

## LABOR AND EMPLOYMENT

AUGUST

2017

# A L E R T

## NEW JERSEY APPELLATE COURT TOSSES EMPLOYEE ARBITRATION AGREEMENT

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In *Dugan v. Best Buy*, an unreported decision (thus far) by the New Jersey Appellate court, we are again reminded of the requirement that an employee's waiver of the right to sue contained in an employee-employer arbitration agreement must be clear and unambiguous, and any waiver that falls short of this exacting standard will not be enforced under New Jersey law.

In *Best Buy*, on February 4, 2016, Plaintiff signed onto an online "eLearning" program that introduced an arbitration policy Defendant sought to implement on March 15, 2016. After explaining the arbitration policy, the last screen provided:

"As with any other Best Buy policy, by remaining employed, you are considered to have agreed to the policy. The purpose of the eLearning is to ensure you read and understand the policy.

Employees who do not take this eLearning are still subject to the policy. I have read and understand the Best Buy Arbitration Policy that takes effect on March 15, 2016."

Below this paragraph the words "I acknowledge" appeared in a box to be clicked by the employee. Plaintiff clicked on the box, although he alleged that he had not read the policy. The Appellate Court also noted that Plaintiff was a general manager for

Defendant, and was responsible to ensure his staff completed the eLearning module.

The policy went into effect on March 15, 2016, and Plaintiff was terminated by Defendant on April 5. On September 16, Plaintiff filed an age discrimination action against Defendant under the New Jersey Law Against Discrimination. The New Jersey Superior Court dismissed Plaintiff's claim, holding that the claim must be arbitrated under the arbitration policy.

In reversing the lower court's dismissal of Plaintiff's claim under the arbitration policy, the New Jersey Appellate Court held that "Plaintiff's conduct was insufficient to establish his assent to the defendant's arbitration policy." In so holding, the Court made the following findings and conclusions:

- Although Plaintiff clicked on the box acknowledging that he had read and had understood the policy, his mouse click on the acknowledgment box did not manifest his assent to the policy, only that he had read and understood the policy;
- Defendant could have established Plaintiff's assent by simply adding the words "and agree to the terms of the policy" to the acknowledgment box;
- The fact that Plaintiff knew of the policy, and as a general manager was responsible for directing other employees to complete

the eLearning module, did not establish his assent to the policy;

- Recognizing that Plaintiff's decision to stay employed past the March 15, 2016 effective date of the policy could show his agreement to the policy under New Jersey law, the Court nevertheless found that "Plaintiff's choice to stay at his job for the short period (after the implementation date) did not indicate his agreement to the policy" – reasoning that it was "unreasonable to expect an established employee to walk away from a career, without any prospects, when an employer unilaterally presents a new agreement."

#### **Lessons Learned**

Although at this point it is unknown whether Best Buy will appeal the matter to the New Jersey Supreme Court, the *Best Buy* decision reinforces previous pronouncements by New Jersey courts that any waiver of rights under an employer-employee arbitration agreement be knowing and voluntary. Therefore, the best employer practice is to incorporate clear and unmistakable language into your arbitration agreement to show that the employee not only fully understands the arbitration agreement and the rights they are waiving, but that the employee clearly and unambiguously agrees to arbitrate the disputed claim. ◆

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