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Wage and Hour Class Actions

What employers can do to minimize their risks

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There has been a significant increase in class and collective-action wage and overtime cases in recent years. These cases are expensive to defend and can result in tremendous financial liability to employers. To minimize liability, it is critical for employers to comply with the complex scheme of federal and state laws and regulations and to engage in self-audits to assess the level of risk. In addition, employers can be proactive and attempt to limit the risk of class and collective actions.

Specifically, employers that require their employees to enter into agreements to arbitrate claims against the company may further reduce the risk by including class and collective action waiver provisions in these agreements. These waivers, if enforced, would require employees who sign them to pursue wage and hour and other employment claims in arbitration, rather than in court, and on an individual rather than a class basis. However, as set forth below, notwithstanding the Supreme Court's recent decisions validating the use of these waivers, the viability of these provisions has been questioned by several courts, agencies and, most recently, by Congress.

Supreme Court Supports Enforcement of Class Action Waivers in Consumer Cases

The enforceability of arbitration agreements has been a hot topic for some time. However, the Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), shifted the focus to enforceability of class-action waiver provisions within arbitration agreements. *Concepcion* broadly held that when an individual contracts to arbitrate disputes individually, the Federal Arbitration Act (FAA) requires that contract, including the class-action waiver, to be enforced. The Court found that state laws and procedures cannot interfere with the FAA's primary purpose to enforce clearly drafted arbitration provisions.

Recently, the Supreme Court upheld another arbitration agreement that contained a class action waiver requiring the arbitration of consumer claims brought under the Credit Repair Organization Act (CROA). In *CompuCredit v. Greenwood,* 132 S. Ct. 665 (2012), the Court found that because the CROA was silent regarding whether statutory claims needed to be litigated in court, the FAA required that the arbitration agreement be enforced according to its terms, which included the class action waiver.

While *Concepcion* and *CompuCredit* addressed consumer arbitration agreements, these decisions have potentially broader application. Management-side employment lawyers are hoping that the Court's holdings will be applied to enforce arbitration agreements containing wage and hour class-action waivers, requiring employees to resolve their claims on an individual basis in arbitration. The analysis may turn on whether the Supreme Court finds that the Fair Labor Standards Act (FLSA) contains a clearly expressed legislative mandate that claims must be pursued in the courts.

Divergent Federal Cases

There have been varying approaches by federal courts throughout the country as to the application of *Concepcion.* This article will focus only on those cases that have applied it to claims in the employment context. Some courts have extended the reach of *Concepcion* to uphold arbitration agreements in employment contracts, giving employers hope that their agreements also will be enforced. See e.g., *Brown v. Trueblue*, No. 1:10-CV-0514, 2011 U.S. Dist. LEXIS 134523 (M.D. Pa. Nov. 22, 2011) (upholding arbitration clause in an employment contract prohibiting class arbitration in collective action alleging violations of wage and hour law); *Opalinski v. Robert Half Int'l,* No. 10-2069, 2011 U.S. Dist. LEXIS 115534 (D.N.J. Oct. 6, 2011)(relying on *Concepcion* to dismiss FLSA class action and compel arbitration); *Valle v. Lowe's*

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HIW, No. 11-1489 SC, 2011 U.S. Dist. LEXIS 93639 (N.D. Cal. Aug. 22, 2011) (applying *Concepcion* to uphold an arbitration agreement in employment contract and compel arbitration).

An example of a federal case, currently on appeal, that has distinguished *Concepcion* and refused to apply it to a FLSA class action waiver is *Raniere v. Citigroup*, 11 Civ. 2448, 2011 U.S. Dist. LEXIS 135393 (S.D.N.Y. Nov. 22, 2011), *appeal docketed*, No. 11-5213, (2d Cir. 2011). The District Court distinguished its case from *Concepcion*, finding that *Concepcion* did not overrule the Second Circuit's decisions addressing federal arbitral law requiring federal courts to declare otherwise operative arbitration clauses unenforceable when enforcement would prevent plaintiffs from vindicating their statutory rights. *See also Sutherland v. Ernst & Young*, No. 10 Civ. 3332, 2012 U.S. Dist. LEXIS 5024 (S.D.N.Y. Jan. 13, 2012) (denying motion to reconsider order finding arbitration agreement with class waiver unenforceable in a FLSA action); *Owen v. Bristol Care,* No. 11-04258, 2012 U.S. Dist. LEXIS 33671 (W.D. Mo. Feb. 28, 2012) (denying motion to compel arbitration and finding that "[i]n the employment context, waivers of class arbitration are not permissible"). These cases relied on a finding that the FLSA contains a statutory right to proceed in court. This issue will make its way through the federal court system, and before long, reach the Supreme Court for determination.

The NLRB's Ruling and the Aftermath

Not content to let the courts have the sole voice on this issue, the National Labor Relations Board (NLRB) in *D.R. Horton*, 357 NLRB No. 184, 2012 NLRB LEXIS 11 (Jan. 6, 2012), recently addressed whether class and collective-action waivers in arbitration agreements restrict an employee's rights under the National Labor Relations Act (NLRA). The NLRB ruled that it is a violation of federal labor law to require employees to sign arbitration agreements that prevent them from joining together to pursue employment-related legal claims in any forum, whether in arbitration or in court, because the agreement unlawfully barred employees from engaging in "concerted activity" protected by the NLRA. Notably, this decision applies to private sector employees whether or not they are unionized.

The NLRB's ruling in *D.R. Horton* already has been rejected and distinguished by some federal courts. For example, in *LaVoice v. UBS Financial Services,* No. 11 Civ. 2308, 2012 U.S. Dist. LEXIS 5277 (S.D.N.Y. Jan. 13, 2012), the plaintiff unsuccessfully sought to assert a collective action for violation of the FLSA and a class action for alleged violations of state law against his employer notwithstanding that he signed a waiver in an employment agreement. The District Court for the Southern District of New York expressly refused to follow *D.R. Horton* and *Raniere,* holding that *Concepcion* precludes any argument that the FLSA's collective action provisions trump the FAA.

Additionally, a California federal court recently granted an employer's motion to enforce an arbitration agreement and distinguished *D.R. Horton*. *See Johnmohammadi v. Bloomingdale's*, No. 11-cv-6434 (C.D. Cal. Jan. 26, 2012). In that case, the court held that *D.R. Horton* did not apply to a wage and hour class action against Bloomingdale's, because the scope of *D.R. Horton* was limited to waivers compelled by the employer as a condition of employment, and did not apply where the employee voluntarily agreed to arbitrate. This decision stands in stark contrast to many California state court decisions that expressly reject the application of *Concepcion* to FLSA claims. Again, until the issue reaches the Supreme Court for determination, the arguments will continue to be won and lost on both sides.

Legislative Action

Creating further uncertainty, in May 2011, the Arbitration Fairness Act (AFA), S. 987, 112th Cong. (2011), was introduced in the Senate. The AFA would invalidate predispute arbitration agreements requiring arbitration of employment and consumer disputes. More recently, in March 2012, a bill (*H.R. 4181*, 112th Cong. (2012)) was introduced in the House that would effectively ban most employment related predispute arbitration. Neither would apply to arbitration provisions in collective bargaining agreements.

Practical Considerations for Employers

In light of the current legal climate where wage and hour class actions are commonplace, and many companies find themselves as defendants in these extraordinarily expensive litigations, the potential ability of employers to take steps to reduce or prevent class and collective actions through a waiver provision can certainly be beneficial. Although some cases, such as *D.R. Horton* and *Raniere*, have deemed such waivers to be unenforceable, this issue is still in flux.

A conservative approach to drafting class and collective-action waivers to address potential risks and maximize enforcement may be prudent given the still-evolving case law in this area. However, at present, there appears to be little, if any, downside to employers' implementing a class and collective-action waiver provision within arbitration agreements in employment contracts, as long as they are willing to test these clauses in the courts and before the NLRB when it is time to enforce them. ■