HOME CARE CLIENT ALERT

U.S. SUPREME COURT APPROVES OF EMPLOYERS' USE OF ARBITRATION AGREEMENTS WITH CLASS ACTION WAIVERS

In three decisions of monumental importance, the U.S. Supreme Court has ruled that employers may require employees to sign arbitration agreements with class action waivers as a condition of employment. In so holding, the Supreme Court rejected the National Labor Relations Board's argument that class action waivers violate the National Labor Relations Act (the "Act"). The Court's decisions promise to dramatically alter the class action landscape, offering home care agencies a new way to minimize their exposure to lengthy and costly employment and wage and hour class actions claims.

Information About Class Action Waivers Generally

A mandatory arbitration agreement with a class action waiver requires an employee to agree that any dispute between the employee and his or her employer will be resolved through one-on-one arbitration. In many states, employers are permitted to require employees to sign such arbitration agreements as a condition of obtaining or keeping their employment with the employer. By signing the agreement, the employee forfeits the right to pursue any claim related to, or arising out of, the employee's employment in court (and agrees to pursue the claim in arbitration). Critically, the employee waives the right to bring any claim (in arbitration or in court) as a class claim, on behalf of other similarly situated workers. For large home care agencies or agencies that have employees in states with lengthy statutes of limitations (e.g., New York Labor Law affords employees 6 years to bring a claim for unpaid wages) a mandatory arbitration agreement with class action waivers may deter the filing of any claim or significantly limit the agency's exposure in a filed claim.

Given their potential to limit employees' right to bring class action claims, worker advocacy groups and the National Labor Relations Board ("Board") have attacked the enforceability of mandatory arbitration agreements with class action waivers. While most of the challenges have been dismissed, a federal Circuit Court of Appeals split emerged with respect to the enforceability of these agreements, with some courts holding that Section 7 of the Act, which guarantees employees "the right to self-organization, to form, join, ...and to engage in other concerted activities for the purpose of ... other mutual aid or protection" overrode the Federal Arbitration Act's mandate directing enforcement of arbitration agreements. Under the Obama Administration, the Board held that Section 7 of the Act supersedes the Federal Arbitration Act and prohibits employers from impeding employees' ability to bring class action claims.

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The Court's Decisions

In a series of three cases, the Supreme Court ruled 5-4 that there is no conflict between the Act and the Federal Arbitration Act. The Court held that, in the "Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." The Court further observed that the Supreme Court "has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board." Criticizing the Board's attack on the enforceability of arbitration agreements with class action waivers, the Court observed that the Board only began to attack arbitration agreements in 2012 when the Obama Board first took office, and 77 years after the Act's adoption. The Court further noted that it seemed "pretty unlikely" that Section 7 conferred upon employees a right to participate in a class action proceeding "when you recall that procedures like that were hardly known when the [Act] was adopted in 1935."

What Does this Mean for Your Agency?

With the certainty conferred by the Court's decisions, agencies that have not implemented class action waivers within their workforce to mitigate exposure to costly class action claims should reconsider their position. When properly drafted and executed, arbitration agreements with class action waivers could prohibit employees from bringing class action claims for unpaid wages, including allegations concerning 24-hour shifts. The agreements could apply to bar a class action claim for wages previously earned (e.g., an aide could be barred from bringing a class action claim for six-years of allegedly unpaid wages for live-in cases). With the uncertainty in New York's home care industry relating compensation of aides, agencies should strongly consider using these agreements.

Arbitration agreements, if adopted, should be carefully drafted to ensure enforceability under the State's contract rules. Further, counsel should be consulted before requiring any employee who might be involved in litigation against the employer to sign an agreement with a class action waiver.

Special consideration should be given to "rolling out" a dispute resolution plan involving an arbitration agreement with a class action waiver as it may inadvertently trigger a claim by an employee.

Lastly, while arbitration agreements with a class action waiver are extremely helpful in mitigating and limiting exposure to class action claims, they do have limits. For example, arbitration agreements may not be binding on former employees who have a claim against the employer because such employees left the employer's employment before the arbitration agreement was adopted by the employer. Further, arbitration agreements do not bar government agencies from conducting audits or investigating complaints against a home care agency. Thus, an arbitration agreement will not protect home care agencies from OMIG, DOL, DOH, OIG, or IRS scrutiny.

If you have any questions about this alert or wish to discuss implementation of an arbitration agreement with a class action waiver within your agency, please contact any member of our Home Care Group.

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