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Arbitration Policy in Employee Handbook Rejected as Insufficient to Show Agreement and Waiver

Legal Alert

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A New Jersey appellate court issued a wake-up call this month to employers that seek to impose mandatory arbitration provisions on employees through employee handbook policies.

In *C.M. v. Maiden Re Insurance Services, LLC*, the Appellate Division of the New Jersey Superior Court held that an employee will not be found to have surrendered his or her right to pursue employment claims in a court of law, unless he or she has entered into an agreement with the employee that "reflect[s] an unambiguous intention to arbitrate" employment claims. Putting a mandatory arbitration policy in an employee handbook and getting the employee to acknowledge receipt and agree to be "bound" by the terms of the handbook are insufficient, if the handbook also contains the typical disclaimer that its provisions "are not intended to create contractual obligations."

In *Maiden Re Insurance*, the employer placed a mandatory and binding arbitration policy at the end of its employee handbook, under the section, "Company Guidelines." The policy provided that any controversy or claim arising out of the employment relationship would be resolved through arbitration in accordance with the rules of the American Arbitration Association.

The employer's arbitration policy is consistent with a national trend among employers seeking to avoid the costs, time and risks of litigation inherent in our judicial system, including the risk of runaway jury verdicts. Led by the U.S. Supreme Court, courts across the country have become more and more deferential to mandatory and binding arbitration provisions in employment agreements, relying upon authority provided by the Federal Arbitration Act and similar state laws, such as the New Jersey Arbitration Act. The increasing acceptance of alternative-dispute-resolution ("ADR") agreements in employment cases can be seen as part of a broader trend in recent years to sanction employee contractual waivers of legal rights. For example, the U.S. Supreme Court has recently enforced arbitration agreements that require employees to surrender their right to participate in class action and collective action claims against their employers as a condition of employment.

Despite this trend, the Appellate Division in *Maiden Re Insurance* reminds employers that courts will be vigilant to ensure an employee has *knowingly* given up his or her rights before barring entry to the courthouse. The court noted the following issues that rendered the *Maiden Re Insurance* policy unenforceable (and that provide employers with a good checklist to ensure their ADR efforts don't suffer the same fate):

- **A waiver must spell out the employee's rights being surrendered**. An effective waiver of the constitutional right to bring employment claims in court "requires a party to have full knowledge of his legal rights and intent to surrender those rights." The agreement, therefore, should reference the rights being waived (including the right to a jury trial, if applicable) and the types of claims covered (such as discrimination, retaliation, wage claims, etc.).
- **The employee must unmistakably agree to arbitrate**. To be enforceable, a waiver must "reflect an unambiguous intention" and "mutual assent" to arbitrate legal claims. *Maiden Re Insurance* failed to produce any document showing that the employee had agreed to arbitrate her claims -- and, of course, she denied that she had.
- **Do not rely on handbooks with disclaimers**. It is "irreconcilable" for an employer to claim an employee is legally obligated to honor an arbitration clause in a handbook, even if she agreed to read and be "bound" by it, if other sections of the handbook "prominently and unequivocally disclaim the handbook is intended to create a legally enforceable contract." While some courts have enforced arbitration clauses in handbooks that do not have disclaimers, we strongly recommend that specific ADR agreements and waivers be obtained separate and apart from employee handbooks (and that the disclaimers remain in the handbooks to avoid unintended breach of contract claims).
- **Email acknowledgment of receipt is not enough**. An employee's email response acknowledging receipt of the employer's handbook, which contains the policy, "is legally insufficient to constitute a knowing waiver of her constitutional rights to have [discrimination] claims decided by a jury."
- **Get the employee's signature**. The failure to obtain either party's signature on an arbitration agreement "is significant in assessing mutual assent." While we all benefit from the ease of email, and an email message agreeing to a term may be sufficient in some circumstances, there is no better evidence of an agreement than an old-fashioned signed contract.

In sum, an arbitration policy in an employee handbook generally is not sufficient to form a binding agreement to arbitrate, due to the issues noted above. Employers that desire to avoid the risks of going to court should review the lessons of *Maiden Re Insurance* and obtain a signed, unmistakably clear ADR agreement and waiver of rights from each employee, covering all claims relating to the employment relationship.