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In A Victory for Employers, the Second Circuit Upholds a Waiver of FLSA Class Action Claims In Favor of Arbitration

By Mary Pat Gallagher

In a victory for employers, on August 9, 2013, the United States Court of Appeals for the Second Circuit (covering Connecticut, New York, and Vermont) held in *Sutherland v. Ernst & Young LLP*, that the Fair Labor Standards Act ("FLSA") does not preclude an employee's waiver of collective or class action claims in favor of arbitration. The Second Circuit concluded that its earlier decisions, which had invalidated class-action waiver provisions pursuant to the so-called "effective vindication doctrine," were no longer good law in light of the Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). In so doing, the Second Circuit joined the Fourth, Fifth, and Eighth Circuits in recognizing the validity of properly drafted FLSA class action waivers.

From September 2008 through December 2009, Stephanie Sutherland worked for Ernst & Young ("E&Y") as an audit employee on a salary-only basis. When Sutherland first accepted employment, she signed an offer letter that stated employment-related disputes would be subject to mandatory mediation or arbitration under the terms of E&Y's alternative dispute resolution program, known as the "Common Ground Dispute Resolution Program" (the "Common Ground Program"), a copy of which was attached to her offer letter. Additionally, Sutherland signed a confidentiality agreement, which listed the terms of E&Y's "Alternative Dispute Resolution" policy and stated that all disputes between Sutherland and E&Y would first be submitted to mediation and, if the mediation was unsuccessful, to

binding arbitration in accordance with the terms and conditions set forth in the Common Ground Program. A copy of the Common Ground Program was also attached to the confidentiality agreement. Sutherland acknowledged receipt of a copy of the Common Ground Program and agreed to abide by its terms.

E&Y's arbitration agreement expressly stated that claims concerning wages and salary were subject to its terms. The arbitration agreement also barred E&Y and Sutherland from suing in court in connection with a covered claim. It also stated that disputes pertaining to different employees would be heard in separate proceedings, thereby barring the pursuit of class or collective proceedings in the arbitration. The Common Ground Program also provided that the Arbitrator fees and other costs of the arbitration would be shared equally to the extent permitted by law and the Arbitration rules. Finally, pursuant to the terms of the Common Ground Program, each party would be responsible for the party's own attorney fees and related expenses, but the arbitrator would have the authority to provide for reimbursement of the employee's attorney's fees, in whole or in part, consistent with applicable law or in the interests of justice.

After Sutherland filed her putative class action lawsuit against E&Y to recover 151.5 hours of unpaid overtime wages totaling $1,867.02, E&Y filed a motion to compel arbitration of Sutherland's claims on an individual basis in accordance with the terms of the arbitration agreement. Relying on the "effective vindication doctrine," Sutherland argued that the entire provision requiring arbitration was unenforceable because the requirement that she arbitrate her claims individually, rather than collectively, prevented her from "effectively vindicating" her rights under the FLSA and state law. In particular, Sutherland argued that the costs and fees associated with prosecuting her claim on an individual basis would dwarf her potential recovery of less than $2,000.00. Citing Second Circuit precedent, the district court agreed with Sutherland and denied E&Y's motion.

Following E&Y's appeal, the U.S. Supreme Court, in *American Express Co. v. Italian Colors Restaurant*, held that the Federal Arbitration Act ("FAA") requires courts to enforce a contractual waiver of class action procedures in an arbitration clause, even where the practical effect of such a waiver is to bar claimants from asserting claims under federal law because they have no economic incentive to arbitrate them on an individual basis. The Supreme Court rejected the "effective vindication" argument, declaring that the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. In light of the *Italian Colors* decision, the Second Circuit reversed the district court's ruling. The Second Circuit found that there was no apparent Congressional command forbidding class action waivers in the FLSA context because the FLSA text does not indicate an intention to preclude a class action waiver.

Absent a contrary Congressional command, the Second Circuit concluded that despite the obstacles facing the vindication of Southerland's claims, the Supreme Court's *Italian Colors* decision compelled the conclusion that Southerland's class action waiver is not rendered invalid by virtue of the fact that her claim is not economically worth pursuing individually.

While the Second Circuit's decision is a clear victory for employers, it is not the end of the discussion. As the *Sutherland* Court recognized, FLSA plaintiffs may still seek "judge-made" exceptions to avoid arbitration. Quoting from the Supreme Court's *Italian Colors* decision, the Second Circuit noted that the "effective vindication doctrine" may still be used to invalidate a provision in an arbitration agreement forbidding the assertion of certain statutory rights and may cover filing and administrative fees that are so high as to make access to the arbitration forum impractical.

In light of the recent Supreme Court and Second Circuit decisions, as well as recent Fourth, Fifth, and Eighth Circuit rulings, an employer that institutes the use of properly-drafted arbitration agreements with its employees can significantly reduce its exposure to FLSA class action lawsuits. For a discussion of what employers should consider when implementing an arbitration program, see the April 10, 2013 GSH 60 Second Memo, *"Don't Let Wage and Hour Class Claims Sink Your Business: Arbitration Clauses Can Be The Life Raft You Need"* by Ronald L. Stadler.


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