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CLASS ACTION TRENDS REPORT

Ensuring *individual* arbitration

ABC Corporation has been hit with a sex and pregnancy discrimination class action suit alleging that it systematically denied promotions to pregnant employees and "mommy tracks" employees upon their return from maternity leave. The complaint asserts that these discriminatory practices are in place throughout the company's offices nationwide. So far, 27 employees have signed on, and there are 600 potential class members who were pregnant or took maternity leave during the class period.

The company filed a motion to compel individual arbitration for those employees covered by ABC's mandatory arbitration agreement. However, the court concluded that the agreement, drafted years earlier, was unclear on whether class arbitration was permissible. The court also held that it was for an arbitrator to decide whether the parties agreed to arbitrate disputes on a class basis—leaving the critical decision of whether classwide proceedings will ensue in the hands of an arbitrator.

In the last issue of the *Class Action Trends Report*, we discussed how employers might ensure that legal disputes brought by employees will be resolved through individual arbitration: by implementing a mandatory arbitration agreement that includes an enforceable waiver of class, collective, and representative claims. What if an employer does not have an arbitration agreement in place? The answer there is easy, if not ideal: the dispute heads to court. What if there *is* an arbitration agreement, but it does not include an enforceable class waiver? That can be even more problematic, and it is the focus of our discussion here.

A worst-case scenario

Arbitrating employment claims on a classwide basis is the worst-case scenario for an employer. As we discussed in our last issue, *individual* arbitration has clear advantages over litigation and is the most efficient means of resolving employment disputes. *Class* arbitration, on the other hand, is to be avoided whenever possible. And while recent U.S. Supreme Court decisions have gone a long way in limiting the extent to which employers may unwittingly be compelled into classwide arbitration, such proceedings regularly take place, often at the arbitrator's behest. The American Arbitration Association (AAA), for example, administered more than 350 class arbitrations in the decade between the Supreme Court's *Green Tree Financial Corp. v. Bazzle* decision in 2003 and

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A WORD FROM WILL AND STEPHANIE

Oscar Wilde once said: "The only thing to do with good advice is to pass it on. It is never any use to oneself." In that same spirit, nearly 130 attorneys from Jackson Lewis' Class Action and Complex Litigation Practice Group gathered in Chicago from April 14-17 to share experiences, knowledge, and trends from offices and jurisdictions across the country. The three-day training program included discussions on legal developments, plaintiff's bar strategies, defense strategies, and effective preventive measures to avoid costly class and collective action litigation. The firm's significant investment in this training underscores its commitment to its clients in the defense against high-stakes class action claims.

As discussed in our last issue, arbitration agreements with class action waivers can be an excellent option for potentially preventing this costly litigation. Arbitrations typically lower defense costs and streamline the process for employers. However, arbitration agreements are not to be entered into lightly and, as we discuss here, they may not be that panacea to the potential of a class action lawsuit that all employers seek.

An employer considering an arbitration program must analyze a number of variables including the organization in which the arbitration will occur (*e.g.*, AAA, JAMS, etc.), the rules of the agency with respect to class or collective actions, and the potential arbitrators. More important, once in arbitration, the standards change and the decision of the arbitrator is subject to a heightened review standard that raises the stakes.

An employer also must consider the state of the law; and, as we emphasize once again in this issue, the law on class action waivers is in flux—even more so after the recent decision by the U.S. Court of Appeals for the Seventh Circuit in *Lewis v. Epic Systems Corp*. There, the appeals court found, contrary to its sister circuits, that such waivers violate the National Labor Relations Act (NLRA). As a result, an arbitration agreement with a class waiver is not an ironclad guarantee that an employer will avoid high-stakes class litigation. Furthermore, if a classwide proceeding is inevitable, the employer may consider whether simply litigating the matter in a state or federal court with clearer rules and precedent is preferable to arbitration.

How to persuade an arbitrator that a classwide proceeding is unmanageable? How are plaintiff's counsel seeking to turn the table on employers that utilize arbitration agreements? Finally—and more practically: Are we staying current with our arbitration practices? As we take a deeper look into class arbitrations in this issue, keep some of these practical considerations in mind. Arbitration programs may indeed serve your company well if implemented and utilized properly.

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About the ***Class Action Trends Report***

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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Your shield, their sword?

In an ideal world, an employee bringing a legal claim against the company would simply invoke the procedures set forth in the parties' arbitration agreement to resolve the dispute. As is often the case, though, the employee instead calls an attorney, who files a putative class or collective action complaint in court. The attorneys will confer, and counsel for the employer will point out that there is an arbitration agreement in place, that the agreement includes a class waiver, and that the employer intends to file a motion to compel individual arbitration pursuant to that agreement. Plaintiff's counsel typically responds that the employee will challenge the arbitration agreement in court. But not always.

"A few very aggressive plaintiffs' firms have developed the approach of filing a multitude of individual demands for arbitration," explains Paul DeCamp, a Principal in Jackson Lewis' Washington, D.C., office. "Those firms work exceptionally hard to recruit as many potential class members as possible before filing a class case, and they continue those efforts while the case is pending. As a result, in many cases, these firms have the names and contact information for dozens, hundreds, or even thousands of potential class members very early in the litigation. With the employer often responsible for filing fees amounting to several thousand dollars per arbitration at the outset of the proceeding, this approach can present employers with a very substantial expense, potentially in excess of $1,000,000, if the plaintiffs' counsel commences several hundred individual arbitrations."

"Even when you win, you lose." One plaintiff's attorney explained that he attempts to convince the employer to simply stay in court by laying out a worst-case scenario for the company. Consider, for example, a wage-hour claim alleging employees have been misclassified as overtime-exempt. With class list in hand, plaintiff's counsel has identified 150 employees who will demand arbitration. He's done the math and presents some daunting numbers. In one hypothetical instance, for example, he tells the company that the cost to the defense to lose all 150 separate arbitration proceedings is $16.4 million. The cost to win half those arbitrations is $10.5 million. The

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Prevention pointer: Time to audit your arbitration agreement practices?

By Brian T. Benkstein and Elizabeth S. Gerling

If your organization made the strategic decision to require employees to arbitrate employment-related disputes, when is the last time you reviewed your practices in this area? Now might be the time to do so.

An audit of the organization's arbitration agreement practices may reveal administrative or process deficiencies. These problems, if left undiscovered, can result in the unintended consequence of litigating employment claims in the court system that would otherwise be subject to arbitration. Examples of administrative or process issues include:

- **Missing or unexecuted agreements.** Are your employees' arbitration agreements stored where they are supposed to be, *i.e.*, in the personnel files? Did the employee actually execute the agreement? The time to discover and correct these problems is when the organization can take active steps to remedy the situation.
- **Lack of uniformity.** If the organization revised its arbitration agreements over time, are there employees or groups of employees who are subject to the outdated agreements? If so, does it matter? If the agreements were amended to correct substantive issues impacting enforceability, the answer is definitely "yes." However, as discussed elsewhere in this report, you should consider

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cost to *win* 90 percent of the remaining cases would still be $5.9 million. His pitch to the employer, then, is: "Even when you win, you lose." Making matters worse is that the employer in this situation has not secured a broad, classwide resolution as to liability, leaving it vulnerable to an onslaught of additional individual claimants.

Of course, the more probable goal in bringing these multiple, coordinated individual arbitration proceedings is to induce settlement. And given the costly, time-consuming ordeal that the employer is faced with at this point, the pressure to do so is intense. The employer must make critical strategic decisions on how best to proceed, assessing the ongoing risk of exposure with the aid of outside counsel, and considering the business implications of each option.

It should also be noted, however, that some plaintiff's attorneys willingly agree to resolve disputes through arbitration—not as a strategic ploy, but because they have come to find that the process is swifter and less cumbersome than litigation, and ultimately fairest for both sides. ■

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the strategy implications of different agreements applying to certain groups or sub-groups of employees. In some circumstances, that may make sense.

- **No agreements or poorly drafted agreements.** As a result of an acquisition, sale or merger, there may be entire groups of employees who are not subject to arbitration agreements. Although one would expect such issues would be addressed during the acquiring company's due diligence, unfortunately, that may not hold true. Also, in this same context, the acquiring entity may inherit poorly drafted or outdated arbitration agreements that should be addressed before it is too late, *i.e.*, when the organization is sued by a former employee.

Changes in the law. Particularly where it's been several years since the arbitration agreement was first executed, there may have been important changes to the law that necessitate review and possible revision. For example, a 2010 defense department appropriations bill and a 2014 executive order have restrained some federal contractors from mandating arbitration of certain claims. The Dodd-Frank Act, passed in 2010, also bars mandatory arbitration of certain whistleblower claims. Arbitration agreements that don't currently have a carve-out of these causes of action must be revised accordingly, if applicable.

State-law considerations. State-law variations may impact the enforceability of arbitration agreements as well. For example, in some states, such as Missouri, continued at-will employment alone does not provide an employee with adequate "consideration" to support an arbitration agreement. However, the exact opposite is true in states such as Maryland, Minnesota, and Texas. Other state-specific limitations include Ohio courts barring enforceability where the arbitration agreement is overly broad, or encompass any claims against an employer. Indeed, an Ohio court of appeals has held that claims of verbal and physical contact culminating in sexual assault, retaliation, and harassment were not subject to the arbitration agreement.

Therefore, when reviewing its arbitration policies and practices, an employer should consider the laws of the states in which it operates. State-specific issues should be addressed so that remedial steps can be taken to correct or, at least, minimize the problem. These provisions present a particular challenge, of course, for organizations that operate in multiple states and must draft an arbitration agreement that satisfies the legal requirements of each.

The initial rollout of an arbitration agreement is usually executed with great care. However, with the ever-changing law, it's essential that employers periodically review the substantive provisions of their agreements. As the examples above highlight, state-specific issues can impact enforceability. The good news is that many of these problems can be eliminated, or at least mitigated, by adjusting the agreement's terms. Finally, if arbitrating employment disputes is a strategic focus of your organization, auditing your practices must be an integral component of that strategy as well.

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its 2013 holding in *Oxford Health Plans, LLC v. Sutter*. And, in its amicus brief in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., the AAA told the High Court that 37 percent of AAA's class arbitrations involved employment-related claims. (For a discussion of these landmark Supreme Court rulings, see "The caselaw" on page 10).

If an employer must face class claims, it is far preferable to do so in a judicial forum rather than in private arbitration. "If one arbitrator gets it wrong, the arbitration can hold you liable to 1,000 people," noted L. Dale Owens, a Principal in Jackson Lewis' Atlanta office. "You would never want to arbitrate where the exposure would be to the entire class."

Why is class litigation preferable to class arbitration? There are several reasons:

- Courts are better equipped and experienced at managing the procedural complexities inherent to class proceedings.
- Courts look out for the interests of absent class members, thus ensuring they are afforded due process; private arbitrators, on the other hand, are not "state actors" and are not vested with this protective role. For example, courts play a more vigorous role in evaluating the adequacy of class counsel and scrutinizing settlements.
- In class arbitration, what *would* have been an "opt in" collective action in court (with lower participation rates and reduced exposure) is now an "opt out" class action—meaning essentially all eligible class members are included, with commensurately greater exposure to the employer.
- Arbitrators rarely trim meritless claims at an early stage on dispositive motions. This drawback is often worth the tradeoff for employers in the individual arbitration context, but it is a clear disadvantage when those frivolous claims are asserted on a class basis.
- Because meritless claims will likely advance through the proceedings, and there is little likelihood of vacating an adverse award (as arbitration awards cannot be appealed, and can only be set aside on very limited grounds), employers face far greater pressure to settle the class claims.
- Classwide resolution carries potentially massive liability. In court, employers may readily seek judicial review, but not in final and binding class arbitration.

Moreover, the usual benefits of arbitration no longer apply in the class arbitration context:

- The informal handling of claims in individual arbitration usually leads to swift resolution at a lower cost. Not so with class arbitration—a complex proceeding that must conform to certain procedural requirements, perhaps at an even higher cost. Unlike individual arbitration,

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Class arbitration: Is that even a *thing?*

In drafting the Federal Arbitration Act (FAA), did Congress envision such a thing as class arbitration? While the statute sets forth the procedural elements that are to apply to arbitration as an alternative means of resolving legal disputes, it contains no provisions addressing how class, collective, or representative arbitrations are to proceed. As the Supreme Court observed in *Stolt-Nielsen*, "the changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." Yet Congress made no provisions in the FAA for how class arbitration—a radically different mechanism—was to unfold.

Did the drafters really intend to empower an individual claimant, in a private forum, to enforce the legal rights of absent parties, seeing them through to a final, (largely) non-reviewable "verdict," and binding potentially thousands of class members? Arguably not.

The Supreme Court in *Stolt-Nielsen* outlined the reasons why consent to class arbitration should not be presumed. Still, the Court has refused to expressly invalidate class arbitration. Consequently, for now, employers remain at risk of having to defend employment claims through class arbitration, to a decided disadvantage.

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for example, class arbitration demands additional arbitration hearings over clause construction and class certification—all of which must be paid for, and usually by the employer—stripping the arbitral forum of its most desirable feature.

- Unlike individual arbitration, where the proceedings and award is confidential, there is no presumption of privacy and confidentiality in class arbitration proceedings. In fact, the AAA provides that class arbitrations are to be made available for public consumption; the organization maintains a "Class Arbitration Docket" on its website.
- Individual arbitration typically ends in the finality of a confirmed judgment. In class arbitration, however, the employer (and absent class members) cannot be confident that the underlying dispute is definitively resolved, given uncertainty as to the binding nature of the arbitrator's decision.

The decision whether an arbitration agreement permits classwide arbitration should be determined by the courts as a "gateway" issue, not left to the discretion of an arbitrator—expressly or as a result of poor draftsmanship. Again, once the arbitrator makes a ruling that the agreement allows for class arbitration, the likelihood of having that decision overturned by a court is virtually nil.

As noted previously, when drafting an arbitration agreement, it is advisable to include a fallback provision which states that if the class action waiver is deemed unenforceable, then the whole deal is off, and you will instead defend against the claims in court. Moreover, once faced with a live class action lawsuit, the employer may opt to wait until after the court makes a class certification decision before filing a motion to compel arbitration (and, if a class *is* certified, simply refrain from filing the motion). Here, however, the employer runs the risk of a court finding that the employer, by exercising such restraint, has acted in a manner "contrary" to an intent to arbitrate, and thus denying the motion based on waiver.

Selecting an arbitrator

The question of whether class arbitration is permissible is a weighty one; consequently, the selection of the arbitrator who will make that decision is critical. A well-drafted arbitration agreement will provide that a neutral arbitrator will be selected by the parties, and set forth the manner of selection. (It's worth noting: one important advantage of arbitration over litigation is the right to select the adjudicator, rather than rely on the luck of the draw as to which judge will rule in your case; in class arbitration, though, only a few plaintiffs enjoy this safeguard, and absent class members are deprived.)

Failing such a provision in the arbitration agreement, the AAA provides counsel for the parties with a list of possible arbitrators from a national roster of class arbitration arbitrators; the parties may both strike specific arbitrators from the list, and then rank the remaining candidates in order of preference. From there, the AAA reviews the parties' lists to identify a mutually agreeable arbitrator. Alternatively, if the parties cannot agree, the AAA will simply appoint an arbitrator. The parties (or the AAA, at its discretion) may provide that a panel of three arbitrators will hear the dispute.

The class arbitration decision

While the cases are conflicting, some courts have ruled that, in the absence of "clear and unmistakable" contrary language in the arbitration agreement, the employer's decision to incorporate the AAA Rules constitutes an agreement to allow the arbitrator to decide whether the agreement provides for classwide arbitration. The AAA Supplementary Rules for Class Arbitrations are

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There are several other arbitration organizations, including JAMS (Judicial Arbitration and Mediation Services, Inc.), Forum (formerly the National Arbitration Forum), CPR (The International Institute for Conflict Prevention & Resolution), among others, each with their own rules and procedures which are similar in many respects to AAA's. However, AAA is the largest body of arbitrators. There are a number of factors to consider in selecting the agency that meets your organization's needs—a decision best made with the guidance of legal counsel experienced in arbitration proceedings.

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incorporated by reference in the AAA Employment Rules, and the Supplementary Rules expressly provide that the arbitrator "shall determine as a threshold matter … whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."

The AAA Supplementary Rules set out a two-step procedure for determining whether class arbitration can take place. First, the arbitrator looks to the arbitration agreement itself to assess whether it permits class arbitration, then issues a "Clause Construction Award." If the arbitrator decides the parties' agreement allows for class arbitration, she next will decide whether the specific dispute before her can proceed as a class, and issue a "Class Determination Award."

The Clause Construction and Class Determination stages mark the critical period for the defense. Again, the goal is to avoid class arbitration of the dispute, so these gateway deliberations are significant.

This second stage largely mirrors the procedures that courts use in deciding whether to certify a class, based on the criteria set forth in Rule 23 of the Federal Rules of Civil Procedure. The AAA Rules note that, in deciding whether a class can be maintained, arbitrators are to consider whether it is desirable to concentrate the resolution of the claims in a single forum, as well as whether the management of a class arbitration will present difficulties, among other factors.

However, *unlike* Rule 23 determinations, the arbitrator also considers whether the putative class members had all signed "substantially similar" arbitration agreements (yet another round of deliberation, by the way, undermining the inherent "efficiency" justifications for arbitration). One preventive strategy, then, is to vary your arbitration agreements slightly, by state, year of hire, or other discernible criteria. Changing up the provisions of your form contracts—as to what state contract law applies, where arbitration is to be held, which arbitration agency will be utilized—may serve to fend off an adverse Class Determination Award in arbitration, or at least to reduce the class scope.

The Supplementary Rules provide that arbitrators may choose to exclude potential class members in some circumstances. However, the Rules do *not* provide formal authority to the arbitrator to divide the class into subclasses of particular groups of employees whose interests diverge from the class as a whole.

Technically, there is recourse at this stage: the arbitrator's Clause Construction Award or Class Determination Award can immediately be appealed in court, and the arbitration will be stayed for 30 days or more to allow for this judicial challenge. The Rules do not articulate the *scope* of such judicial review, however. And, as a practical matter, recall that the grounds for vacating an arbitrator's decision—even gateway determinations such as these—are exceedingly narrow.

Moreover, this provision, which has its counterpart in Rule 23(f), does not appear to apply in the context of *conditional* certification of collective actions under the Fair Labor Standards Act (FLSA) or Equal Pay Act (EPA). Recently, for example, a federal district court concluded that it lacked jurisdiction under the FLSA or EPA to consider the arbitrator's Class Determination Award because the Award was not "final." (This ongoing litigation in discussed further in "The caselaw" on page 10.) Note also that the Rules frame the class determination decision as a "partial final award," in that it entitles the arbitrator to alter or amend the class certification at any time prior to rendering a final arbitration award on the merits.

Persuading the arbitrator

The Clause Construction and Class Determination stages mark the critical period for the defense. Again, the goal is to avoid class arbitration of the dispute, so these gateway deliberations are significant. How can an employer persuade the arbitrator that a classwide resolution is inappropriate? An appeal to policy arguments against class arbitration (like the points noted above) likely will not sway the arbitrator; the data suggest that arbitrators quite frequently find that

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class arbitration is proper, and so have already made their minds up on this point. Instead, as in court, the defense's job is to strenuously explain how the Rule 23 factors disfavor class arbitration in this particular instance.

The arbitral forum presents additional considerations, however. When in court, employers submit testimony, affidavits, and other evidence in opposing class certification—or in an effort, at minimum, to narrow the class. However, the streamlined proceedings typical of arbitration, with a deliberate eye toward limited discovery, may hinder the ability to present a robust defense to certification. Of course, in arbitration, the parties can jointly set their own ground rules on discovery. This is where strategic choices must be made as to the desired scope of discovery.

[T]he streamlined proceedings typical of arbitration, with a deliberate eye toward limited discovery, may hinder the ability to present a robust defense to certification.

Plaintiffs will want to "cherry pick" their best cases, while the employer wants more class discovery to show that those claims aren't representative. (On the other hand, the employer wants to limit merits discovery. The desired scope depends on the potential class size, the nature of the claim, and other factors.) Employers will typically wish to depose a number of potential class members, especially those who provide declarations to support the plaintiff's motion for class certification. Even in court, judges often want to limit the number of depositions that can be taken. In arbitration, which is supposed to be more streamlined, there may be additional pressure to limit depositions and other discovery. This may adversely impact the employer's ability to defend against certification.

Given the limited discovery that the employer may be able to engage in, it may be all the more important for the employer to be able to effectively attack the plaintiff's trial plan, *i.e.* to demonstrate that the case is not manageable and cannot be proved through common proof, but only individualized evidence.

Arbitrate or settle?

If the arbitrator decides the class may be certified, she will direct that notice be sent to class members. The Rules call for the "best notice practicable under the circumstances" to be given "to all [class] members who can be identified through reasonable effort," and class arbitration on the merits will thus unfold.

Once a class is certified, the plaintiff class gains considerable leverage, and employers typically feel greater pressure to settle—even non-meritorious claims. This pressure is magnified in class arbitration, for the reasons noted above. As a result, it is often the case that the most prudent strategy for an employer at this point is to pursue settlement.

Under the AAA Rules, an arbitrator must approve any class settlement or compromise of any claim that has been filed in arbitration. Absent class members are entitled to notice of any proposed settlement to which they would be bound. However, arbitrators are not similarly charged as judges (pursuant to Rule 23) to carefully scrutinize the parties' proposed settlement in order to ensure that absent class members are treated fairly. From the vantage point of the employer, of course, the aim is to settle the dispute classwide, encompassing as broad and final a resolution as feasible.

The takeaway

In sum, an employer that finds itself facing the prospect of class arbitration, as its primary goal, must prepare to persuade the arbitrator that the case before her is not appropriate for class treatment. Failing that, a prompt resolution through settlement may be the most sensible course of action. ■

Only in California? By Joel Kelly

It took decades, but California finally has joined the rest of the nation. The California Supreme Court has acknowledged (reluctantly) the supremacy of the U.S. Supreme Court as the final arbiter of the scope of federal preemption as to the enforceability of arbitration agreements.

In a 2011 decision, *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic I*), the California high court held that arbitration agreements that required employees to waive their right to an administrative hearing before the state labor commissioner in wage disputes (called a *Berman* hearing) were unenforceable as contrary to public policy. The U.S. Supreme Court summarily vacated the case for reconsideration in light of its decision in *AT&T Mobility LLC v. Concepcion*, also in 2011, in which the Court ruled that the FAA preempts state law and public policy purporting to ban class action waiver clauses in arbitration agreements. Hearing the *Sonic-Calabasas* case again following remand in 2013 (*Sonic II*), the California Supreme Court majority conceded that federal law under the FAA trumped state public policy and required that the arbitration agreement be enforced, even though it required the employee to waive the *Berman* hearing.

But what of class action waivers? Many had hoped that the state supreme court in *Sonic II* would address the continued validity of its 2007 decision in *Gentry v. Superior Court*, in which it refused to enforce class action waivers on public policy grounds. No such luck. Instead, while recognizing that a state court could not invalidate an arbitration agreement based simply on its view of the importance of state public policy, the *Sonic II* majority doubled down on the availability of the unconscionability defense in analyzing the validity of an arbitration agreement under California law. According to the majority, the FAA preempts the application of unconscionability as a defense *only* if it interferes with the "fundamental attributes of arbitration." Thus, while the majority conceded that states cannot categorically prefer one form of dispute resolution (e.g., *Berman* hearings) over arbitration, it concluded that this would not prevent a case-by-case evaluation as to whether an agreement that includes such a waiver is unconscionable.

At bottom, *Sonic II* holds that arbitration agreements are unenforceable as unconscionable where there is "the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Examples cited by the state high court as unconscionable were arbitration agreements that limit the recovery of damages; that effectively allow the employer to choose a biased arbitrator; that impose a $50,000 threshold for appeals; and that allow the employer to obtain attorney's fees if it prevails without also granting a prevailing employee the right to recoup her own attorney's fees.

***Gentry* is dead (finally). But there's a catch . . .** Fast forward to 2014. The California Supreme Court once again was asked to re-evaluate its *Gentry* ruling. This time, the issue arose in a case where the employer sought to compel arbitration under an agreement that contained both a class action waiver and a waiver of representative claims under the state Private Attorneys General Act (PAGA). The PAGA provides "aggrieved employees" a private right of action against an employer to collect civil penalties on behalf of the state Labor and Workforce Development Agency (LWDA). The statute requires that 75 percent of any penalties collected be paid to the LWDA, with the remaining 25 percent distributed to the aggrieved employees.

In *Iskanian v. CLS Transportation Los Angeles, LLC*, the state high court offered employers good news and not-so-good news. First, it held that class action waivers in arbitration agreements were valid; thus, *Gentry* is dead, having been abrogated by subsequent U.S. Supreme Court decisions. However, the majority also ruled that an arbitration agreement that requires employees to waive the right to bring a representative action for civil penalties under the PAGA is contrary to public policy and thus unenforceable. The majority concluded that a PAGA representative action is not a private dispute to which the FAA applies, and therefore, the "FAA does not preempt a state law that

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The caselaw

No class action waiver in your arbitration agreement? No problem, one might be tempted to think, ever since *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* was handed down. In that 2010 decision, as we discussed in our last issue of the *Class Action Trends Report*, the U.S. Supreme Court held that when an arbitration agreement is silent as to whether the parties intended to submit to class arbitration, then class arbitration is not allowed. A party may not be compelled into class arbitration unless there is a "contractual basis for concluding that the party agreed to do so," the High Court said. Given the "fundamental" distinctions between individual ("bilateral") arbitration and class arbitration, it explained, silence on the matter cannot be deemed consent.

"Silence"? Thus, *Stolt-Nielsen* appears to save employers from a class arbitration fate—even when an employer has failed to include a class waiver in its arbitration agreement. However, that is not necessarily the case, because *Stolt-Nielsen* did not definitively resolve the question of *how* "silence" is to be determined. "The failure to mention class arbitration in the arbitration clause itself does not necessarily equate with the 'silence' discussed in *Stolt-Nielsen*," one district court noted (*Yahoo! Inc. v. Iversen*, N.D. Cal. 2011). And, since the High Court's decision, some courts have found "silence" lacking.

For example, the U.S. Court of Appeals for the Second Circuit, in *Jock v. Sterling Jewelers Inc.* (July 1, 2011), reversed a district court decision overturning an arbitrator's finding that an arbitration agreement permitted employees to proceed as a class to resolve claims they were the victims of sex discrimination in pay and promotions, in violation of Title VII and the EPA. The court of appeals rejected the notion that the arbitrator did not have authority, in light of *Stolt-Nielsen*, to find the parties contractually agreed to class arbitration. In fact, it noted, the Supreme Court declined to hold that an arbitration agreement must expressly state

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prohibits waiver of PAGA representative actions in an employment contract."

***Iskanian* still standing.** Several federal courts in the state had disagreed with *Iskanian* and held they were not bound to the state high court's decision because federal preemption is an issue of federal, not state law. However, in September 2015, the U.S. Court of Appeals for the Ninth Circuit upheld *Iskanian*, finding the FAA did not preclude a California rule against waiving PAGA claims. That same month, the federal appeals court also issued *Sakkab v. Luxottica Retail North America, Inc.*, which fell in line with *Iskanian*. After closely examining the *Concepcion* decision and other statements by the U.S. Supreme Court on the purposes of the FAA, the Ninth Circuit ruled that the *Iskanian* rule was no obstacle to FAA objectives, and therefore it was not preempted by the FAA. The Ninth Circuit has rejected the employer's request for *en banc* review and, having failed to obtain relief there, the employer will likely file a petition for review in the U.S. Supreme Court. Surprisingly, though, the High Court has refused three opportunities thus far to review the holding in *Iskanian*, so there is little reason to expect the Justices would grant review in *Sakkab*, given that its holding aligned with those cases.

The result? A resurgence of PAGA-only claims. As a result of *Iskanian*, California PAGA cases cannot be compelled to arbitration. Consequently, even before the U.S. Supreme Court rejected challenges to *Iskanian*, we already had begun to see a plethora of cases filed as PAGA-only actions.

While the limitations period is far shorter than for claims in a typical wage-hour class action (one year instead of four years, for example), many plaintiffs' counsel will dispense with the longer limitations period in favor of (1) avoiding arbitration *and* (2) avoiding class certification requirements—since the California Supreme Court, in *Arias v. Superior Court* (2009), has held that a plaintiff need *not* bring a PAGA representative claim as a class action.

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that the parties agree to class arbitration. Rather, an arbitration agreement may contain an implicit agreement to authorize class arbitration; however, an "implicit" agreement was not to be *inferred* merely by virtue of the fact the parties had reached an agreement to arbitrate. Thus, *Stolt-Nielsen* did not foreclose an arbitrator's finding that an arbitration agreement implicitly authorized class arbitration (a position that the High Court would subsequently validate).

Currently, the circuits are split, with the U.S. Courts of Appeals for the Third and Sixth Circuits concluding that this gateway issue is to be resolved by a judge, and the Fifth Circuit placing the question before the arbitrator.

The ongoing *Sterling Jewelers* litigation is illustrative in other ways, too, of the legal battle that can typically ensue over class arbitration, as well as the uncertain state of the law in this area. Much has happened in the case since that appellate court ruling. In February 2015, an AAA arbitrator certified a class of 44,000 female employees with respect to claims for declaratory and injunctive relief arising from their disparate impact allegations, but not as to their claims for monetary damages based on alleged disparate treatment. In November 2015, a district court held the arbitrator had improperly certified the "opt-out" EPA class (*Jock v. Sterling Jewelers, Inc.*, S.D.N.Y. 2015). However, in May 2016, the court found it lacked jurisdiction to review the arbitrator's decision as to conditional certification of the EPA class, reasoning that under the two-stage certification process used under the EPA (which borrows the FLSA's collective action procedural mechanism), the decision is not "final" until the second stage, when an ultimate determination is made that the requirements for certification have indeed been met. Currently, the massive litigation is in the arbitrator's hands. Sterling Jewelers, however, has filed an appeal, hoping it will fare better before the Second Circuit this time around.

Who decides? Also left unresolved by the Supreme Court in *Stolt-Nielsen*: Who decides whether parties to an arbitration agreement agreed to submit to class arbitration? The *Stolt-Nielsen* Court cleared up a misconception left over from its decision a decade earlier in *Green Tree Financial Corp. v. Bazzle* (2003), in which a plurality held it was for the arbitrator, not a court, to decide as a matter of contract interpretation whether an arbitration agreement is "silent" on the matter of classwide arbitration. However, the Court noted, that position was unable to secure a majority. Because the parties in *Stolt-Nielsen* had expressly left the question in the arbitrator's hands, the High Court did not definitively resolve the matter for once and for all here, either.

Currently, the circuits are split, with the U.S. Courts of Appeals for the Third and Sixth Circuits concluding that this gateway issue is to be resolved by a judge, and the Fifth Circuit placing the question before the arbitrator. (Another variable is the agreement itself, and whether it includes language that might be construed as empowering the arbitrator to address the question in the first instance.)

The stakes of the question are inherently high; heightening the risk is the fact that the Supreme Court, in its unanimous decision in *Oxford Health Plans,* has made it clear that if an arbitrator decides an arbitration agreement allowed for class arbitration, a court may not disturb that finding, as long as the arbitrator had based the decision on an interpretation of the parties' contract. Because of the limited scope of review allowed under FAA, Section 10(a)(4), this is the case even if the court thinks that the arbitrator's interpretation is erroneous, and even though the Supreme Court, in its 2011 decision in *AT&T Mobility, LLC v. Concepcion*, made clear its distaste for classwide arbitration.

Consequently, inserting a class action waiver into your arbitration agreement *may* be the wisest course of action. However, we face renewed uncertainty as to whether such provisions are enforceable. Although the High Court in *Concepcion* held that the FAA preempts states from refusing to enforce arbitration agreements that bar class arbitration, we still have the National Labor Relations Board (NLRB) to contend with. The NLRB insists that class waivers violate the NLRA—a position that once seemed unsupportable in light of the FAA's powerful countervailing influence. Yet a recent appellate court decision has given the Board a leg to stand on. (We discuss this matter in "Regulatory roundup" on page 12 and also in "On the radar" on page 17.) ■

Regulatory roundup

The U.S. Supreme Court has spoken: Federal policy favors the arbitration of disputes, and arbitration agreements with class action waivers are enforceable under the FAA. When the federal enforcement agencies are involved, however, it's not quite that simple.

The Supreme Court's 1991 decision in *Gilmer v. Interstate/ Johnson Lane Corp*. was an enormous victory for employment arbitration. It was the first High Court ruling to hold that employment claims under federal statutes may be resolved through private dispute resolution. However, the *Gilmer* Court stated that an arbitration agreement would *not* preclude the Equal Employment Opportunity Commission (EEOC) from pursuing relief (including classwide relief) on behalf of employees in federal court, which was later specifically confirmed by the Court in *EEOC v. Waffle House, Inc.* Likewise, the U.S. Department of Labor (DOL) may bring suit on behalf of employees as well, notwithstanding the policies embodied by the FAA.

Private arbitration agreements may not prohibit employees from filing a charge with a federal administrative agency such as the EEOC or NLRB. It should be noted, moreover, that the agencies will not hesitate to defend their turf in the face of encroachment, be it real or perceived.

There is an important corollary to this principle that employers must heed: Private arbitration agreements may not prohibit employees from filing a charge with a federal administrative agency such as the EEOC or NLRB. It should be noted, moreover, that the agencies will not hesitate to defend their turf in the face of encroachment, be it real or perceived.

EEOC's position. In 1997, the EEOC released its formal "Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment." The EEOC's official position is that employees should not be required to arbitrate claims that arise out of the statutes the EEOC enforces. Being required to do so as a condition of employment is "contrary to the fundamental principles evinced in these laws," according to the agency. The federal government is charged with enforcing these laws, it reasoned, and in this vein, the federal *courts* bear ultimate responsibility. Mandatory arbitration, however, "privatizes" the enforcement of these laws and undermines their public enforcement, according to the EEOC. While the EEOC's Policy Statement demonstrates the EEOC disfavors arbitration, the statement does not have the force of law. Without an additional legal hook to hang its hat, the EEOC has stood by as courts apply *Gilmer* and enforce arbitration when discrimination lawsuits are brought by individuals.

Then came the release of the EEOC's most recent "Strategic Enforcement Plan" in 2012, which outlines the federal agency's targeted agenda through 2016. "Preserving access to the legal system" is one of six stated priorities driving the EEOC's efforts in the last few years. To this end, the agency in September 2014 filed a "pattern-or-practice" suit against the owner and operator of more than 140 franchise restaurants, including Applebee's, Panera Bread, and other popular chains, alleging that the company's mandatory arbitration policy unlawfully restricted employees from filing discrimination charges. Specifically, the arbitration policy at issue required prospective employees to agree, as a condition of employment, to submit any work-related disputes exclusively to arbitration—*including* claims that employees would normally pursue by filing charges with the agency.

Note that there was no underlying charge of discrimination in the lawsuit. Nonetheless, in September 2015, a federal district court gave the green light for the EEOC to proceed, finding the agency had standing to bring a pattern-or-practice challenge to the arbitration policy under Section 707 of Title VII (*EEOC v. Doherty Enterprises, Inc*., S.D. Fla., September 1, 2015).

"When an employer forces all complaints about employment discrimination into confidential arbitration,

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it shields itself from federal oversight of its employment practices," according to the EEOC regional attorney overseeing the case in a press release issued by the agency when it first brought suit. He warned that the EEOC would "take action to deter further use of these types of overly broad arbitration agreements."

The DOL's shifting stance. A report authored by the Clinton administration's Office of the Secretary of Labor's "Commission on the Future of Worker-Management Relations" paid lip service to strained court dockets, the steep costs of litigation, and judicial resolutions that often prove unsatisfying, even to prevailing parties. The Commission encouraged employers to develop voluntary alternative dispute resolution mechanisms, noting, in fact, that "high-quality, low-cost alternatives to litigation would greatly increase the accessibility of public law protections to low wage workers." The Commission also urged the adoption of minimum quality standards and protections to ensure that "employees participating in private systems [get] a fair and full airing of their complaints, and a full range of relief for the real victims of employment discrimination."

However, the Commission also concluded that binding arbitration agreements should not be enforceable as a condition of employment and that the FAA should not be interpreted in this fashion. Failing that, "Congress should pass legislation making it clear that any choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract."

More recently, the DOL submitted an amicus brief, in concert with the EEOC, as the NLRB deliberated in its controversial 2012 *D.R. Horton, Inc.* case. The agencies asserted in their July 2011 brief that class or collective actions were critical to the laws they administer and that class or collective waivers in mandatory arbitration pacts should be unenforceable when they would prevent employees from effectively vindicating their rights. Thus, while the DOL has yet to enter the fray in a meaningful way as its sister agencies have done in *Doherty Enterprises* and *D.R. Horton*, there is little room for doubt as to where the agency currently stands. However, its stated position cannot likely survive the Supreme Court's 2013 ruling in *American Express Co. v Italian Colors Restaurant*, which held that the plain intent of the FAA prevails over such "vindication of rights" concerns.

The NLRB defies the courts. Currently, though, the peskiest thorn in arbitration's side is the NLRB. The Board has doggedly insisted that mandatory arbitration agreements that, in particular, require employees to waive the right to pursue claims on a classwide basis are unlawful under the NLRA. Thus, while the EEOC seeks to ensure that employees are still able to avail themselves of its services, the NLRB takes a more sweeping stance: It contends not only that is it unlawful to restrict employees' right to file Board charges by way of an arbitration agreement, but that any employer policy that would shut the door entirely to classwide resolution of *any* employment claims (not merely unfair labor practices) would run afoul of the NLRA—namely, employees' Section 7 right to pursue such claims

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Is your company a federal contractor? Take note.

In December 2014, President Barack Obama issued his Fair Pay and Safe Workplaces Executive Order, EO 13673, which imposes substantial new compliance requirements upon federal government contractors. (The DOL's proposed guidance implementing the executive action was published in May 2015.) Among the EO's provisions: Employers with federal contracts of $1 million or more (as well as their subcontractors) may not require employees to sign pre-dispute arbitration agreements mandating arbitration of Title VII claims specifically, or of any tort claims related to allegations of sexual harassment or sexual assault. However, the EO does not affect employers' ability to enforce mandatory arbitration agreements as to other workplace disputes.

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through class or collective action. Indeed, as dissenting Board Member Philip Miscimarra observed, the Board had positioned itself, and the narrow statute that it is charged with enforcing, as the "protector of class action procedures under all laws, everywhere."

In *D.R. Horton*, the NLRB held that an employer violated employees' protected rights under the Act when it required them to sign an arbitration agreement precluding them from bringing class or collective claims in any forum, judicial or arbitral. In the Board's view, this mandate interfered with employees' right to engage in "concerted activity" for their mutual aid or protection, a right afforded to employees under Section 7 of the Act. However, the U.S. Court of Appeals for the Fifth Circuit reversed, rejecting the NLRB's expansive interpretation of the statute and the notion that class adjudication of FLSA claims, in this instance, was a statutorily protected right. The appeals court also corrected the Board's faulty presumption that federal labor policy as embodied in the NLRA effectively trumped the policies underlying the FAA.

When will it end? The NLRB's enthusiasm for striking mandatory arbitration agreements shows no sign of waning.

Undaunted, a five-member Board panel reaffirmed the agency's hostility to mandatory arbitration in its divided 2014 decision in *Murphy Oil USA, Inc.*, exacerbating its questionable jurisprudence in this area by holding further that, in seeking to *enforce* an arbitration agreement containing NLRB-disfavored provisions, an employer commits an independent violation of the Act. In doing so, the majority "doubled down on a mistake," according to Miscimarra, in dissent.

The Fifth Circuit in October 2015 rejected the Board's holding in part. It concluded that the company's revised arbitration agreement, which specifically states that nothing therein precludes employees from participating in NLRB proceedings, could not reasonably be interpreted as prohibiting employees from filing Board charges. And it rejected the Board's finding that Murphy Oil acted unlawfully by seeking to enforce its arbitration agreement. In February 2016, the appeals court issued its judgment based on its panel opinion and, on May 13, denied the Board's petition for rehearing.

Nonetheless, the NLRB has gone on a spree this past year, systematically invalidating a spate of employer arbitration agreements in steadfast adherence to its holdings in *D.R. Horton* and *Murphy Oil*. The Board has invalidated the arbitration policies of Kmart Corp., GameStop Corp., and a Pep Boys franchise, among other employers. Even policies with opt-out provisions, and policies expressly permitting employees to file claims with administrative agencies—which might then pursue a judicial remedy on behalf of employees as a group—could not escape the Board's scrutiny intact.

As Member Miscimarra repeatedly points out in dissent in these cases, the NLRB is defying the Fifth Circuit in doing so, as well as other federal courts which have rejected the agency's contention that mandatory arbitration agreements with class waivers interfere with employees' NLRA-protected rights. The U.S. Courts of Appeals for the Eighth, Ninth, and Eleventh Circuits have adopted a similar stance, leaving employers fairly confident that the Board's position was unsupportable.

More cause for concern. However, in late May, the Seventh Circuit gave employers considerable cause for alarm in *Lewis v. Epic Systems Corp.*, a surprising decision which held mandatory class waivers did indeed violate the NLRA. (See "On the radar" on page 17 for a discussion of this ruling and its implications. Employers within the Seventh Circuit, in particular, should confer with council regarding the best approach to take with their arbitration agreements in light of this decision.)

When will it end? The NLRB's enthusiasm for striking mandatory arbitration agreements shows no sign of waning. While the Board (perhaps wisely, at the time) refrained from seeking Supreme Court review of the Fifth Circuit's holding in *D.R. Horton*, the sheer number of Board cases that continue to percolate at the agency and, most recently, the newly created split among the circuits suggests that at some point in the near future, the High Court will step in. Prior to the passing of Justice Antonin Scalia—a steadfast supporter of arbitration and a class action skeptic—that looked to be a promising development for employers. But the prospect of how the Court might rule is now rife with uncertainty. ■

What's trending?

Important developments in class litigation since our last issue:

The U.S. Supreme Court issued three opinions impacting employers: decisions that made it easier for plaintiffs to obtain class certification using "representative" evidence; affirmed the rights of employers to obtain attorneys' fees for defending frivolous Title VII claims; and concluded a risk of harm may be enough to show injury for purposes of Article III standing.

Class certification using representative evidence

In *Tyson Foods, Inc. v. Bouaphakeo* (March 22, 2016), a divided Supreme Court held that plaintiffs may use representative statistical evidence to support class certification. The ruling came in an FLSA collective action and Rule 23 class action overtime suit brought by hourly workers at a pork processing plant who contended they should have been paid for time spent donning and doffing personal protective equipment. The district court had found common questions existed as to whether these donning and doffing activities were compensable "work," even though there were "differences in the amount of time individual employees actually spent on these activities" and "hundreds of employees worked no overtime at all." The U.S. Court of Appeals for the Eighth Circuit, according to Tyson, had sanctioned the use of "seriously flawed procedures" in certifying the class, urging that allowing the plaintiffs to prove liability and damages with "common" statistical evidence "erroneously presumed all class members are identical to a fictional 'average' employee." But person-specific inquiries into individual work time were necessary, the employer argued; reliance on a representative sample absolves each employee of the responsibility to prove personal injury, and thus deprived it of any ability to litigate its defenses to individual claims.

Because the employer failed to keep records of donning and doffing time, though, the employees were forced to rely on the representative evidence, derived from a study performed by an industrial relations expert in order to determine the average time engaged in donning and doffing activities. Thus, because a representative sample may be the only feasible way to establish liability, it cannot be deemed improper merely because the claim is brought on behalf of a class, the High Court majority held. Here, had the employees proceeded with individual lawsuits, each employee likely would have had to introduce the study to prove the hours he or she worked. Therefore, the representative evidence was a permissible means of making that very showing. Further, reliance on the study did not deprive Tyson of its ability to litigate individual defenses, the Court found; rather, the employer's defense was to show that the study was unrepresentative or inaccurate (a defense that was itself common to the claims made by all class members).

The Supreme Court declined to establish broad categorical rules on the use of representative and statistical evidence in all class actions, however, noting instead that the ability to use a representative sample to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action.

Fee awards for frivolous pattern-or-practice claims

In *CRST Van Expedited, Inc. v. EEOC* (May 19, 2016), a sweeping sexual harassment suit brought by the EEOC against a national trucking company, the Supreme Court held that a defendant need not obtain a favorable judgment on the merits in order to be a "prevailing" party for purposes of awarding attorneys' fees to defendants under Title VII. The Court reversed a decision by the Eighth Circuit which held a Title VII defendant can be a prevailing party only by obtaining a "ruling on the merits," and that the district court's dismissal of the EEOC's claims, including those on behalf of 67 women that it found to be barred based on the EEOC's failure to adequately investigate or attempt to conciliate, was *not* a ruling on the merits. The High Court interpreted the statute to allow prevailing defendants to recover whenever the plaintiff's claim was frivolous, unreasonable, or groundless. "Common sense undermines the notion that a defendant cannot 'prevail' unless the relevant disposition is on the merits," it observed.

Moreover, the Court found no indication that Congress intended that defendants should be eligible to recover attorney's fees *only* when courts dispose of claims on the merits. "Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in the

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defendant's favor, whether on the merits or not. Imposing an on-the-merits requirement for a defendant to obtain prevailing party status would undermine that congressional policy by blocking a whole category of defendants for whom Congress wished to make fee awards available," the Court wrote.

Injury needed for standing; risk of harm may be enough

In *Spokeo, Inc. v. Robins* (May 16, 2016), the Court grappled with questions that have clear implications for employers that rely on consumer reporting agencies to run background checks, and so must follow the notice requirements of the Fair Credit Reporting Act (FCRA): Does an individual suffer an injury merely because a consumer reporting agency has published inaccurate information about him? And if not, does he have standing to sue under the FCRA?

In the underlying case, the plaintiff sued a consumer reporting agency that operates a "people search engine" that gathers and provides personal information about individuals to a variety of users, including employers wanting to evaluate prospective employees. According to the plaintiff, Spokeo violated the FCRA by generating a personal profile for him that contained inaccurate information. Dismissing his federal class action suit, the district court held he did not allege injury in fact as required to establish standing to sue under Article III. But the U.S. Court of Appeals for the Ninth Circuit reversed. Based on the plaintiff's allegation that the defendant "violated his statutory rights" and the fact that his "personal interests in the handling of his credit information are individualized," the appeals court found that he adequately alleged an injury in fact.

The Supreme Court found the Ninth Circuit's injury-in-fact analysis was incomplete because it focused only on whether the alleged injury was "particularized" and left out the independent requirement that the injury be "concrete." A "concrete" injury need not be "tangible," but a plaintiff will not automatically satisfy the injury-in-fact requirement whenever a statute grants a right and purports to authorize a suit to vindicate it, the High Court explained. While Congress plays an important role in identifying injuries and creating causes of action, there must still be a concrete injury, even in the context of a statutory violation. Thus, a plaintiff cannot show a concrete injury by alleging a "bare" procedural violation, divorced from any concrete harm. Yet while "bare" procedural statutory violations will not automatically confer standing, they may be enough in certain circumstances where there is a *risk* of real harm—which can, in some circumstances, satisfy the requirement that an injury be concrete. Thus, a plaintiff in that type of case would not need to allege any additional harm beyond the one that Congress identified.

Beyond the facts of this case and the FCRA, an individual's standing to sue an employer for a statutory violation involving no actual injury or damages is critical for assessing potential liability, especially in the context of class action lawsuits. The *Spokeo* decision may allow potential class members who otherwise would be excluded from a class for failing to assert actual damages to be included as plaintiffs.

Other developments

On the wage-hour front (historically the largest source of class employment litigation), courts have certified a spate of class and collective actions since our last issue. Perhaps most notably: a California Labor Code class of 20,000 Home Depot employees in the state who are challenging the retailer's overtime pay policies for workers on overnight shifts that span two calendar days.

In recent months, in the federal courts alone, class or collective actions have been certified in cases brought by:

- Call center employees
- Production workers
- Temp workers
- Inside sales reps and other sales employees
- LPNs and other healthcare workers
- Fast food employees
- Cooks, waitstaff, and other restaurant and catering employees
- Delivery drivers, mortuary drivers, and tow truck drivers
- Construction workers and flagmen
- Laborers, electricians, equipment operators, and welding inspectors
- Assistant general managers
- Assistant bank managers, financial advisors, mortgage loan officers, and insurance agents
- Spa technicians, fit models, salon stylists, and pet groomers
- Sheriff's deputies, court bailiffs, and animal control officers
- Cable TV installers

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On the radar

Class waivers and the NLRB

The U.S. Court of Appeals for the Seventh Circuit handed the NLRB a significant victory when it recently held that an employer violated the NLRA by enforcing an arbitration agreement that included a class waiver. The decision, *Lewis v. Epic Systems Corp.* (May 26, 2016), creates a split among the circuits, teeing up potential Supreme Court review.

The Seventh Circuit affirmed a district court's order denying a software company's motion to compel arbitration of a technical writer's putative wage-hour class and collective action. The lower court and appeals court both found the employer's arbitration agreement, with its class waiver, violated NLRA, Section 7 by interfering with employees' right to engage in protected, concerted activities. Since the FAA's savings clause provides that agreements to arbitrate are revocable if illegal, the appeals court saw no need to compel arbitration pursuant to the FAA's dictates. The NLRA and FAA could readily be harmonized, the appeals court said.

Although the NLRA does not define "concerted activities," Congress said the statute was enacted to help equalize bargaining power between employees and employers, the Seventh Circuit explained, and class, collective, and representative actions were consistent with this purpose. Therefore, Section 7 should be "read broadly to include resort to representative, joint, collective, or class legal remedies." Furthermore, even if the statute were ambiguous on this point—"and it is not," the court emphasized—the NLRB had adopted a similar interpretation in *D.R. Horton*, and the Board's interpretations of ambiguous provisions of the NLRA are entitled to deference.

The U.S. Court of Appeals for the Fifth Circuit, of course, had come to the opposite conclusion in invalidating *D.R. Horton*, as have the other circuit courts to address the question. Moreover, since the Seventh Circuit's outlier decision, the Eighth Circuit in *Cellular Sales of Missouri, LLC v. NLRB* (June 2, 2016) reaffirmed its stance (first asserted in 2013, in *Owen v. Bristol Care, Inc.*) that employers do *not* run afoul of the Act when they require employers to enter into arbitration agreements with class waivers.

Meanwhile, the NLRB and its administrative law judges continue, unabated, to strike down arbitration agreements. For example, a national restaurant chain, a major health insurer, a security company, a national grocery retailer, and many small employers have found their arbitration policies within the Board's crosshairs. Moreover, the NLRB has boasted of its Seventh Circuit victory in its efforts to overturn the adverse circuit court decisions on this question. Ultimately, the Supreme Court will likely have its say. ■

WHAT'S TRENDING? continued from page 16

- Airport workers (including aircraft technicians)
- Pharmacy managers and other pharmacy employees
- Market research company trainers and door-to-door marketers

The suits claim a variety of overtime and minimum-wage allegations, including independent contractor misclassification, erroneous exempt classifications, off-the-clock work, improper tip-pooling, and incorrect calculation of bonuses. The list goes on, and reflects the sheer breadth of industries—employers large and small—that are vulnerable to classwide wage claims.

Also, certain to invite more such claims: the DOL has released its revised overtime regulation, which more than doubles the salary floor that employees must be paid in order to fall within the FLSA's "white collar" exemptions. The regulation takes effect December 1. In the meantime, employers have tough choices to make as to how best to comply with its provisions—choices best made in consultation with experienced wage-hour counsel.

Finally, employers also regularly face high-stakes discrimination claims. The EEOC continues to aggressively pursue pattern-or-practice claims against national restaurant chains, trucking companies, and other employers, and to secure massive settlements. In May, for example, the Commission reached an $8.6 million settlement with a national retailer, resolving allegations that the employer's leave policy violated the Americans with Disabilities Act.

EEOC pattern-or-practice suits, and class discrimination lawsuits by private litigants, show no sign of abating. The challenges presented by these difficult claims will be the focus of our next issue of the *Class Action Trends Report*. ■

Jackson Lewis holds Class Action Training Program

The Jackson Lewis Class Action Practice Team

Jackson Lewis' first-ever Class Action Training Program was held in Chicago on April 14-17. Led by Class Action and Complex Litigation Practice Group Leaders William Anthony and Stephanie Adler-Paindiris, approximately 130 Jackson Lewis attorneys gathered from all over the country to participate in more than 20 hours of intensive instruction in how to investigate, develop, and manage a class action. The training also included more practical considerations, such as preventive strategies, mediations, and other tools at an employer's disposal.

Practitioners from California, Connecticut, Florida, Georgia, Illinois, New York, and elsewhere led sessions on class and collective litigation topics including ERISA, FCRA, the FLSA, and Title VII. Jackson Lewis took the opportunity to educate (or re-educate) attorneys on the firm's capabilities in class action litigation including e-discovery, subject-matter expertise, and successful strategies in the defense of class action claims. The training included mock oral arguments and mediations during which attorneys advocated on behalf of clients under specific fact patterns.

"The goal was to 'strengthen our bench' by offering substantive information focusing on legal and strategic issues in class actions," said Mr. Anthony. "Topics included initial case preparation, how to gather evidence through blitzes or other electronic means, data analysis, and best strategies for handling pleadings, motions to dismiss, motions for conditional certification, motions for decertification and trials."

"We invested a great deal of time and resources into this training to ensure Jackson Lewis attorneys will continue to practice at the highest level in this very dynamic area of our practice," added Ms. Adler-Paindiris. ■

Up next...

Allegations that a rogue manager in your company had engaged in discriminatory conduct can be daunting enough. Allegations that your company has engaged in a *systemic*, companywide pattern of discrimination can have far more dire consequences, of course. How does an organization prepare to defend against such claims on the merits while simultaneously narrowing the scope of the inquiry and challenging class certification? What practical and strategic differences come into play when the EEOC is the plaintiff? What about when you're up against *both* the EEOC and an intervening plaintiff? What unique considerations arise based on the particular type of discrimination claim at issue? We'll address these and related questions in the next issue of the Jackson Lewis *Class Action Trends Report*.