Labor & Employment/Class Action Litigation | Alert

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Sixth Circuit Refuses To Stop Collective Action Notice To Employees with Individual Arbitration Agreements

A Sixth Circuit opinion filed this week reaffirms what experienced Fair Labor Standards Act (FLSA) attorneys have known for some time: when it comes to employer arbitration programs, they are not always the panacea that employers (and their lawyers) believe them to be. In *Taylor v. Pilot Corp. et al.*, Case No. 16-5326, a plaintiff-employee filed a FLSA collective action against her employer. As is typical, she promptly asked the court to authorize the sending of notice of the lawsuit to other "similarly situated" employees, asking if they wanted to participate, or "opt in," to the lawsuit. The defendant employer opposed, arguing in part that numerous putative collective action members were party to arbitration agreements that prevented them from participating in class, collective, or group actions. The district court nevertheless authorized sending the notice – ***including to those employees who had agreed to arbitrate any disputes they had with the defendant on an individual basis***. The Sixth Circuit declined to disturb the district court's decision to send notice to employees with individual arbitration agreements, holding that it lacked jurisdiction to do so because conditional certification decisions under the FLSA, unlike class certification decisions under Rule 23, are not subject to interlocutory appeal. The net effect is a ruling that arguably shifts the court's role toward claim soliciting, tacitly authorizing broad notice programs in FLSA collective actions to include employees who admittedly may not be able to participate in the litigation due to an agreement to arbitrate.

Although employers understand that arbitration agreements do not stop employee claims from coming, many employers turned to such agreements as the proverbial "silver bullet" to protect against seemingly pervasive class and collective actions, especially spurred by legal developments favoring the enforcement of arbitration agreements. They have likely closely watched the *Murphy Oil* trilogy (whether agreements to arbitrate on an individual basis interfere with employees' rights to engage in concerted activity protected by Section 7 of the National Labor Relations Act or whether the Federal Arbitration Act mandates their enforcement as written), and eagerly await the U.S. Supreme Court's ruling. Even if the Supreme Court upholds the validity of class action waivers in employer arbitration programs, however, it is clear that other case law developments may be tarnishing the silver bullet regardless.

This week, the Sixth Circuit made clear that, regardless of the outcome of the *Murphy Oil* trilogy, employers cannot just rest easy after putting an arbitration program in place. In *Taylor*, the district court authorized sending the "opt in" notices to other employees, and this is not unusual. District courts often decline to rule on what effect, if any, arbitration agreements have on who may participate in class or collective actions until after ruling on class or collective certification. *E.g.*, *Garcia v. Jcpenney Corp., Inc.*, No. 12-CV-3687, 2016 WL 878203, at *7 (N.D. Ill. Mar. 8, 2016); *Whittington v. Taco Bell of Am.*, Inc., No. 10-CV-01884-KMT-MEH, 2011 WL 1772401, at *5 (D. Colo. May 10, 2011). In other words, as in *Taylor*, plaintiffs in FLSA collective actions often ask for permission to send notice of the case to all putative claimants, arguing that once employees optin and it can be determined who is in fact party to an arbitration agreement, then the court can best decide what to do with those individuals, *i.e.*, send them off to individual arbitration and/or void the agreement for some reason, permitting them to participate in the collective litigation.

This "practical" argument, which appears to be gaining steam in lower courts, threatens the viability of arbitration as an efficient means of dispute resolution and may transform courts into solicitation vehicles, just as Justice Scalia warned in *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 181 (1989) (Scalia, J., dissenting) (finding irony in majority opinion authorizing district courts to "[s]eek[] out and notify sleeping potential plaintiffs" of pending litigation). The approach now seemingly endorsed by the Sixth Circuit means that an employer could be forced to defend a putative collective action against claimants who are not party to an arbitration agreement in court, while simultaneously fending off numerous individual arbitrations filed only because a court informed such individuals of a potential claim that heretofore had not concerned them. This can quickly become costly for employers, as the upfront filing fees with many arbitration providers (which the employer typically bears) are in the thousands of dollars, which can far outstrip the value of most FLSA claims.

Exacerbating the situation for employers is that there is no quick fix should a court go down this path at a plaintiff's urging. As *Taylor* explains, and as several other circuit courts have also held, there is no immediate mechanism for an aggrieved employer to appeal a district court's ruling on conditional certification until the case reaches final judgment (which will likely be years later). In other words, at least in the Sixth Circuit, it is acceptable for a district court to send notice of a FLSA collective action to employees with arbitration agreements and there is nothing – in terms of an appeal – that employers can do about it. As such, it is key for employers to consult with experienced and knowledgeable FLSA counsel. A defendant's conduct from the very beginning of the case – even down to the smallest details, such as how the defendant styles or captions a pleading – can have significant ramifications in FLSA actions. If defense attorneys are aware of these ramifications, and familiar with the plaintiffs' tactics, then employers may have a better shot at obtaining the benefits of those arbitration agreements they worked so hard to put into place.

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