Second Circuit Court of Appeals Holds that Class Action Waivers are Enforceable Under the FLSA

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On August 9, 2013, in *Sutherland v. Ernst & Young LLP,* the Second Circuit Court of Appeals ruled that the Fair Labor Standards Act ("FLSA") does not prohibit the enforcement of a class action waiver in an arbitration agreement. The Second Circuit determined that nothing in the FLSA could be construed to override the liberal policy favoring the enforceability of arbitration agreements established by the Federal Arbitration Act ("FAA"). The Second Circuit further held that a class action waiver in an arbitration agreement was not rendered invalid simply because that waiver removed the financial incentive for the employee to pursue a claim under the FLSA.

Stephanie Sutherland ("Sutherland") sued her former employer, Ernst & Young LLP ("E&Y"), in a putative class action to recover overtime wages under the FLSA and the New York State Department of Labor's Minimum Wage Order. When Sutherland accepted her offer of employment with E&Y, she signed an offer letter and a confidentiality agreement, both of which provided that disputes between Sutherland and E&Y would be resolved in mandatory mediation and arbitration, pursuant to the terms of E&Y's Common Ground Dispute Resolution Program (the "Arbitration Agreement"), a copy of which was attached to the offer letter and the confidentiality agreement. Sutherland and E&Y agreed that the Arbitration Agreement barred both civil lawsuits and any class arbitration proceedings.

After Sutherland filed her putative class action in federal court, E&Y filed a motion to dismiss or stay the proceedings, and to compel arbitration on an individual basis. The U.S. District Court for the Southern District of New York denied the motion, and E&Y appealed. The Second Circuit reversed the District Court's order.

The Second Circuit noted that the FAA establishes a liberal federal policy favoring arbitration and that federal courts should enforce arbitration agreements according to their terms unless there is a contrary congressional command overriding the FAA's mandate in favor of arbitration. The Second Circuit held that the FLSA contains no contrary congressional command against waiving class actions. The court reasoned that since Section 16(b) of the FLSA requires an employee to affirmatively opt-in to any collective action brought under the statute, the employee surely also has the power to waive participation in class proceedings as well. Notably, the Second Circuit expressly declined to follow the National Labor Relations Board's decision in *D. R. Horton, Inc.*, which held that a waiver of the right to pursue a claim under the FLSA collectively in any forum violates the National Labor Relations Act.

Sutherland asserted that the Second Circuit should invalidate the class action waiver in the arbitration agreement because the waiver prevented her from effectively vindicating her statutory claims, and thus operated as a prospective waiver of her "right to pursue" statutory remedies. She argued that she could not effectively vindicate her FLSA claims because she had no financial incentive to pursue those claims on an individual basis. She claimed that she would be forced to expend approximately $200,000 in an individual action to recover less than $2,000 in damages. The District Court had been persuaded by this argument, relying on the Second Circuit's 2009 decision in In re: *American Express Merchants' Litigation*.

After the District Court's ruling, however, the Supreme Court reversed the Second Circuit's decision in *American Express*. The Supreme Court held that the plaintiffs in that case could not justify the invalidation of a class action waiver under the "effective vindication doctrine" by showing that they had no economic incentive to pursue their antitrust claims individually in arbitration. The Supreme Court noted that the mere fact that it was not worth the expense to prove a statutory remedy did not constitute an elimination of the right to pursue that remedy. Accordingly, the Second Circuit concluded that its 2009 *American Express* decision, upon which the District Court relied, was no longer good law.

With this decision, the Second Circuit has joined the trend among the federal circuit courts to enforce class action waivers in FLSA lawsuits. Given the high cost of litigating wage and hour class actions, arbitration agreements containing class action waivers can be a useful tool for some employers. Employers should carefully evaluate whether it would be worthwhile to enter into arbitration agreements with employees and whether to include a class action waiver in such arbitration agreements. ✦