MOSES & SINGER LLP

Alert

NEW YORK'S TOP FEDERAL COURT UPHOLDS CLASS ACTION WAIVERS IN WAGE AND HOUR SUITS

The Ruling Rejects the NLRB's Holding That Such Waivers are Unenforceable

New York's highest federal court has joined a growing list of appellate courts that have rejected the National Labor Relations Board's ("NLRB" or "Board") finding that class action waivers in arbitration agreements are unenforceable in wage and hour suits. New York courts have also upheld class action waivers in other employment contexts, including discrimination claims.

With the recent decisions enforcing class action waivers in the employment context, employers should consider implementing arbitration agreements in the workplace.

On August 9, 2013, the United States Court of Appeals for the Second Circuit upheld a class action waiver of wage and hour claims under the Fair Labor Standards Act ("FLSA") even where such arbitration is "prohibitively expensive" for the employee. In *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, (2d Cir. 2013), the plaintiff filed a putative class action for unpaid overtime wages, despite an arbitration agreement barring class or collective action arbitration. In filing the civil action, the plaintiff argued that requiring individual arbitration would impermissibly prevent her from "effectively vindicating" her rights under the FLSA and New York law, as the cost of pursing the claim individually would far exceed her potential recovery of less than $2,000. On Tuesday, the Second Circuit denied *en banc* Sutherland's request for rehearing.

By compelling arbitration, the Second Circuit rejected the controversial NLRB ruling in *D.R. Horton, Inc. and Cuda*, 357 NLRB No. 184 (Jan. 3 2012), which held that class action waivers do not apply in the employment context where employees would be denied their right to engage in protected concerted activities. The controversial *D.R. Horton* ruling seemingly was at odds with the U.S. Supreme Court's decision, *AT&T Mobility LLC vs. Concepcion*, 131 S. Ct. 1740 (2011), which, just a year earlier, upheld class action waivers in arbitration agreements, albeit in the consumer context. See our alert titled, NLRB: Employees Cannot Waive Right to Class Actions.

In rejecting *D.R. Horton*, the Second Circuit cited Supreme Court precedent holding that the Federal Arbitration Act ("FAA") establishes "a liberal federal policy favoring arbitration agreements" and that arbitration agreements should be enforced according to their terms "unless the FAA's mandate has been overridden by a contrary congressional command." The Second Circuit noted that Supreme Court precedent required it to reach the conclusion that "waiver of collective action claims is permissible in the FLSA context."

The Second Circuit also relied on the recent U.S. Supreme Court case, *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), in which the Supreme Court admonished lower courts not to apply their own brand of the "effective vindication doctrine" and instead to "rigorously enforce arbitration agreements according to their terms." Based on this guidance, the Second Circuit went on to hold that the FLSA does not contain a "contrary congressional command" that would negate the class action waiver in *Sutherland*. The Court also held that the fact that the individual arbitration proceeding could be "prohibitively expensive" for Sutherland did not mean that she could not "effectively vindicate" her FLSA rights.

In addition to wage and hour claims, the Second Circuit has upheld class action waivers in the discrimination context. In *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483 (2d Cir. 2013), the Court ruled

that the plaintiff, who claimed her and other women were subjected to pay and promotion discrimination, could not maintain a civil action where her employment contract contained a clause requiring disputes to be resolved through arbitration and barred class arbitration. In rejecting the plaintiff's claim, the Court held that "pattern-or-practice" was not a freestanding cause-of-action, but merely a method of proving an element of a Title VII claim. Thus, the arbitration agreement and class action waiver remained valid.

Sutherland and *Parisi* are part of a growing body of appellate cases upholding the use of class action waivers for a variety of employment claims. *Richards v. Ernst & Young, LLP*, No. 11–17530, --- F.3d ----, 2013 WL 4437601, at *2 (9th Cir. Aug. 21, 2013) (per curiam) (rejecting *D.R. Horton* and noting that that "the overwhelming majority of the district courts" to have considered the issue "have determined that they should not defer to the NLRB's decision in *D.R. Horton* because it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act"); *Raniere v. Citigroup, Inc*., No. 11-5213-cv, 2013 WL 4046278 (2d Cir. Aug. 12, 2013) (following and applying *Sutherland*); *Owen v. Bristol Care, Inc*., 702 F.3d 1050, 1055 (8th Cir. 2013) (rejecting *D.R. Horton* and noting that "nearly all of the district courts to consider the decision have declined to follow it").

D.R. Horton Inc. v. NLRB, No. 12-60031 is currently on appeal before the U.S. Court of Appeals for the Fifth Circuit.

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Employers should consult counsel to determine whether arbitration is appropriate for their business and to draft arbitration agreements with enforceable class action waivers.