LEVELING THE PLAYING FIELD WITH JURY AND STATUTE OF LIMITATIONS WAIVERS

A frustrating aspect of serving as employment counsel for corporate clients is advising employer-defendants of the risks of putting their fate in the hands of a jury. This is especially true in the many frivolous cases brought by terminated employees. Even when the employer has done everything right, juries often do not view employers favorably and decide cases with little regard for evidence or the law. Unfortunately, this reality must be factored into an employer’s consideration of most potential terminations.

Common sense dictates that employers have a disadvantage in front of a jury, as most jurors are employees. Chief Executive Officers, senior management and business owners are a minority to begin with, and most find a way to avoid jury duty. Many people also have life experiences from which they are more likely to identify with an aggrieved employee. Although that pre-conception can change during a trial, the odds are not favorable. Juries also tend to award damages that can be out of touch with reality. In addition, because most employment cases involve statutes that allow for counsel fee-shifting, in which a prevailing employee’s attorneys’ fees are paid by the employer, judges have broad discretion to increase the judgment amount against the unsuccessful employer. In sum, a jury trial for an employer is serious and costly business.

In the 1990’s, lawyers became enamored with arbitration as an alternative to litigating disputes in court, including employment claims. The pitch for arbitration was that it was quicker, less expensive and complicated, and avoided the risks of a runaway jury. Ultimately, courts upheld arbitration agreements in most contexts and established guidelines that have enabled employers to secure effective waivers of an employee’s right to sue in court.

Fast forward twenty years. Not surprisingly, lawyers have figured out a way to screw up arbitration too, as it has become almost as long a process and a not-so inexpensive alternative to court. Now, in the context of arbitration, lawyers often insist on full discovery (which leads to inevitable battles and delays), while arbitrators, with their exorbitant per diem fees, are motivated to prolong the process, which is easy to do when most employment cases take many hearing days.

1 In light of the June 2013 decision by the United States Supreme Court in American Express v. Italian Colors, which upheld a class action waiver in an arbitration agreement between the giant credit card company and merchant users of its services, the trend in favor of arbitration appears to be stronger than ever

2 An in-house lawyer with an Employment Practices Liability (EPL) Insurance carrier and long-time friend of the firm recently told us that for five days of arbitration in an employment case, the insured’s 50% share of the arbitrators’ fees alone came to $80,000.
Our firm never caught “arbitration fever” for three primary reasons, all of which remain valid today. First, arbitration rarely provides an opportunity to dismiss a claim. Although some arbitration rules allow for dispositive motions, cases are very rarely dismissed. Second, in arbitration, a case is far more likely to be “tried” to conclusion because the risk of a biased or runaway jury is not present, and because of the arbitrator’s financial incentive to do so (in stark contrast to judges who work to push cases off their docket). Finally, there are virtually no appellate rights in arbitration, as appealing a ruling is generally limited to situations where there is demonstrable fraud in the process or an undeniable conflict of interest (e.g., the arbitrator is the winning party’s business partner or best friend). Accordingly, even in the face of overwhelming evidence and/or law that is inconsistent with the arbitrator’s decision, the likelihood that a court will consider an appeal is very small.

For these reasons, we have discouraged clients from adopting arbitration requirements in their employment relationships. The problem: Arbitration, while avoiding the uncertainty of a jury, is often not a cost-effective way to resolve lawsuits. Moreover, no matter how frivolous, an arbitrated case will more likely be tried to conclusion or settle for more than it should (because there is no threat of a dispositive motion or appeal), unless the employer spends the counsel and arbitrator fees to roll the dice on a full arbitration hearing. Another problem is that an outright defense victory is rarely achieved, as arbitrators are too often inclined to “split the baby” to make everyone a little happy.

The answer: Employers can level the playing field with a seldom used, but effective tool: the jury waiver. The idea is that rather than have an employee agree to arbitration, employers should insist that employees waive their right to a jury trial. As a result, employment claims would be decided by a judge in a “bench trial,” where all the other trappings of old fashioned litigation remain intact, including the ability to bring a summary judgment motion, discovery motions and the opportunity to appeal if the outcome is unsatisfactory. Eliminated is the uncertainty caused by juries, the potential for a runaway verdict and the added cost of an arbitrator with significant per diem fees (for our court system we already pay exorbitant fees to judges to resolve legal disputes; those fees are called taxes).

For more than a decade, New Jersey courts have recognized an employer’s right to require prospective or existing employees to waive the right to have employment disputes resolved in court, including those for discrimination. In 2002, the state Supreme Court, in Martindale v. Sandvik, Inc., found that an employer hiring an applicant, or even considering an applicant for employment, is a sufficient exchange of value to uphold an arbitration provision in an employment application. Even earlier, in 2000, a New Jersey

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3 Because of the inherent disproportionate bargaining power between the parties, courts have consistently ruled that if an employer insists upon arbitration, then the full cost of the arbitrator and associated fees (e.g., room rental, transcripts) must be paid by the employer.

4 An EPL Claims Manager, who has made his disenchantment with arbitration very clear to us, explained that the last bench trial he oversaw for an insured was a far more satisfying and less anxiety provoking experience.
appellate court, in *Quigley v. KPMG Peat Marwick, LLC*, made it clear that *continued* employment is a sufficient to allow an employer to require existing employees to agree to new terms and conditions of employment (such as mandatory arbitration of employment claims). However, in order for such agreements to be binding, employers must be prepared to terminate any existing employee who refuses to agree to waive their right to a court resolution in exchange for continued employment.  

As alternative dispute resolution has grown in popularity throughout the last decade, and as droves of judges have retired to lucrative new careers in private ADR companies or ever expanding law firm ADR departments, the jury waiver remains the less utilized and under-valued tool. However, in 2011 and 2012, New Jersey appellate courts upheld jury waivers in the commercial litigation context. In *Investors Savings Bank v. Waldo Jersey City* (2011) and *Lee v. Tenafly Associates* (2012), the courts ruled that there is no public policy prohibiting jury waivers and that the rationale for permitting them is the same as that favoring arbitration provisions. The courts emphasized that the enforceability of jury waivers, as with arbitration agreements, is dependent on whether the waiver of rights is “knowing and voluntary.”

Clearly, in New Jersey, an arms-length negotiated jury waiver is enforceable according to those decisions. Significantly, in *Lee v. Tenafly Associates*, the court, quoting an earlier federal appellate court case, stated: “Agreement to a bench trial cannot logically be treated less favorably than agreement to... arbitrate or litigate in a forum that will not use a jury.” In the context of a consumer (take it or leave it) contract, the courts have identified three factors that need to be considered in evaluating a jury waiver, including:

- Parties relative bargaining power;
- Degree of economic parity of the parties; and
- The public interest involved.

In the employment context, the disparate bargaining power is arguably less than in a consumer situation. Indeed, job applicants are presumably far more concerned, careful and engaged in the process of determining the benefits and burdens of an employment opportunity (and thus read the fine print), than a consumer in making a purchase (even a large one). Accordingly, jury waivers should be readily enforced in an employment case as long as they are carefully drafted and fairly presented.

In March 2013, the first case of its kind in New Jersey, a court upheld a jury wavier in an employment discrimination case. The trial court in *Farrell v. Toys R’ Us* considered the validity of a jury waiver contained in the job application of the retail giant. The wavier was introduced in the job application as follows: **PLEASE READ AND SIGN.** Underneath, the wavier was not in bold or capitalized and read in part:

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5 If some employees can refuse to sign and keep their jobs, there is no exchange of value for those who do sign the waiver.

6 New Jersey courts are not alone in upholding jury waivers in multiple commercial contexts. Only two states, California and Georgia, have not allowed pre-litigation jury waivers.
…if I am hired, I agree as a condition of any employment to waive my right to a jury trial in any action or proceeding related to my employment or the termination of my employment…I am waiving my right to a jury trial voluntarily and knowingly and free from coercion. I understand that I have a right to consult with a person of my choosing before signing this application.

The Farrell court held that this jury waiver was a valid contract because it was sufficiently definite that both parties understood, with reasonable certainty, what would be expected. In addition, the exchange of value is likewise sufficient: waiver of a jury trial in exchange for employment.

Nevertheless, even with a valid jury waiver, the Farrell court still had to determine whether the waiver applied to the former employee’s statutory discrimination claim under the New Jersey Law Against Discrimination (“NJLAD”). The plaintiff argued that because the waiver makes no reference to the NJLAD or any other statute, he did not waive the right to a jury trial for claims brought pursuant to an employment statute. The court disagreed and found the language sufficiently broad to encompass any statutory claim “related to [his] employment or the termination of [his] employment.” Notably, if the language referred only to claims arising under a contract of employment, the court would likely have found that there was no waiver of the statutory right to a jury trial. However, because of the broad language of the waiver, the court held that an applicant signing the Toys R’Us employment application validly waived the right to jury trial for NJLAD or other statutory claims. Although only a trial court decision, Farrell follows the logic and precedent of the many appellate decisions involving jury waivers in the commercial context and the arbitration cases in the employment context.7

Most importantly, Farrell is New Jersey’s first step in confirming the opportunity employers have to obtain valid jury trial waivers in an employment application; thereby allowing employers to preserve the benefits of defending employment discrimination and whistleblower cases in court (e.g., court-mandated mediation, settlement conferences, dispositive motion practice, judicial oversight and case management, and appellate rights), while avoiding the potential significant risks of an employee-friendly and/or runaway jury.

7 Judicial decisions in other states, including New York, Florida, Texas and Iowa, have enforced jury waivers. In those cases, the courts were most concerned that the waivers were obtained from the employees in a manner that was “knowing and voluntary.”
New Jersey’s second and far more significant step came on June 19, 2014, when the Superior Court Appellate Division upheld the validity of both a jury trial and statute of limitations waiver set forth in an employment application. In *Rodriguez v. Raymours Furniture Company, Inc.*, the court held that a properly written, prominently displayed provision in an employment application that waived a jury trial and reduced the period of time that an employee could file a state law discrimination claim against the employer from two years to six months was valid and enforceable.

The *Rodriguez* decision is clearly a game-changer for employers in New Jersey. The court specifically found that a six month limitations period for an employee to sue an employer for discrimination under state law is reasonable. Although the court did not focus on the jury waiver, it tacitly approved its validity as well. This means that New Jersey employers, simply by adding these waivers to their applications, can drastically limit their exposure to state law discrimination claims by not only shortening the time period that an employee has to sue, but also by eliminating the pitfalls of jury trials.

In sum, employment counsel should be advising clients to not be misled by the false promise of arbitration, and to instead consider carefully crafted jury waivers in their employment applications and/or contracts. In addition, to take full advantage of the special opportunity presented by the very recent *Rodriguez* decision to dramatically reduce the otherwise applicable limitations period, employment counsel should be encouraging clients to include statute of limitations waivers. In our imperfect and increasingly litigious world, jury and statute of limitations waivers strike an exceedingly important and practical balance between the respective pros and cons of arbitration versus a jury trial. The bottom line: To level the litigation playing field, these waivers deserve very serious attention.

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8 Last year, a New York State intermediate appellate court upheld the exact same jury and statute of limitations waiver in *Hunt v. Raymour & Flanigan*. 