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Termination Provisions May Defeat Arbitration

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A New Jersey trial court last month declined to compel arbitration of a wrongful termination dispute on grounds that the written agreement between the employer and a high-level executive had, by its terms, "expired" before the dispute arose. *Susan L. O'Keefe v. Edmund Optics, Inc.*, No. CAM-L-3349-18, 2018 N.J. Super. Unpub. LEXIS 2517 (N.J. Super. Ct. Law Div. Nov. 15, 2018).

It is easy enough to say that the employer was hoisted by its own petard because it drafted the agreement and must have had a reason for choosing the agreement terms and structure to "sign up" the executive for a limited period of time, all the while contemplating that the executive might continue to work beyond the initial term. This case suggests a review may be warranted of employment and other

commercial agreements to avoid this and similar "termination" problems by, for example, including a survival provision.

It is common for an employment or commercial arrangement to expire at the end of the term set out in a written agreement. Disputes that arise in the course of the concluded relationship or its termination often are subject to the arbitration clause in the agreement. A second visit to the kiddy park is not covered by the agreement signed for a prior visit, though, unless the initial contractual relationship specifically covers subsequent visits; the second visit requires a second contract signed by a person with legal authority. *See Weed v. Sky N.J., LLC*, No. A-4589-16, 2018 N.J. Super. Unpub. LEXIS 410 (N.J. Super. Ct. App. Div. Feb. 22, 2018) (friend's signing of second form inadequate). Commercial entities often try to avoid this problem by entering into a general agreement stating that future purchases or transactions are subject to specified basic terms and conditions. Unless covered by a carefully worded agreement, an employee who leaves a job, then returns as a rehire, is not bound by the terms of the initial writing; a new agreement is required. The reason? Because arbitration agreements must be in "writing" (9 U.S.C. § 2) or in a "record" (N.J. Stat. Ann. 2A:23B-6), oral agreements may be sufficient to enforce most terms of the second contract but not an arbitration clause only in the earlier writing.

Another twist: After the end of the contractual term, the employee may continue to work without the employer's revising the writing to cover an extended term. This also happens in franchise, licensing, service, or similar commercial relationships. Where claims relate to conduct during the original term, most courts would conclude that the dispute must be arbitrated pursuant to the arbitration clause in the written agreement. But if the dispute arises from conduct during the extension period, covered only by the oral contract, arbitration may not be available. In *Spathos v. Smart Payment Plan LLC*, No. 15-8014, 2016 U.S. Dist. LEXIS 95152 (D.N.J. July 21, 2016) (citing *Bogen Commc'ns, Inc. v. Tri-*

Signal Integration, Inc., 227 F. App'x 159 (3d Cir. 2007)), for example, the parties agreed orally to continue their agency relationship after the end of the term of a written agreement with an arbitration clause; arbitration was not permitted of a dispute arising out of the period governed by the oral agreement. Broad reliance on an earlier arbitration agreement covering the parties' "relationship" may not solve the problem. *See Katsil v. Citibank, N.A.*, No. 16-3694, 2016 U.S. Dist. LEXIS 169560 (D.N.J. Dec. 8, 2016) (declining arbitration regarding dispute over second credit card).

In the case involving Susan O'Keefe, the court faced a different scenario —the executive continued to work after the initial term, but the contractual language relied on by the employer to argue that the right to arbitration and other contractual obligations continued was, at best, equivocal. One section of the agreement provided that the employee might "remain in the *employ* of the Company" (emphasis added) after the initial one-year term but under conditions consistent with those applicable to other employees. Thus, the employee may have become an at-will employee, without the written protections of the original one-year term. The arbitration clause covered disputes "arising out of Executive's *employment* . . ." (emphasis added), but the court held that was insufficient to cover anything beyond the initial one-year term.

As with confidentiality and non-compete clauses, arbitration clauses may be drafted to include survival language. Or the employer may require a new, separate arbitration agreement after the initial term, presumably without risking the employee's at-will status. Otherwise, contract terms may "cease[] to exist" at the expiration of the contract. *See Craffey v. Bergen Cty. Utils. Auth.*, 315 N.J. Super. 345, 350 (App. Div. 1998); *cf. Owens v. Press Publ'g Co.*, 20 N.J. 537, 550 (1956).

Time to look again at those arbitration contracts.

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