June 27, 2018

# Enforcing Arbitration Agreements in New Jersey

Arbitration can be an efficient and cost-effective method for resolving workplace disputes. The benefits of arbitration over litigation can include confidentiality during the process, reduced publicity, lower legal costs, avoiding an irrational jury decision, and the potential to avoid class action claims.[1] However, there are some key rules to follow if an employer wants to implement an enforceable arbitration agreement.

**Knowing and Voluntary Assent**

The principles of contract law will apply in determining whether an agreement to arbitrate is valid. Under those principles, arbitration agreements "must be the product of mutual assent" such that the "parties have an understanding of the terms to which they have agreed," and "[a]n effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." In addition, employees must receive notice of the arbitration agreement and enter into it "knowingly and voluntarily."

One recent New Jersey federal court decision highlights the burden on employers seeking to enforce the terms of arbitration agreements.[2] In that case, the court denied an employer's request to compel arbitration because it could not show (without dispute) that the employee had knowingly and voluntarily agreed to participate in its arbitration program. The employer provided its employees, including the plaintiff, with copies of its arbitration agreement via e-mail. Those e-mails informed the employees of the arbitration program and contained a link to the arbitration agreement. The e-mail also informed employees that the arbitration program was mandatory, unless they opted out within 30 days of receipt, and that their continued employment without opting out constituted acceptance of the arbitration agreement. The arbitration agreement was also available on the employer's internal portal. The employer presented the court with documentary evidence showing the e-mail was delivered to the plaintiff. The plaintiff, on the other hand, provided a sworn statement to the court *denying* any recollection of receiving, viewing, or opening the e-mail.

New Jersey courts have held that "an arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it."[3] Although courts do not require an actual signature, the employee must at least demonstrate a willingness and intent to be bound by the arbitration provision. For example, assuming confirmed receipt of the arbitration agreement, employees may indicate their agreement by failing to opt out of the program,[4] or by continuing employment where, as was the case here, an arbitration agreement states that an employee accepts its terms by continuing employment following the effective date.[5]

The court noted that in those cases in which courts had enforced arbitration agreements without an actual signature, the employee had taken some affirmative action to indicate his or her acceptance.[6] Here, however, the plaintiff's "passive acquiescence" did not indicate acceptance, and there was a factual dispute about whether he had notice of the arbitration provision at all because he denied receipt of the e-mail. Accordingly, the court could not find the employee had "knowingly and voluntarily" relinquished his rights to litigate, and denied the employer's motion seeking to compel arbitration.

**Additional Considerations**

While this recent decision is a reminder to employers and makes clear that a "knowing and voluntary" waiver of rights is necessary to compel arbitration, there are also other principles of which employers must be mindful. For example:

**Know the Rules**

Arbitration agreements must not be unconscionable. For instance, employees often challenge the agreements by claiming defects in the underlying arbitration process — and those defects usually relate to discovery procedures or other allegations of inequity or unfairness. New Jersey courts have held that the American Arbitration Association's (AAA) Employment Arbitration Rules & Mediation Procedures adequately protect employees' rights to discovery and also afford sufficient flexibility and informality to the parties.[7] Thus, an arbitration program should incorporate these (or similar) rules to avoid this challenge.

**Separate Arbitration Agreements From Employee Handbooks**

The New Jersey Appellate Court has held that it is "irreconcilable" to compel an employee to arbitrate claims based on a handbook provision, even if she agreed to read and be "bound" by it, when other sections of the handbook "prominently and unequivocally disclaim the handbook is intended to create a legally enforceable contract."[8] Accordingly, employers should continue to include disclaimers in employee handbooks to avoid breach of contract claims, and they should require employees to sign *separate* arbitration agreements.

**Make the Waiver Explicit and Understandable**

To be effective, a waiver of the right to bring employment claims in court and before a jury "requires a party to have full knowledge of his legal rights and intent to surrender those rights."[9] Arbitration agreements must, therefore, reference the rights being waived (including the right to go to court and to a jury trial, if applicable) and the types of claims covered (such as discrimination, retaliation, class actions, wage claims, etc.). Courts have declined to take away an employee's right to trial in court absent "simple, clean, understandable and easily readable" language specifying the employee is waiving that right.[10] Likewise, arbitration agreements should identify by name the statutory claims the employee is waiving.[11]

**Make Sure There Is an "Unmistakable" Agreement to Arbitrate**

As discussed above, the arbitration agreement must "reflect an unambiguous intention" and "mutual assent" to arbitrate, and include a knowing and voluntary waiver. Although something less than a signature may suffice to show an intent to be bound, employers should seek signatures wherever possible. If that is not possible, an electronic record of the employee's receipt, review, *and acceptance* of the arbitration program must be clear and convincing.

Before implementing any arbitration program, employers should always confer with legal counsel to ensure that their agreements comply with applicable requirements.

---

[1] *See Epic Sys. Corp. v. Lewis,* 584 U.S. ___ (2018) (slip op. May 21, 2018) (holding that class and collective waiver provisions are enforceable in the context of workplace agreements).

[2] *Schmell v. Morgan Stanley & Co.*, No. CV-17-13080, 2018 WL 1128502, at *2 (D.N.J. Mar. 1, 2018).

[3] *See, e.g., Leodori v. CIGNA Corp.*, 175 N.J. 293, 306 (2003).

[4] *See, e.g., Descafano v. BJ's Wholesale Club, Inc.*, 2016 WL 1718677, at *2 (D.N.J. Apr. 28, 2016).

[5] *See, e.g., Nascimento v. Anheuser-Busch Cos., LLC*, 2016 WL 4472955, at *5 (D.N.J. Aug. 24, 2016).

[6] *See, e.g., Ricci v. Sears Holding Corp.,* 2015 WL 333312, at *2 (D.N.J. Jan. 23, 2015) (enforcing an arbitration agreement and noting that "the PeopleSoft system reflects he entered into the Agreement by clicking 'Yes' and 'Submit.'"); *Uddin v. Sears, Roebuck & Co.*, 2014 WL 130292, at *4 (D.N.J. Mar. 31, 2014) (describing number of webpages with links, attention-grabbing font, and a series of policy acknowledgments that employees had to complete).

[7] *Quigley v. KPMG Peat Marwick, LLP,* 749 A.2d 405, 411 (N.J. App. Div. 2000).

[8] *C.M. v. Maiden Re Ins. Servs., LLC*, A-2913-13T1, 2015 WL 5518087, at *6 (N.J. Super. Ct. App. Div. Sept. 18, 2015).

[9] *See, e.g., Noren v. Heartland Payment Sys., Inc.*, 448 N.J. Super. 486, 495 (App. Div. 2017) (citing *Knorr v. Smeal*, 178 N.J. 169, 177 (2003)).

[10] *See Milloul v. Knight Capital Grp., Inc.*, A-1953-13T2, 2015 WL 12719598, at *2 (N.J. Super. Ct. App. Div. Sept. 1, 2015).

[11] *Id.*

---

Would you like to receive our *Employment and Labor Quarterly Update*? Sign up here.

# Authors


## Daniel L. Schwartz

### Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

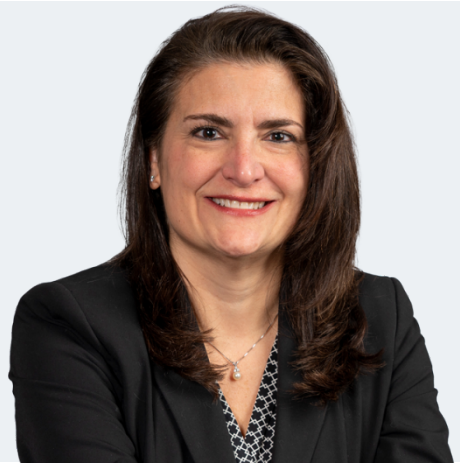
dlschwartz@daypitney.com

## David P. Doyle

### Partner

Parsippany, NJ | (973) 966-8136

ddoyle@daypitney.com

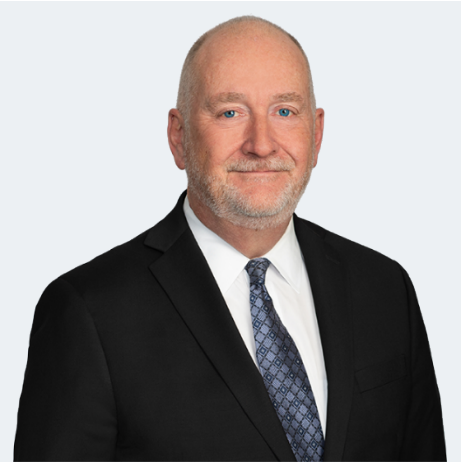


## Francine Esposito

### Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com

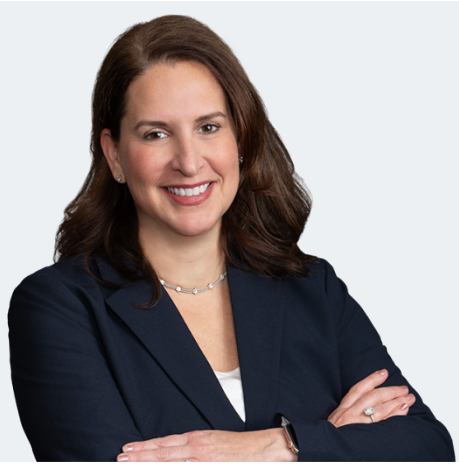



## Glenn W. Dowd

### Partner

Hartford, CT | (860) 275-0570

gwdowd@daypitney.com

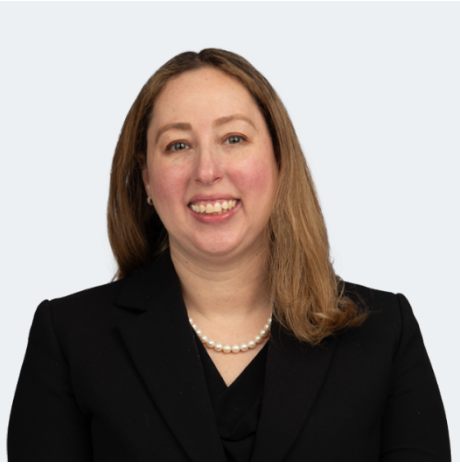

## Heather Weine Brochin

### Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com

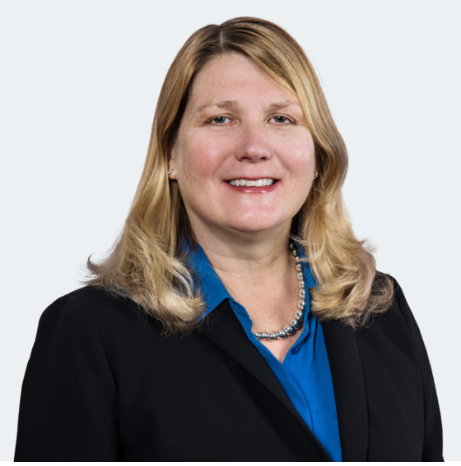

## Rachel A. Gonzalez

### Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com


## Theresa A. Kelly

### Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com