



Employers Win Latest Round In Class Waiver Fight

2ND CIRCUIT REFUSES TO JOIN CIRCUIT COURTS SIDING WITH NLRB

Insights

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Employers can breathe a sigh of relief after the 2nd Circuit Court of Appeals once again upheld the validity of class and collective action waivers in arbitration agreements. Rather than siding with several recent circuit courts that struck down mandatory class and collective action waivers, the 2nd Circuit (covering New York, Connecticut, and Vermont) stuck to its guns and prior precedent to rule that employers can require employees to bring arbitration claims on an individual basis and prohibit them from joining together to bring class or collective actions (*Patterson v. Raymour's Furniture Co.*).

However, the court's summary order practically invites a full panel of the circuit court or the U.S. Supreme Court to intervene and overrule controlling precedent, signaling that this battle is far from over.

Background: Class Waivers Have Increased In Use

As we have outlined before, agreements requiring employees to submit workplace claims to an arbitrator instead of a court have become increasingly commonplace in today's workplaces. These agreements are a favored tactic of the modern employer, lowering the cost of litigation and introducing some much-welcomed efficiency to the resolution of workplace disputes. Due to a recent series of victories at the Supreme Court over the past five years heralding the "liberal federal policy favoring arbitration agreements," the use of mandatory arbitration agreements has become safer and less apt to be challenged in court.

But mandatory arbitration agreements in and of themselves do not protect employers from their biggest fear – a class or collective action. Consequently, rather than simply requiring employees to bring workplace claims through arbitration instead of court, employers have regularly incorporated into their agreements class and collective action waivers. Pursuant to these waivers, employees agree not to pursue claims against their employer on a class or collective basis. The result of a mandatory arbitration agreement with a class and collective action waiver is that a worker's only avenue for redress is limited to single-plaintiff arbitration hearings.

NLRB Disfavors Class Waivers

The National Labor Relations Board (NLRB), however, has issued several rulings striking down class and collective action waivers as violating the National Labor Relations Act (NLRA). In 2012, in

the infamous *D.R. Horton* case, the NLRB held that arbitration agreements are unlawful if they prevent employees from filing class or collective action claims in court or arbitration. The NLRB reasoned that class and collective action waivers violate Section 7 of the NLRA because they interfere with workers' rights to engage in concerted activity for their mutual benefit and protection (in this case, class or collective action litigation).

Although that decision, and the NLRB's reasoning, was rejected by a federal court and is therefore not considered "good law," that has not stopped the NLRB from continuing to attack class and collective action waivers whenever possible. In the intervening years, the Board has issued several additional rulings striking down class and collective action waivers, without regard for whether reviewing circuit courts upheld those decisions. Until recently, the NLRB's position had not found much traction in the courts.

Courts Had Consistently Upheld Class Waivers

Between 2013 and May 2016, three circuit courts ruled on this exact issue and determined that the NLRA does not prohibit class and collective action waivers. As discussed above, in 2013, the 5th Circuit (Texas, Louisiana, and Mississippi) overturned the NLRB's seminal *D.R. Horton* decision. Later that year, the 2nd Circuit, in *Sutherland v. Ernst & Young LLP*, and the 8th Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota), in *Owen v. Bristol Care, Inc.*, similarly rejected the argument that the NLRA prohibits class and collective action waivers.

In 2014, the 11th Circuit (covering Georgia, Florida, and Alabama) upheld a class and collective action waiver in *Walthour v. Chipio Windshield Repair, LLC*, although the decision did not directly involve an interplay between class waivers and the NLRA.

Employers Sustain Two Big Losses In 2016

On May 26, 2016, the 7th Circuit (covering Illinois, Indiana, and Wisconsin), in *Lewis v. Epic Systems Corp.*, became the first appeals court to strike down class and collective action waivers. The 7th Circuit adopted the NLRB's position that class and collective action waivers violate Section 7 of the NLRA, opining that there is nothing quite so "concerted" as a piece of class or collective action litigation, where employees band together to collectively assert a legal challenge to a workplace practice.

Then, on August 22, 2016, the 9th Circuit (covering California, Washington, Arizona, Nevada, Oregon, Hawaii, Idaho, Montana, and Alaska), in *Morris v. Ernst & Young, LLP*, joined the 7th Circuit and became the second circuit court to strike down class and collective action waivers. This was perhaps the most bruising loss for employers to date, not only because the 9th Circuit covers such a large area of the country, but because the ruling demonstrated that the 7th Circuit's *Epic Systems* decision was not an outlier.

Employers have been waiting on pins and needles for the next decision, hoping that the NLRB does not gain further ground in this battle. The good news is that the most recent decision maintains the

not gain further ground in this battle. The good news is that the most recent decision maintains the status quo – for now.

Raymours' Arbitration Agreement

Raymours Furniture Company, Inc. required all of its employees to sign an arbitration agreement as a condition of their employment. The agreement made clear that any such claims brought against Raymours must be done so on an individual basis:

CAN CLAIMS BE DECIDED BY CLASS OR COLLECTIVE ACTION? No. This section describes the “Class Action Waiver” of the Program. Claims under this Program cannot be litigated by way of class or collective action. Nor may Claims be arbitrated by way of class or collective action. All Claims between you and us must be decided individually. . . . Thus, the arbitrator shall have no authority or jurisdiction to process, conduct, or rule upon any class, collective, private attorney general, or multiple-party proceeding under any circumstances.

In 2014, sales associate Connie Patterson brought a wage and hour lawsuit against Raymours in federal court, alleging that she and other sales associates had been misclassified as exempt from overtime. She brought her claim as a class action under the New York Labor Law and a collective action under the Fair Labor Standards Act (FLSA). Raymours asked the court to compel individual arbitration, which it did, leading Patterson to file an appeal with the 2nd Circuit.

Employers Claim Victory – For Now

On September 2, 2016, the 2nd Circuit sided with Raymours. In doing so, it noted the circuit split between the pro-employer courts (5th and 8th Circuits) and the pro-NLRB courts (7th and 9th Circuits) but said it had no choice but to follow earlier 2nd Circuit precedent in *Sutherland v. Ernst & Young LLP*. As noted above, in 2013, a 2nd Circuit panel rejected the NLRB’s arguments and upheld the use of mandatory class waivers.

This most recent decision was not resounding, however. The court stated that “if we were writing on a clean slate, we might well be persuaded” by the NLRB’s position. However, the existence of the 2013 *Sutherland* decision mandated that the 2nd Circuit rule for Raymours. The court concluded by saying, “We are bound by that holding until such time as it is overruled either by an en banc panel of our Court or by the Supreme Court.”

To add to the limited effect of the decision, the court issued its decision in the form of a “summary order,” a non-precedential opinion reserved for those cases where the court does not want to amplify its ruling or have it carry weight for future cases.

For now, employers can rest comfortably knowing the status quo remains in effect. Those employers in New York, Connecticut, and Vermont who use mandatory class and collective action waivers can continue doing so without current concern.

However, this opinion will surely add fuel to the ongoing class waiver fire. There is the distinct chance that a full (en banc) panel of the 2nd Circuit will agree to hear this case again to determine

whether it should stand, and many believe that the U.S. Supreme Court will take up this issue as soon as 2017. Employers who use mandatory class and collective action waivers should continue to stay apprised about this topic as it evolves in the near future.

For more information, visit our website at www.fisherphillips.com, or contact any member of [our New York City office](#) or your regular Fisher Phillips attorney.

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