim, and, if so, (2) did the employee clearly agree to that provision?[78] In the instant case, the acknowledgement signature was not enough.[79]

More recently, New Jersey again relied upon the "clearly written" provision in *Angrisani v. Financial Technology Ventures, L.P.* ("*FTV*"). In this case, Angrisani signed two agreements.[80] First, he signed a stock purchase agreement without an arbitration agreement with FTV, the predecessor company to Nexxar Group, Inc. ("Nexxar").[81] On the same day, he signed a second agreement with Nexxar.[82] The second agreement was a valid employment contract and contained an enforceable

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[71] *Id.* at 1101.

[72] *Id.* at 1101-1102. Specifically, the agreement stated:

> This is to acknowledge that I have received my copy of the . . . employee handbook. I understand that by accepting employment and being eligible to receive increases in compensation and benefits, I am agreeing to the following two important terms of my employment described in [the handbook]: . . . (2) I will use the Company's internal and external employment dispute resolution processes to resolve legal claims against the Company--therefore rather than go to court or to a government agency for a hearing to decide my legal claim, I will submit my employment related legal claims except workers' compensation and unemployment compensation to final and binding neutral third party arbitration. *I understand further that these two terms of my employment replace and supersede any prior agreement concerning these terms and cannot be changed except in writing signed by me and the president of the Company*.

Id. (emphasis in original).

[73] *Id.*

[74] *Id.* at 1103.

[75] *Id.* at 1104.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 1107.

[80] Angrisani v. Financial Technology Ventures, 952 A.2d 1140, 1142-43 (N.J. Super. Ct. App. Div. 2008).

[81] *Id.* at 1142-1143.

[82] *Id.*

arbitration provision.[83] FTV moved to compel arbitration on the basis that the alleged claims were intertwined between the two companies, the stock purchase agreement was reliant upon his employment, and the intent of the parties was to arbitrate claims arising from the employment relationship.[84] The arbitration provision read: [Angrisani] and [Nexxar] will arbitrate any and all controversies, claims or disputes arising out of or relating to this Agreement or the Executive's employment with the Company ("Claims") before the American Arbitration Association ("AAA") in accordance with the AAA's National Rules for the Resolution of Employment Disputes.[85]

Although the court upheld the broad agreement for claims against Nexxar, it did not compel arbitration for the specific dispute with FTV.[86] The court concluded that it was appropriate to enforce the arbitration provision for only those claims specifically against Nexxar because there was no clearly written arbitration agreement with FTV.[87] Thus, New Jersey once again utilized its "clearly written" provision to force an employer into a trial.

It is clear the New Jersey courts will continue to use the "clearly written" provision as a tool to render arbitration agreements unenforceable unless the agreement is specific and detailed. Thus, New Jersey employers must account for these decisions when drafting arbitration agreements. Below are some items for New Jersey employers to consider:

1. *Separate agreement.* Instead of burying an arbitration agreement in an employment application or employee handbook, the agreement should stand alone. The *signed* agreement should be kept by the employer in the employee's personnel file.

2. *Use plain language.* When drafting an arbitration agreement, use plain language that employees will understand. A representative of the employer should review the agreement with the employee and answer any questions.

3. *List arbitral disputes.* The arbitration agreement should clearly and specifically list all forms of disputes that it covers. Periodically, this list should be reviewed and modified as appropriate.

4. *State the forum.* The arbitration agreement should include the forum where the arbitration will be heard, such as the American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services (JAMS). The agreement should defer the arbitration rules, procedures, and arbitrator selection to the forum's standard rules and procedures.

5. *Change of Control.* Each time there is a change in the employer of record, the employee should sign a new arbitration agreement.

Conclusion

The legal path of arbitration agreements in employment cases began with (i) reluctance by the courts to enforce, followed by (ii) growing acceptance of arbitration and waiver agreements, and

[83] *Id.*
[84] *Id.* at 1145.
[85] *Id.* at 1148.
[86] *Id.*
[87] *Id.*

progressed to (iii) full acceptance with certain limitations. It is clear from state and federal case law that arbitration can be substituted for a jury trial in employment cases. However, reluctant states limit the ability of the employer to compel arbitration and impose higher standards for the company to prove good faith and fair dealing. Since the Supreme Court has not provided guidance on the appropriate limitations, employers are bound by state contract law and public policy.

New Jersey courts have developed the "clearly written" provision as a weapon to shoot down arbitration agreements in employment contracts. The court will render an arbitration provision unenforceable unless there is a specific and detailed agreement. Therefore, New Jersey employers must implement more detailed arbitration agreements. Although New Jersey has a general policy favoring ADR, it is clear the courts favor an employee's right to adjudicate a dispute that arises from the employment relationship without a clearly written provision.