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Don't Let Wage And Hour Class Claims Sink Your Business: Arbitration Clauses Can Be The Life Raft You Need!

By Ronald S. Stadler

Wage and hour claims under the Fair Labor Standards Act (FLSA) or state law can be the beginning of the end for many businesses and the individuals who own and control those businesses. Especially concerning is the fact that some wage and hour claims can be turned into class actions, and defending those class actions can require tens of thousands or even hundreds of thousands of dollars in attorneys' fees. Even worse, if there is liability - even on small issues - and that liability can morph into huge damages. A mistake on overtime or paying for all hours actually worked can lead to minor violations, but the claim can encompass a three-year period, lead to double damages, and require the defendant to pay the attorneys' fees of the plaintiffs. For a mid-sized employer, a one-thousand-dollar mistake can grow into a million dollars of liability.

The FLSA also imposes personal liability on the individuals who control the business. Thus, if your business goes bankrupt because of the FLSA liability, you too could face personal bankruptcy or the loss of your personal assets.

The significance of these FLSA claims often goes unnoticed until a lawsuit is filed. Unfortunately once the lawsuit is filed employers cannot correct the mistakes that have already been made. An employer cannot simply "pay up" for its mistakes and make the issue - or the class action - go away. So many employers ask if there is anything that they can do to protect themselves. Often times the advice is simply "comply with the

law." But of course sometimes mistakes are inadvertently made, and that advice offers no protection against these devastating claims. Luckily, however, the United States Court of Appeals for the Fourth Circuit (covering Maryland, North Carolina, South Carolina, Virginia, and West Virginia) issued a ruling on April 1, 2013, that could be a huge life raft for employers.

In *Muriithi v. Shuttle Express*, 2013 WL 1287859 (Apr. 1, 2013), a driver for an airport shuttle company filed a class action against his employer alleging wage and hour violations under the FLSA. The company argued that the claims were subject to its mandatory arbitration clause in a franchise agreement the driver signed with the company. That agreement also contained clauses that prohibited class actions, required the claimant to pay for one-half of the costs of arbitration, and limited the claims period to one year.

The federal district court found that these clauses unconscionable, which in turn rendered the arbitration clause unenforceable. The Fourth Circuit disagreed and reversed the decision of the district court. The Fourth Circuit held that pursuant to the United States Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) - which came out after the district court's decision - including a clause that prohibited class actions did not render the arbitration clause unconscionable. The *Muriithi* court also held that the one-year limitations period and the cost-splitting requirement did not render the arbitration clause unconscionable.

The fact that the Fourth Circuit upheld all three of these provisions is significant and could be very valuable in terms of helping employers reduce their exposure to FLSA law suits. An employer that institutes the use of arbitration agreements with its employees can significantly limit the period of time in which claims can be brought and can prevent class actions, which drastically limits the exposure for liability and the cost of defense. Employers considering the implementation of arbitration agreements with employees should consider the following:

- A written requirement that all claims arising out of the employee's employment be resolved by arbitration.
- A written provision that any arbitration, suit, action, or other proceeding arising out of the employee's employment be filed within one year of when the claim arises.
- A written requirement that the employee must pay for a portion of the costs of the arbitration proceeding. Be careful with this clause, however, because if the costs of arbitration are so prohibitive that they effectively deny the employee access to arbitration, then the clause could be found to be unconscionable. An employer will need to analyze each class of employee before including this type of provision.

Employers should also consider consulting with legal counsel when

drafting such provisions to ensure that they meet current statutory and legal requirements, as well as are properly tailored to the employer's business. By implementing these protective measures, employers may be able to rest easier at night knowing that a FLSA claim may no longer be the torpedo that can sink their ship.

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