

New Jersey Arbitration Agreement Declared Invalid Without Express Waiver of Employee's "Right to a Trial"

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By [Mark Diana](#)

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Several basic drafting and implementation rules have emerged from the case law over the last 15 years. For example, an arbitration agreement need not "list every imaginable statute by name," but the agreement "should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination" including "workplace discrimination claims." Also, an employer must secure an employee's "explicit, affirmative agreement" to arbitrate, which typically (but not always) requires an employee's signature—either "wet" or electronic—on the arbitration agreement. See *Leodori v. Cigna Corp.*, 175 N.J. 293, cert. denied, 540 U.S. 938 (2003).

According to a recent unpublished New Jersey Appellate Division decision, a mandatory employment arbitration agreement must also include an express waiver of the employee's "right to a trial." In *Milloul v. Knight Capital Group, Inc.*, A-1953-13T2 (App. Div. Sept. 1, 2015), the court refused to compel arbitration of an employee's discrimination claim where the arbitration agreement the employee signed failed to mention a waiver of the "right to a trial" and instead merely stated that the employee agreed to settle all disputes "exclusively by final and binding arbitration pursuant to the rules of the American Arbitration Association." According to the court, to be enforceable in New Jersey, an employment arbitration agreement "must include language informing the employee that he or she is waiving a right to a trial in court," and it must "be

written in a simple, clear, understandable and easily readable way. . . . Minimally, the agreement must state in some express fashion that the employee is sacrificing his or her right to a trial.”

The *Milloul* court based its holding on a recent Supreme Court of New Jersey decision involving a consumer arbitration agreement, in which the court had held that an enforceable arbitration agreement must include an express waiver of the right to a trial. The supreme court, however, has not to date held that an employment arbitration agreement must refer to a waiver of the “right to a trial,” and several federal courts have rejected that position.

Unless and until the *Milloul* decision is reversed on appeal, employers that wish to enforce arbitration agreements in New Jersey should ensure that their agreements include language informing employees that they are “waiving a right to a trial in court,” or some similar language.

AUTHOR



Mark Diana

Shareholder, [Morristown](#)

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