

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2014

PHILADELPHIA, MONDAY, JUNE 2, 2014

VOL 249 • NO. 105

An **ALM** Publication

## W A G E A N D H O U R

# The Case for Mandatory Class and Collective Action Waivers

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*Special to the Legal*

According to a report published by payroll services company ADP, class and collective action filings in federal court increased nearly 500 percent between 2001 and 2011. An analysis of court data reflects that, as of the date of the ADP report, 90 percent of all employment law class and collective actions filed across the country were wage-and-hour cases. An analysis conducted by Seyfarth Shaw of Federal Judicial Center data shows that, for the period ending March 31, federal wage-and-hour filings increased for the seventh straight year. Class and collective action claims are not just more numerous every year, they are more expensive too—according to a report published by NERA Economic Consulting, companies paid, on average, about \$4.5 million to resolve a wage-and-hour case in 2013.

In spite of these costs and increased filings, there is no evidence that individual employees enjoy better outcomes in class actions. To the contrary, there is a growing drumbeat of criticism that most of the gains from class and collective action litigation inure to the benefit of plaintiffs attorneys rather than to class members. Indeed, a 2012 empirical analysis of class actions by Mayer Brown found that the vast majority of class actions resulted in no benefits at all for most putative class members.



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In addition to these general criticisms about the efficacy and efficiency of the class and collective action model, the costs associated with defending wage and hour and other employment-related class and collective action claims, together with the risk of a large adverse verdict, are enough to make even the most risk-tolerant employer think twice about whether vindication through litigation is worth the candle.

Against this backdrop of exploding claims and out-of-control costs, employers across the country have looked to mandatory arbitration agreements in an effort to channel employment disputes into arbitration. The potential benefits of arbitration are many: in addition to potential cost savings and risk mitigation, arbitrations typically involve shorter case closure times, less discovery, more flexibility in planning and scheduling and less public attention than litigation.

### THE LIBERAL FEDERAL POLICY FAVORING ARBITRATION

Efforts to impose mandatory arbitration as a risk mitigation strategy have gotten a lift in recent years from pro-arbitration opinions issued at every level of the federal judiciary, including the U.S. Supreme Court. In the almost 90 years since the Federal Arbitration Act (FAA) was enacted in an effort to reverse long-standing judicial hostility to arbitration agreements, the Supreme Court repeatedly has affirmed that the FAA establishes a "liberal federal policy favoring arbitration agreements."

Although the Supreme Court has not spoken on the specific issue of the enforceability of a mandatory arbitration agreement with a class and collective action waiver in the wage-and-hour context, it has brushed back attempts to abridge or invalidate such agreements in other contexts absent an explicit Congressional directive to override the

FAA or an “inherent conflict” between arbitration and another statute’s underlying purpose. In recent years, the Supreme Court has upheld the enforceability of class action waivers in the consumer context despite state laws purporting to prohibit such waivers (*AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011)) and even though the costs of individual arbitration exceed the potential recovery (*American Express v. Italian Colors Restaurant*, 570 U. S. \_\_\_\_ (2013)). Guided by these decisions, a wave of district and circuit courts has affirmed the use of mandatory arbitration agreements as a legally valid tool to avoid wage-and-hour class and collective actions.

## THE NLRB REARS ITS HEAD

Against the background of growing support for the enforceability of class action waivers, on Jan. 3, 2012, a panel of the National Labor Relations Board (NLRB) issued a decision in the matter of D.R. Horton and Michael Cuda, holding that D.R. Horton violated Section 8(a) (1) of the National Labor Relations Act (NLRA) when it began requiring its new and existing employees to sign a mandatory arbitration agreement (MAA) containing a class action waiver as a condition of employment. The NLRB held that the MAA not only precluded employees from filing class or collective claims—which the NLRB concluded violated the employees’ rights under Section 8(a)(1) to engage in concerted activity—but also gave employees the reasonable impression that they were precluded from filing charges with the NLRB in violation of the Section 8(a)(1). The NLRB ordered D.R. Horton to rescind or revise the agreement to clarify that employees remained free to both bring charges with the NLRB and to resolve employment-related claims collectively or as a class.

D.R. Horton subsequently appealed to the U.S. Court of Appeals for the Fifth Circuit, attacking the NLRB’s opinion on several grounds, including that there is no right to bring class or collective action litigation in the NLRA and that the NLRB’s interpretation of the NLRA impermissibly conflicts with the FAA by prohibiting the enforcement of an

arbitration agreement. In a thoughtful decision issued in December 2013, the Fifth Circuit affirmed the validity of the class and collective action waiver but agreed with the NLRB that the MAA created the reasonable impression that employees waived their right to bring an administrative charge with the NLRB.

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In reaching its conclusions, the Fifth Circuit made several critical points. First, the Fifth Circuit observed that the use of class action procedures is not a substantive right. Rather, as various appellate courts have held, a class action is a “procedural device” that, although it “may lead to certain types of remedies or relief ... is not itself a remedy.” Moreover, the Fifth Circuit noted with approval the several circuits (including the Fourth and Ninth) that have held that there is no substantive right to proceed collectively under the Fair Labor Standards Act (FLSA), the statute under which plaintiff Cuda originally sought to bring suit.

Furthermore, although the Fifth Circuit acknowledged that prior case law provides some support for the notion that the NLRA protects the rights of employees to bring class and collective action claims, the NLRA was “not the only relevant authority” on the matter. To the contrary, the Fifth Circuit found that it was compelled by recent Supreme Court precedent to assess the impact of the federal policy in favor of arbitration agreements embodied in the FAA in deciding the issue. In so doing, the Fifth Circuit concluded that there was neither a “congressional command” to override the application of the FAA in either the text

or the legislative history of the NLRA, nor was there an “inherent conflict” between the FAA and the NLRA’s purpose.

The Fifth Circuit concluded its analysis with the observation that “every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale, and held arbitration agreements containing class waivers enforceable.”

On April 16, the Fifth Circuit denied the NLRB’s petition for en banc review, setting up possible review by the Supreme Court. Given the makeup of the Supreme Court and its recent pro-arbitration decisions, however, the NLRB may not be in any rush to petition for certiorari.

In the meantime, apparently undeterred by the unanimous and unequivocal rejection of its waiver-enforceability position by the Second, Fifth, Eighth and Ninth circuits, the NLRB has persisted in attacking class action waivers on the ground that D.R. Horton remains controlling law unless and until the Supreme Court expressly overrules it.

## NOW WHAT?

As a result of the current legal landscape, employers wishing to implement or enforce class action waivers will do so with a cloud of uncertainty hanging over them. Although the tug-of-war between the NLRB and the federal courts is likely to continue for the foreseeable future, the critical mass of pro-arbitration opinions from the Supreme Court and the growing consensus in the lower federal courts about the validity and utility of these agreements provide reason for optimism that mandatory class and collective action waivers will be enforced as written. Employers facing an increasing hostile legal environment where wage-and-hour class and collective action litigation continues to rise should take heed of this potential tool for mitigating against such significant (and often uninsured) legal risk. •