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Class Action Waivers in Employment Agreements

By Bruce F. Fain

The Federal Arbitration Act (the "FAA") was passed in 1925 in an effort to counter a perception that courts were opposed to arbitration, which at least in theory, is meant to be a swifter, more efficient and more economical manner of resolving disputes.   In 1935, at the urging of unions, the National Labor Relations Act (the "NLRA") was passed in an effort to protect workers ability to organize and collectively bargain concerning the terms and conditions of employment. In 1938, Congress passed the Fair Labor Standards Act (the "FLSA") which primarily addresses minimum wage and overtime and also provides employees the ability to seek collective enforcement of the rights established under the FLSA.

The various policies behind these statutes have occasionally come into conflict with one another over the years. On May 21, 2018, one of the conflicts, namely the enforceability of arbitration agreements prohibiting collective action concerning employment disputes was recently the subject of a United States Supreme Court decision in a trio of cases upholding the enforceability of employment agreements requiring "one-on-one" arbitration. The cases, filed separately, but decided as one, *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP et al. v. Morris et al.*, and *National Labor Relations Board v. Murphy Oil* (together "*Epic Systems*") involved substantially similar language which prevented employees from bringing collective legal action against employers.

Epic Systems provided its employees with an arbitration agreement, including a waiver of class and collective claims and required that any "covered claims will be arbitrated only on an individual basis." Ernst Young referenced and incorporated into its employment agreements language from an employment policy which noted that disputes "pertaining to different Employees will be heard in separate proceedings." Murphy Oil, like Epic Systems, provided the employee with a document titled "Binding Arbitration Agreement and Waiver of Jury Trial." The applicable language provided that:

By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or class member or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.

In each of the cases, the validity of the agreements were not in dispute, except for whether the agreements could validly bar collective action, even in arbitration. The respective employers argued that the language requiring one-on-one arbitration was enforceable under the FAA. In contrast, the Employees argued that the Section 2 of the FAA and Section 7 of the NLRA both barred enforcement of provisions seeking to bar collective and class actions. As will be discussed, what may have led to their undoing was that each and every action concerned overtime pay, which is governed by the FLSA and Justices Gorsuch, Roberts, Kennedy, Thomas and Alito carried the day against the arguments of Justices Ginsburg, Breyer, Sotomayor and Kagan.

The majority rejected claims by the employees that the "savings clause" of the FAA which states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and that Section 7 of the NLRA, concerning rights to "collective action," preserved the right to bring "collective" and class actions to enforce rights under the FLSA, essentially a limited invalidation of the arbitration clauses.

The Court rejected suggestions that the NLRA was "a ground at law" which supported invalidating the requirement for one-on-one arbitration. The Court instead ruled that the defenses which would defeat an arbitration clause were those which would apply to "any contract," such as "fraud, duress or unconscionably," not claims of conflicting public policy.

The majority next rejected an argument that Section 7 of the NLRA's protections of employees rights to organize and collectively bargain and "engage in other concerted activities" required striking down the agreed upon one-on-one participant rule. The Court's basis for rejecting the argument was that the items specifically identified in the statute focus upon "collective bargaining" and "rights to organize" and failed to either approve or disapprove of arbitration.

Finally, the Court rejected an argument that courts should defer to the National Labor Relations Board (the "NLRB"), the agency charged with administering the NLRA, under the "Chevron Standard," which generally requires providing deference to the agency. In support of this reasoning the Court noted that this would have required granting the NLRB deference based upon a 2012 ruling which changed years of prior law which was supported by the NLRB as recent as 2010 as well as in regards to a statute, the FAA, which the NLRB does not administer.

Perhaps most telling of all, the Court noted that in order to have reached any conclusion invalidating the one-on-one arbitration requirement would result in ignoring the law, as established by Congress, for "the Court's preferred economic policies for those chosen by the people's representatives ." This statement, and Justice Gorsuch's (who is widely known as a critic of *Chevron* deference) comment that "no party in these cases has asked us to reconsider *Chevron* deference . . .," should be seen as a signal that the Court is likely moving to a much more employer friendly position.

Impact For Employers

The ruling will provide substantial benefits to employers wishing to utilize one-on-one arbitration, provided the following rules are considered:

1. A provision in an employee handbook, even if the employee acknowledges receipt of the handbook, will generally be insufficient as handbooks universally deny that they are "contracts."
2. The Court should look much more favorably upon standalone arbitration agreements. It may be possible to simply have an agreement which refers to and incorporates a much more detailed policy, but the safer course would be to provide a complete arbitration agreement.
3. If you want to use an arbitration agreement, or if you wish to modify an existing arbitration agreement, remember that in order to apply new agreements or new provisions to current employees, you must provide them some "consideration" to ensure the "contracts" are enforceable, such as a small raise, a promotion, special training or a promise of continue employment of a period of time. Continued employment will generally not constitute "consideration" for the addition of or change to an arbitration agreement.
4. Do not underestimate the possible breadth of FAA coverage or assume that it only applies to multi-state companies as the United States Supreme Court has made it clear that the FAA applies to the full extent of the Commerce Clause in the United States Constitution – which does have a very broad reach.

USDOL restarts Wage and Hour Opinion Letter Program

by Mike Green

In early 2018, the Wage and Hour division (the "Division") of the US Department of Labor, reinstituted a long dormant opinion letter process. The opinion letter process allows employers to seek formal advice and determinations from the Division on issues relevant to federal labor laws. The opinion letters are issued in response to formal requests by employers, employees, or employee representatives, and are generally based on the specific facts outlined in the letters. During the prior administration, the Division had abandoned the opinion letter process in favor of Administrator Interpretations, which tend to be broader policy pronouncements as opposed to fact specific opinions. While these advice paths have been criticized by some as a tool for politically motivated interpretations, both Opinion Letters and Administrator Opinions allow Division guidance on important labor law issues, and provide a basis to assert a good-faith defense to liquidated damages under the Fair Labor Standards Act ("FLSA").

The 19 opinion letters issued in January of 2018 covered a wide range of wage and hour issues ranging from proper calculations of base rate for overtime purposes, calculations of compensable time in a variety of scenarios including travel time and on-call standby time, as well as the application of white-collar exemptions to specific fact patterns. The full list of opinions can be found at https://www.dol.gov/whd/opinion/flsa.htm. A few of the opinions of broader application are summarized below.

Medical break times do not have to be compensated:

In Opinion FLSA2018–19, the Division clarified that an employer is not necessarily required to pay an employee for an employee's medical or disability related breaks. Specifically, the Division opined that breaks of less than 20 minutes which are provided at the request of the employee to meet his or her medical needs pursuant to a request under the Family Medical Leave Act ("FMLA") need not be compensated or paid time. The general rule under 29 CFR § 785.18 requires that employers pay employees for short employer-provided breaks of less than 20 minutes, because they primarily benefit the employer. The Division differentiated the employee requested medical breaks from compensable rest breaks on the basis that the medical leaves are for the convenience of and at the request of the employee. The Division followed earlier case law which had provided that similar medical breaks granted as accommodations were not considered rest periods subject to the compensability rules. See e.g. *Spiteri v. AT&T Holdings, Inc.*, 40 F. Supp. 3d 869 (E.D. Mich. 2014). The Division did clarify, however, that if an employer provides rest breaks for other employees, that employees who take FMLA – protected breaks are still entitled to take those employer provided rest breaks and to be compensated for them like all other employees.

Comprehensibility of travel time:

In Opinion FLSA2018–18, the Division addressed the compensability of employee travel time for employees who work variable schedules and clarified that the traditional standards governing compensability of commuting and job-to-job site travel time apply even in cases where all employee travel is done with employer-provided vehicles. Under the traditional rules, travel from home to job site is generally non-compensable commuting time while travel between jobsites during the day and long-distance travel during the employee's normal work day are compensable. (Citing 29 CFR §§ 785.35 to 39.) The opinion addresses three fact scenarios presented by the employer, but the primary new clarification applies to the calculation of compensable travel time when an employee does not have "normal working hours" due to work variability (e.g. employees work schedule depends entirely on client needs and may vary substantially in any particular time period). Under these circumstances, normal work hours must be calculated based on an employee's typical work schedule but if the employee has a variable schedule, those normal work hours must be calculated by applying some average over a month. 29 CFR § 785.39. The employer then must pay an employee who is traveling off-site during the normal work hours established, even if the travel is occurring on a day the employee does not normally work. For example, if an employee's normal work hours are determined to be 7 a.m. to 5 p.m., the employer is required to compensate the employee for work travel occurring between those hours, even if it is on a Saturday or Sunday, which is not the employee's normal work day.

Salary deductions for exempt employees:

In Opinion FLSA2018–14 and Opinion FLSA2018-7, the Division reissued former Opinion Letters addressing permissible deductions for salaried employees. In both letters, the Division reiterated the rule that salaried employees pay cannot be reduced for absences of less than one full day, but clarified that the employer is not required to reduce pay by a full day's pay. Citing 29 CFR § 541.602. As a result, an employer cannot dock a salaried employee's pay for less than a full day absence, but if the employee misses a full day or more, the employer can reduce the employee's pay by less than a full day's pay. The opinion clarifies that an employer is not required to dock that employee for a full eight hours if the employee has partial coverage under some form of paid time off, or if the scheduled shift the employee misses is greater than or less than a typical eight hour shift. As a result, if an employee misses a full eight hour day of work but has four hours of PTO, the employer can reduce the weekly pay by the equivalent of the four hours of unpaid time without eliminating the employee's salary basis. Similarly, if the employee misses a full 10-hour scheduled shift, the employer can dock or reduce the employees pay by the 10 hours actually missed rather than a typical 8 hour day.

By way of background, the salary basis test is an integral component of satisfying the white-collar professional, executive, and administrative exemptions, and requires that an employee receive a weekly salary of at least $455 which is not reduced based on the quantity or quality of work performed in that workweek. Absences of a full day or more, and application of a bona fide paid time off program, are two of the very few exceptions to this rule.

Inclusion of nondiscretionary bonuses in overtime calculation:

Opinion FLSA2018–11 and OpinionFLSA2018–9 reissues prior opinion letters in which the Division opined regarding the inclusion of nondiscretionary bonuses in the regular rate for calculations of overtime. Opinion letter 2018–11 reissued prior decision 2009–30 in which the Division reiterated the general rule that job bonuses must be included in the regular rate for purposes of calculating overtime in each work week. In the example used in this opinion, the bonuses were paid as a flat daily rate based on the number of days for a particular job. In this case, the total weekly amount of the daily bonus had to be added to the weekly wage to calculate the regular rate for purposes of determining the 1 1/2 time overtime premium.

In Opinion letter 2018–9, the division reissued opinion letter 2009–27 which addressed year end non-discretionary bonuses. Again the Division reiterated the rule that non-discretionary bonuses must be considered in calculation of the regular rate and overtime premium even if applied at the end of the year. In this opinion, the Division endorsed a methodology by which the employer eliminated some of the arithmetic challenges in a year-end bonus system by applying a single percentage to all of the compensation the employee earned that year.

While not specifically addressing other challenges presented by nondiscretionary bonuses, these opinions do highlight the challenges employers may face when providing nondiscretionary bonuses for their hourly employees outside of the normal pay period. In those situations, the employer is required to calculate the impact on overtime and pay the overtime premium for employees for all weeks in which they worked more than 40 hours and are entitled to overtime compensation. In a lump sum bonus situation, the employer can create overtime issues if it fails to calculate the overtime premiums that would be attributable to overtime hours worked during the period to which the bonus applies. As a result, employers should plan carefully in situations where they are providing nondiscretionary bonuses to their employees and proactively develop a bonus plan which can be effectively administered within your timekeeping and payroll system.

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Masterpiece Cakeshop – The U.S. Supreme Court Sides with the Baker, but Leaves Unanswered Questions

By Alissa Chambers

The United States Supreme Court declined to rule on whether a Christian baker's sincerely held religious beliefs outweighed Colorado's interest in prohibiting discrimination based on sexual orientation in the provision of goods or services in *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018). The *Masterpiece* case stems from Jack Phillips, a devout Christian bakery owner, declining to bake a wedding cake for a same-sex couple. The couple filed a complaint under the Colorado Anti-Discrimination Act, alleging discrimination on the basis of sexual orientation. The baker argued that creating a wedding cake for a same sex marriage violated his First Amendment right to free speech and free exercise of religion.

The Colorado Civil Rights Commission (the "Commission") (the Colorado equivalent of the Montana Human Rights Bureau, the North Dakota Department of Labor and the Wyoming Department of Workforce Services) ruled against the baker and found in favor of the gay couple. The Commission's decision was upheld by the Colorado Court of Appeals. The United States Supreme Court ("the Court") agreed to hear the case and ultimately found in favor of the baker, reversing the judgment of the Colorado Court of Appeals. The Court reasoned that the actions taken by the Commission demonstrated hostility toward the baker's sincere religious beliefs motivating his objection to baking the cake. The Court focused on comments made by some of the commissioners at the formal, public hearings which disparaged the baker's religion. Significantly, the Court did **not** hold that the right to free exercise of religion or right to free speech created an exemption from compliance with a state anti-discrimination law, nor did the Court provide guidance on what an employer should do if faced with competing rights (rights of a LGBTQ employee versus rights of a devout religious employee). Many expected this issue to be the central focus of the Court's decision, but it was not.

While there are no comparable state-wide anti-discrimination laws protecting sexual orientation in Montana, North Dakota, or Wyoming, several cities in Montana and Wyoming have local ordinances that prohibit discrimination on the grounds of sexual orientation. Further, the Equal Employment Opportunity Commission (the "EEOC"), the agency responsible for enforcing federal law Title VII's prohibition of sex discrimination, interprets Title VII as forbidding any employment discrimination based on gender identity or sexual orientation. While there is uncertainty at the federal court level as to whether Title VII protects sexual orientation, the EEOC's website states that "if a state or local law permits or does not prohibit discrimination based on sexual orientation or gender identity, the EEOC will still enforce Title VII's discrimination prohibitions against covered employers in that jurisdiction." *See* https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm._lgbt_workers.cfm.

Until further guidance is issued on this item, we recommend that our clients understand the applicable employment laws (both at the state and a local level) where they operate and ensure that all employees are treated equally. Further, if an employee requests an accommodation on the basis of religious beliefs, an employer should ensure that the request is considered in a fair and impartial way.

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