LUM, DRASCO & POSITAN LLC
Attorneys At Law Since 1870

You Can't Have Your Arbitration Cake and Eat It Too!

By Christina Silva, Esq. and Scott E. Reiser, Esq.

Lum, Drasco & Positan LLC
103 Eisenhower Parkway
Suite 401
Roseland, NJ 07068-1049
(973) 403-9000
www.lumlaw.com

A New Jersey appeals court recently held that it would not enforce an arbitration clause mandating arbitration of an employment-related claim contained in an employee handbook if the employee handbook also contains a disclaimer provision which notifies the employee that the handbook does not constitute a binding contract of employment.

In Morgan v. Raymours Furniture Company, Inc., A-2830-14T2 (App. Div. Jan. 7, 2016), the Appellate Division of the New Jersey Superior Court considered whether an employee was required to arbitrate his claims against his former employer in accordance with an arbitration clause in the employee handbook, in which the employee waived his right to sue the employer for claims arising out of his employment. The employee argued that after making a claim of age discrimination, his employer informed him he would have to sign a stand-alone arbitration agreement or his employment would be terminated. The employee refused to sign the arbitration agreement and was fired. He then filed a lawsuit against his former employer, alleging violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., wrongful termination and other related causes of action. Despite the employee's refusal to sign the arbitration agreement, the employer moved to compel arbitration of the claims, based on the arbitration provision contained in the employee handbook and other language regarding the employee's waiver of his right to sue. The employer claimed that the employee handbook clearly and unambiguously set forth an arbitration requirement, and that the employee knowingly and voluntarily agreed to waive his right to sue by signing an acknowledgment indicating he received the employee handbook and understood its contents. The employer's motion to compel arbitration of the employee's claims was denied, and the employer appealed.

In upholding the lower court's denial of the employer's motion to compel arbitration, the Appellate Division determined that the employer could not have it both ways with respect to contractual application of the provisions in the handbook. The court specifically noted that the employer could not insist that the handbook did not constitute a contract of employment, while still asserting that the employee was contractually obligated to submit his employment related claims to arbitration. The court noted that to do so would mean the employer was applying a contractual obligation "when it suits its purposes," and that such a proposition was conceptually similar to the proverb, "You can't have your cake and eat it too." The court stated: "It is simply inequitable for an employer to assert that, during its

dealings with its employee, its written rules and regulations were not contractual and then argue, through reference to the same materials, that the employee contracted away a particular right." *Id. at 7.*

The New Jersey Supreme Court has held that an employee, faced with an arbitration clause, must "clearly and unambiguously" agree to a waiver of the right to sue. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 444-45 (2014), *cert. denied* ___ U.S. ___, 135 S.Ct. 2804, 192 L.Ed.2d 847 (2015). Relying on this holding, the court in Morgan v. Raymours Furniture Company, Inc., concluded that the employee did not clearly and unambiguously agree to such a waiver when the waiver provision was inserted in a company handbook which the employer insisted was not contractual in nature. The court further determined that the employee's signature acknowledging that he "received" and "understood" the contents of the company handbook, did not constitute an agreement to a waiver of the right to sue. As such, the court declined to enforce the arbitration provision and waiver of the right to sue clause contained in the employer's employee handbook.

Notably, the court indicated that had the employee executed the stand-alone arbitration agreement originally presented to him, a different result may have followed. Based on the court's ruling and this indication, employers who would like to utilize an enforceable mandatory arbitration provision for employment claims should review their employee handbooks to determine: (1) whether they want to use the employee handbook as a contract; and (2) if not, to draft separate, stand-alone arbitration agreements for their employees. The formulation of a clearly worded notice provision in a separate document addressed solely to mandatory arbitration of employment related claims with accompanying waiver of the right to sue, will ensure that both the employer and the employee have a common understanding that the employee has effectuated an affirmative, voluntary, and informed waiver of the right to sue. An executed document of this nature will also serve to bolster an employer's position that an employee who raises an employment related claim must be compelled to bring such claims to arbitration. Employers should be guided by this recent ruling in reviewing arbitration provisions in their current employee handbooks, and take action to redraft arbitration provisions in a separate document in a manner that will withstand the higher level of scrutiny now applied to such terms.

Contact our Labor and Employment Group lawyers if you should have any questions:

Wayne J. Positan, Chair	wpositan@lumlaw.com	(973-228-6730)
Christina Silva, Vice Chair	csilva@lumlaw.com	(973-228-6763)
Daniel M. Santarsiero	dsantarsiero@lumlaw.com	(973-228-6780)
Elizabeth Y. Moon	emoon@lumlaw.com	(973-228-6792)
Scott E. Reiser	sreiser@lumlaw.com	(973-228-6738)
Elaine R. Cedrone	ecedrone@lumlaw.com	(973-228-6778)