The Epic Sequel: Federal Appeals Court Extends Class Waiver Victory To Wage Claims

Insights
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On the heels of the Supreme Court's decision in *Epic Systems Corporation v. Lewis*, which held that the National Labor Relations Act (NLRA) does not bar class or collective action waivers in arbitration agreements, the 6th Circuit Court of Appeals took up the corollary question of whether the Fair Labor Standards Act (FLSA), and its specific collective action mechanism, would invalidate arbitration agreements with collective action waivers. Relying on the lessons learned from the Supreme Court in *Epic*, the 6th Circuit just held that the FLSA likewise did not bar collective action waivers in arbitration agreements (*Gaffers v. Kelly Services, Inc.*).

For employers, the 6th Circuit's decision comes as a relief. There was a fear that the victory in *Epic* could be diminished by an inability to avoid costly FLSA collective actions on a broad—and sometimes nationwide—scale via individual arbitration agreements. The *Gaffers* decision puts that fear to bed, at least for those employers with operations in the 6th Circuit's jurisdiction (Ohio, Tennessee, Michigan, and Kentucky).

Court: "As It Relates To The FAA, The FLSA Is No More Powerful Than The NLRA"
Jonathan Gaffers is a former employee of Kelly Services, Inc., having worked as a virtual call center representative for the company. He claimed that his employer underpaid him and an entire class of fellow employees, alleging that they were shortchanged for time spent logging into the company network, logging out, and fixing any technical problems that arose. He brought suit under the FLSA seeking back pay and liquidated damages on a collective basis.

Kelly Services moved to compel arbitration, pointing to the fact that many of those whom Gaffers hoped to represent in his collective action had signed an arbitration agreement mandating that individual arbitration actions were the only legal recourse they could seek. However, the lower federal court in Michigan denied the employer's motion to compel, and Kelly Services brought the issue before the 6th Circuit Court of Appeals. On August 15, 2018, the appeals court reversed the lower court and ruled in the employer's favor.

Gaffers had first argued that the FLSA and the Federal Arbitration Act (FAA) were irreconcilable due to the FLSA's collective action provision in 29 U.S.C § 216(b), and that the FLSA's collective action mechanism and an arbitration agreement barring collective actions could not both be enforced. The appeals court disagreed, holding that in order for the FLSA and FAA to be irreconcilable, the FLSA

needed to "clearly and manifestly" make arbitration agreements barring collective actions unenforceable, which the FLSA did not do.

The court reasoned that the FLSA's collective action mechanism simply "gives employees the *option* to bring their claims together," but it "does not require employees to vindicate their rights in a collective action." Accordingly, the FLSA did not "clearly and manifestly" state that an arbitration agreement must allow an employee to pursue a collective action, and thus the Court could give effect to both the FLSA and the FAA.

Gaffers next argued that because the FLSA gives employees a right to pursue a collective action, the arbitration agreements requiring employees to pursue individual arbitration were illegal under the FAA's savings clause (9 U.S.C. § 2), "which allows courts to refuse to enforce arbitration agreements upon such grounds as exist at law or inequity for the revocation of any contract." The court again disagreed. As the Supreme Court explained in *Epic* in addressing similar arguments under the NLRA, the FAA's savings clause only covers arguments that would apply to contracts, generally, and arguments specific to arbitration agreements or that "interfere with the fundamental attributes of arbitration" will not prevail.

Relying on *Epic*, the court reasoned that the plaintiff's argument that the arbitration agreements are illegal because they require individual proceedings and bar collective actions undermined one the fundamental attributes of arbitration—its "historically individualized nature." Therefore, objecting to an arbitration agreement "precisely because it requires individualized arbitration proceedings" instead of collective actions attacks the fundamental nature of arbitration itself. Just as the Supreme Court held in *Epic*, the 6th Circuit ruled that the FAA's savings clause cannot be used to make such an argument.

What's Next

The Supreme Court's *Epic* decision begged the question of how courts would analyze the FLSA's collective action mechanism against the FAA, and the 6th Circuit's *Gaffers* decision is a welcome sight for employers. This decision appears to be the first federal appeals court ruling holding that the reasoning in *Epic* can be applied equally to the FLSA. However, employers *outside* of the 6th Circuit's jurisdiction (Ohio, Tennessee, Kentucky, and Michigan) should still remain cautious.

The Bottom Line

As employees and the plaintiffs' bar increasingly make similar arguments under the FLSA, other circuits will weigh in and may apply *Epic* differently than the 6th Circuit.

Ultimately, true clarity on this issue likely will not come until the Supreme Court weighs in. In the meantime, you should ensure that your arbitration agreements—whether they include collective action waivers are not—are well drafted to meet your business needs. Your Fisher Phillips attorney can assist if you have further questions.

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