Remember That Good News On Class Waivers? Forget What We Said

Insights
8.31.16

There's a great scene in the Naked Gun movie where Lieutenant Frank Drebin (Leslie Nielsen) is trying to clear a crowd forming around a crime scene, except that the crime scene happens to be a fireworks factory on fire. While a massive pyrotechnic fireworks show is going on behind him, Drebin vainly yells to the gathering crowd, "Move along! Nothing to see here! Please disburse! Nothing to see here!"

That's sort of how I feel about my now-outdated August 18 post about how class waivers got a "much-needed Lyft" in the form of a positive court ruling from a federal trial court in Massachusetts. That ruling seemed to stem the tide of bad news calling class waivers into question. "This recent decision, specifically involving one of the two foremost gig companies in the country, should give confidence to gig employers using class waivers. If you are in this boat, you would do well to specifically examine the method and manner in which Lyft implemented the class waiver, taking into account state and local legal requirements, and mimic its same policies." I remember feeling pretty happy about things and I was glad to share this good news.

But now I want you all to just disburse and go away and not read it. Nothing to see here. Maybe I jinxed it by writing that post, but just four days later, the 9th Circuit Court of Appeals came down hard against class waivers. Its decision in *Morris v. Ernst & Young* struck down mandatory class waivers, ruling that these provisions within arbitration agreements violate the National Labor Relations Act (NLRA). Here's a full summary of the decision that I co-wrote, including a section about what it means to most employers. But what does it mean for the gig economy? Quite simply, this is not good news.

What it means immediately is that gig employers in California, Washington, Arizona, Nevada, Oregon, Hawaii, Idaho, Montana, and Alaska are now facing a new legal reality. Federal courts in these states will strike down any mandatory class waiver you happen to employ with your workforce (and possibly even your contractors if they are claiming to be improperly classified). You should adjust by adopting a non-mandatory arbitration system, perhaps including an opt-out provision allowing workers the choice of accepting or rejecting the mechanism. Although there is a chance that a full panel of 9th Circuit judges might want to review the decision (an *en banc* panel), unless and until that happens, this is now the law of the land out west.

What it means in the long-term is perhaps even more depressing. Before this decision came out, only one other federal appellate court had ruled that class waivers violated the NLRA, and we could comfort ourselves by calling that decision an outlier. But now that the largest appellate circuit has joined the mix, we have to face the conclusion that momentum seems to be swinging in an anti-employer direction. There are several other similar cases working their way up the appellate chain in other jurisdictions around the country, and we could see more bad news before the end of the year.

The last stop in this battle may be at the U.S. Supreme Court. Although difficult to predict how a newly constituted Court would decide this issue without knowing the identity of the ninth justice to one day be installed on the bench, there are warning signs that current nominee Judge Merrick Garland would not take too kindly to class waivers.

Sorry to burst the bubble I helped to create by posting such a cheerful post a few weeks ago, so please just ignore it and walk away, disburse, there's nothing to see there.

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