

**To: New Jersey Law Revision Commission**  
**From: Samuel M. Silver, Deputy Director**  
**Re: Waiver of Rights in an Employment Contract (N.J.S.10:5-12.7) as discussed in *Antonucci v. Curvature Newco, Inc.*, 470 N.J. Super. 553 (App. Div. 2022)<sup>1</sup>**  
**Date: May 08, 2023**

## MEMORANDUM

### Project Summary

Pursuant to both the federal law and New Jersey law, “arbitration is fundamentally a matter of contract.”<sup>2</sup> The Federal Arbitration Act (“FAA”) vests state legislatures with the authority to regulate arbitration agreements under general contract principles and courts are permitted to invalidate inequitable or illegal arbitration clauses.<sup>3</sup>

In March of 2019, the New Jersey Legislature amended the New Jersey Law Against Discrimination (“LAD”).<sup>4</sup> Among the amendments was the addition of N.J.S. 10:5-12.7 (“Section 12.7”). The statute provides that employment contracts that waive any substantive right or remedy relating to a claim of discrimination are unenforceable because they are against public policy.<sup>5</sup>

In *Antonucci v. Curvature Newco, Inc.*, the Appellate Division considered as a matter of first impression whether Section 12.7 was pre-empted when applied to an arbitration agreement governed by the FAA.<sup>6</sup> The *Antonucci* Court considered the federal and state law and concluded that “the FAA pre-empts Section 12.7 when applied to prevent arbitration called for in an agreement governed by the FAA.”<sup>7</sup>

### Statute Considered

N.J.S. 10:5-12.7, provides:

- a. A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.
- b. No right or remedy under the “Law Against Discrimination,” P.L.1945, c. 169 (C.10:5-1 et seq.) or any other statute or case law shall be prospectively waived.

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<sup>1</sup> See also *Salters v. Brinker International, Inc.*, 2022 WL 729801 at \*2 (N.J. App. Div. Mar. 11, 2022).

<sup>2</sup> *Antonucci v. Curvature Newco, Inc.*, 470 N.J. Super. 553, 561 (App. Div. 2022). (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010); 9 U.S.C. § 2; *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 424 (App. Div. 2011)).

<sup>3</sup> *Id.*

<sup>4</sup> New Jersey's Law Against Discrimination (LAD), N.J. STAT. ANN. §§ 10:5-1 to -50. N.J. STAT. ANN. § 10:5-12.7 (West 2023).

<sup>5</sup> N.J. STAT. ANN. § 10:5-12.7 (West 2023) (providing that “no right or remedy under LAD or any other statute or case law shall be prospectively waived.”).

<sup>6</sup> *Antonucci*, 470 N.J. Super. at 557.

<sup>7</sup> *Id.* at 566.

c. This section shall not apply to the terms of any collective bargaining agreement between an employer and the collective bargaining representative of the employees.

### **Background**

Gilbert Antonucci (“Plaintiff”) was employed as a field engineer by Curvature Newco, Inc. (“Defendant” or “Curvature”).<sup>8</sup> The Plaintiff was sent electronic versions of employment-related documents to read and acknowledge as part of his training program.<sup>9</sup> Among these documents was an arbitration agreement “enforceable under and subject to the Federal Arbitration Act, 9 U.S.C. Sec. 1, *et seq.*”<sup>10</sup> Without signing the documents, the Plaintiff electronically accepted them and acknowledged that he had “received and reviewed the policies and procedures outlined in the Codes and Handbook.”<sup>11</sup>

The Plaintiff was fired approximately seven months after agreeing to the terms of employment.<sup>12</sup> Several months later, the Plaintiff filed a complaint against his former employer in which he asserted “claims of discrimination and wrongful termination under LAD.”<sup>13</sup> In lieu of an answer, the Defendant filed a motion to dismiss the complaint and compel arbitration.<sup>14</sup> The trial court found that the Plaintiff agreed to the Arbitration Agreement, dismissed the complaint with prejudice, and compelled the parties to participate in arbitration.<sup>15</sup> The Plaintiff appealed.<sup>16</sup>

### **Analysis**

As a preliminary matter, the Appellate Division considered whether the Plaintiff and the Defendant entered into a valid and enforceable agreement to arbitrate all employment related disputes. The Court noted that arbitration is fundamentally a contract matter.<sup>17</sup> An agreement to arbitrate is therefore the equivalent of a contractual agreement.<sup>18</sup>

The federal law “permits states to regulate . . . arbitration agreements under general contract principles. . .” and invalidate clauses that are contrary to law or determined to be inequitable.<sup>19</sup> To be enforceable, an arbitration agreement must be the product of mutual assent, its terms must be clear, and it must identify any legal rights being waived.<sup>20</sup> In an employment setting, an

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<sup>8</sup> *Antonucci*, 470 N.J. Super. at 557.

<sup>9</sup> *Id.* at 558.

<sup>10</sup> *Id.* at 559.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 559-60. The Plaintiff also asserted post-employment harm caused when the plaintiff contested his claim for unemployment benefits. A discussion of these allegations exceeds the scope of this Memorandum.

<sup>14</sup> *Id.* at 560.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 561. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010); 9 U.S.C. § 2; *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 424 (App. Div. 2011).

<sup>18</sup> *Rent-A-Center*, 561 U.S. at 67,

<sup>19</sup> *Antonucci*, 470 N.J. Super. at 561 (quoting *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 445-46 (2014)).

<sup>20</sup> *Id.* (quoting *Altese*, 219 N.J. at 442-43).

arbitration provision must reflect that the employee has “clearly and unambiguously agreed to arbitrate the disputed claim.”<sup>21</sup>

The *Antonucci* Court noted that “it was undisputed that plaintiff was given a copy of the Arbitration Agreement and had an opportunity to review it.”<sup>22</sup> In addition, the “terms of the Agreement clearly stated that the parties were giving up the right to pursue all employment-related claims in court, and instead agreed to arbitrate those claims....”<sup>23</sup> The Court determined that because the Arbitration Agreement met New Jersey’s requirements for a valid contract, it was a valid and enforceable agreement.<sup>24</sup>

The Appellate Division also considered whether the FAA pre-empted the LAD’s prohibition of arbitration of discrimination claims.<sup>25</sup> The Court noted that this question involved the interpretation of both federal and state law that necessitated an examination of the relevant sections of both the FAA and the LAD.<sup>26</sup>

The FAA was enacted to “ensur[e] that private arbitration agreements are enforced according to their terms.”<sup>27</sup> The FAA will find such agreements to be valid and enforceable unless they are contrary to the law or equity.<sup>28</sup> Although the FAA does not contain an express pre-emption provision, “a state law that conflicts with the FAA or frustrates its purpose violates the Supremacy Clause of the United States Constitution.”<sup>29</sup>

The term “arbitration” is not used in Section 12.7 of the LAD.<sup>30</sup> The plain language of this section, however, “prohibits all pre-dispute agreements... [that] prospectively waive the right to file a court action for a LAD claim.”<sup>31</sup> The “waiver” of the right to pursue an action in court is one of the primary objectives of any arbitration agreement.<sup>32</sup> The Court reasoned that “[e]ven when the state law does not expressly single out arbitration agreements, it will be pre-empted if its application ‘covertly accomplishes the same objective by disfavoring contracts that... have the defining features of arbitration agreements.’”<sup>33</sup> The Court opined that since “Section 12.7 effectively ‘singles out arbitration agreements for disfavored treatment’ it is pre-empted by the FAA.”<sup>34</sup>

The *Antonucci* Court affirmed that portion of the order compelling arbitration.<sup>35</sup>

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<sup>21</sup> *Id.* (quoting *Leodori v. CIGNA Corp.*, 175 N.J. 293, 302 (2003)).

<sup>22</sup> *Id.* at 560.

<sup>23</sup> *Id.* at 562-63.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 563.

<sup>26</sup> *Id.* at 564.

<sup>27</sup> *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)).

<sup>28</sup> 9 U.S.C. § 2.

<sup>29</sup> *Antonucci*, 470 N.J. Super. at 564. U.S. CONST. art. VI, cl. 2; *Concepcion*, 563 U.S. at 347 n.6.

<sup>30</sup> *Id.* at 565. N.J. STAT. ANN. § 10:5-12.7.

<sup>31</sup> *Id.* at 565.

<sup>32</sup> *Id.* at 566.

<sup>33</sup> *Id.* at 565 (quoting *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 581 U.S. ----- (2017)).

<sup>34</sup> *Id.* at 566.

<sup>35</sup> *Id.* at 567 (reversing the portion of the order dismissing the case with prejudice pursuant to 9 U.S.C. § 3 which provides that court actions should be stayed if the action involves “any issues referable to arbitration”).

### **Pending Bills**

There are no bills pending that seek to amend the language of N.J.S. 10:5-12.7.

### **Conclusion**

Staff seeks authorization to conduct additional research and outreach regarding N.J.S. 10:5-12.7 to determine whether the statute would benefit from modification.

## **For Reference**

9 U.S.C. § 2, Arbitration. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

9 U.S.C.A. § 3, Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.