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CLASS ACTION TRENDS REPORT

Is an arbitration agreement with a class waiver right for your organization?

By L. Dale Owens

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.

ABC implemented a dispute resolution program in 2014, and all new hires were required to enter into arbitration agreements with the company, consenting to resolve any employment-related disputes through final and binding arbitration, rather than through litigation in court. These agreements provide that all claims covered by the arbitration agreements must be brought on an individual basis. They also provide that the employees expressly waive their rights to bring or participate in a class, collective, or representative action—in any forum. While all employees hired after the date the program was rolled out in 2014 signed the agreements, those employed prior to that date did not do so.

The company decided the best course of action was to file a motion to compel individual arbitration by each employee who was covered by an arbitration agreement. The court enforced the class action waiver and the plaintiffs who signed arbitration agreements were compelled to use individual arbitration, not a lawsuit, to assert their claims. Those employees who had not signed arbitration agreements proceeded with the class action in court.

Why now?

Employers long have implemented arbitration agreements, requiring that claims relating to employment be resolved in arbitration rather than court. As an alternative to class, collective, and representative actions, employers increasingly are instituting arbitration agreements which contain class waivers, in which the parties agree that disputes between employees and employers are to be brought in arbitration on an *individual* basis, rather than in court before a judge or jury or on a class, collective, or representative action basis.

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A WORD FROM WILL AND STEPHANIE

Law students tend to view trial as the apex of practicing law. This is the stuff of TV dramas, of Academy Awards. Once we enter legal practice and service real world clients we quickly come to realize that we—as Col. Nathan Jessup explained—"can't handle the truth" that the parties involved in the litigation seldom view trial with such romanticism. A costly, drawn-out trial is rightly viewed with apprehension and is generally considered by astute employers to be the defense of last resort.

When an employment dispute arises, the ideal outcome is an amicable, mutually agreeable resolution brought about through a private discussion between the employer and the aggrieved employee. Failing that and depending on the venue and factual circumstances, the parties are often best served by taking the dispute to arbitration. Congress enacted the Federal Arbitration Act to formally codify the public policy favoring the private resolution of civil claims outside the courtroom. The U.S. Supreme Court has repeatedly and emphatically reinforced this principle that agreements to arbitrate disputes are to be honored as a matter of public policy. The High Court also has stressed that parties to an arbitration agreement should not be forced to arbitrate disputes on a class basis unless they have agreed to do so. Generally, arbitration agreements which require the individual litigation of claims serve the employer's interests. In this issue of the *Jackson Lewis Class Action Trends Report*, we discuss why this is the best practice. We also offer practical guidance for employers to ensure that they will be able to do so.

How can you draft an enforceable arbitration agreement that will allow you to defend claims on an individual basis? What hurdles do employers face in enforcing such agreements? What are the potential pitfalls and drawbacks? Those are the topics before us here.

Finally, I am delighted to introduce Stephanie L. Adler-Paindiris as my Co-Leader in the Jackson Lewis Class Actions and Complex Litigation Practice Group. Stephanie, a Jackson Lewis Principal, is Litigation Manager for the firm's Orlando, Florida, office. She brings twenty-three years of litigation experience to the role, having conducted more than a dozen trials before juries and judges in state and federal courts and participated in many arbitrations and administrative hearings. She will share her considerable wisdom on such matters in this and future issues of the *Class Action Trends Report*.

William J. Anthony

Co-Leader, Class Action & Complex Litigation Practice Group
Jackson Lewis P.C.
18 Corporate Woods Blvd, 3rd Floor, Albany, NY 12211
518.434.1300
E-mail: AnthonyW@jacksonlewis.com

Stephanie L. Adler-Paindiris

Co-Leader, Class Actions & Complex Litigation Practice Group
Jackson Lewis P.C.
390 N. Orange Avenue, Suite 1285, Orlando, FL 32801
407-246-8440
E-mail: Stephanie.Adler-Paindiris@jacksonlewis.com

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.

Jackson Lewis editorial team

Ashley B. Abel
Brett M. Anders
Stephanie L. Adler-Paindiris
Co-Leader, Class Action & Complex Litigation Practice Group
William J. Anthony,
Co-Leader, Class Action & Complex Litigation Practice Group
Brian T. Benkstein
Chad D. Bernard
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Employment Law Daily editorial team

Joy P. Waltemath, J.D., *Managing Editor* Lisa Milam-Perez, J.D., *Senior Employment Law Analyst* Ronald Miller, J.D., *Employment Law Analyst*

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Why has there been such an uptick in these agreements now? The answer is a series of Supreme Court decisions, beginning with the landmark decision in *AT&T Mobility v. Concepcion,* 563 U.S. 333 (2011), which held that arbitration agreements containing class waivers are enforceable. These decisions are rooted in the Federal Arbitration Act (FAA), which embodies a strong policy in favor of arbitration and enforcing the parties' agreement to arbitrate.

Potential advantages to arbitration as a forum

In addition to the class waiver, there are other potential advantages to making arbitration the forum for employment disputes:

- Arbitration, if managed correctly, may be less costly than court litigation:
  - Discovery, by agreement of the parties, can be more limited, including limits on e-discovery, number of depositions, and interrogatories;
  - The parties, by agreement, can have discovery disputes decided by the arbitrator via a more informal process than court motion practice;
  - The arbitration's discovery period may be shortened;
  - The actual arbitration hearing may be completed in less time, because multiple breaks are not required for a jury and the arbitrator may be willing to start early or go late into the day; and
  - An arbitration case may proceed more rapidly than litigation in court, particularly given increasingly crowded court dockets.
- The final and binding nature of arbitral awards, with only very limited grounds upon which awards may be set aside, may avoid extended delays in appeals (admittedly only an advantage to an employer when the result is acceptable).
- The parties play a role in selection of the arbitrator who will resolve their dispute.
- Unlike courtroom trials, there is no direct public access to pleadings and arbitration hearings, affording greater confidentiality to both sides and a reduced risk of exposure of sensitive information. The nonpublic forum also reduces the potential for "copycat" litigants.
- The uncertainty and unpredictability of a jury trial, and the risk of a "runaway" jury verdict, are replaced with an arbitrator's consideration.
- Given the reduced prospects for a "Lotto ticket" damages award, plaintiffs' counsel may be less enthusiastic about prolonging or trying to expand a case that goes to arbitration, and may be more motivated to work toward a prompt and efficient resolution of the dispute.
- Rolling out an arbitration agreement often provides an opportunity for employers to strengthen existing, or implement new, internal dispute resolution programs. When communicated effectively, these programs may help the parties to resolve disputes before they become "legal matters."

Potential challenges to class waivers

Given the advantages discussed above, employers may be asking themselves why wouldn't they implement arbitration agreements containing class waivers? Employers should keep in mind that the legal landscape relating to class waivers remains unsettled in some respects.

First, the National Labor Relations Board (NLRB) takes the position that mandatory arbitration agreements that require employees to waive rights to participate in class or collective actions violate employees' statutory rights under Section 7 of the National Labor Relations Act (NLRA)—even if no union is involved. In the NLRB's view, class and collective litigation amounts to protected concerted activity under the NLRA. The Board continues to challenge arbitration agreements which contain class waivers, even though the Fifth Circuit Court of Appeals has rejected the NLRB's view twice. Nonetheless, employers may well find themselves defending their arbitration agreements before that agency, and seeking court review of an adverse NLRB decision. Moreover, if at least one federal appellate court agrees with the NLRB, creating a "circuit split," the issue may be taken up by the Supreme Court. The recent vacancy on the Supreme Court, particularly given the current political atmosphere, increases uncertainty about how that Court might rule on the question.

In addition, a July 2015 executive order issued by the current administration—if it goes into effect—will prohibit federal contractors with large contracts from mandating arbitration of certain employee claims. This order is not in effect yet and its fate remains in flux, pending the issuance of final implementing regulations as well as the outcome of the upcoming election.

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Finally, federal and state courts have ruled that employers may not require that representative claims under the California Private Attorneys General Act (PAGA) be submitted to arbitration.

Potential disadvantages of arbitration

Employers should be aware that in some instances, arbitration agreements can have disadvantages:

- If plaintiffs' counsel are able to recruit significant numbers of plaintiffs on their own, without the benefit of the class or collective action procedures in court, they can exert pressure on employers by filing large number of coordinated, individual arbitration claims. For example, in order to escape invalidation of the agreement on unconscionability grounds, or because they are required to do so under existing state law, employers often agree in arbitration agreements to pick up the costs of arbitration. In view of those costs, even the threat of such coordinated actions can create leverage for plaintiffs' counsel regardless of the strength or weakness of the claims. Similarly, if the "transaction costs" for the employer in each of numerous arbitration cases will exceed the amount at issue for each case, plaintiffs' counsel will try to use that circumstance to put pressure on the employer to settle all of them.
- If the employer is forced into arbitrating claims on a class basis, rather than individually, what would otherwise have been an "opt in" collective action in court (with lower participation rate and lower exposure) is converted into an "opt out" class action in arbitration (including all or essentially all eligible class members and increased exposure).
- Because the arbitration requirement should be mutual, the employer must consider how agreeing to arbitrate its disputes with employees will impact the process for it to enforce restrictive covenant agreements such as non-competes, non-solicits, and/or confidentiality agreements.
- As noted above, the limited right to appeal an arbitrator's award leaves an employer with little recourse to challenge an adverse arbitration decision.
- Though this varies, courts may be more willing than arbitrators to dispose of plaintiffs' claims (in whole or in part) on motions to dismiss or summary judgment.
- Some of the procedural and cost-saving "advantages" in arbitration may prove to serve as disadvantages in some cases. For example, an arbitrator may allow more witness testimony than a court, thus increasing the scope of discovery or the length of the arbitration hearing.
- Instituting an arbitration agreement with a class waiver also may have some negative employee relations effects and/or garner negative publicity.

In sum, given the potential advantages and disadvantages of arbitration, an employer considering whether to implement an arbitration agreement should review its litigation history and philosophy—including whether the cases were settled, disposed of on summary judgment, or tried to verdict. Employers also should consider the above in light of their employment practices and class action risk. When doing so, they also should consider the importance of having a well-drafted agreement, so as to increase the likelihood that the arbitration agreement—and the class waiver—is more likely to be enforced if challenged.

Key provisions: state law matters

If the employer has an arbitration agreement in place with a class waiver, then when an employee files a lawsuit, the employer may file a motion to compel individual arbitration. Generally, under the FAA, a written agreement to arbitrate should be enforced according to its terms. Accordingly, a case should be compelled into arbitration if there is a valid contract under applicable state law and the dispute is covered by the agreement. In some states and courts, however, there is a long tradition of hostility to arbitration agreements. Employers should anticipate challenges to the very existence of a valid agreement, and should be prepared to meet them.

Consequently, arbitration agreements should be drafted to satisfy applicable state contract law. For example, a valid contract requires consideration. In most states, new or continued employment is adequate consideration for a contract, particularly when coupled with mutuality of obligation. In others, it is unclear. Likewise, some states require—and in all states it is a best practice—that the agreement be mutual. This means that the employee and employer *both* agree to bring disputes covered by the agreement in arbitration and not in court. This may be problematic for some employers that prefer to litigate in court claims for violations of restrictive covenants. Some courts also take the position that mutuality of obligation is

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destroyed where the employer retains the right to change the terms of the arbitration agreement unilaterally or if there is a carve-out for certain types of claims. Finally, employers should review whether the jurisdictions applicable to them require that agreements be signed and whether and how they will obtain that signature.

It is very important that the agreement state clearly that it prohibits class arbitration.

In addition, courts may recognize generally applicable contract defenses, such as fraud and procedural and substantive unconscionability, as grounds upon which to invalidate an arbitration agreement. In order to try and avoid such arguments, employers should include other provisions, such as providing for a neutral arbitrator, adequate discovery, all relief available in court, and, importantly, no cost-shifting to employees (employer-paid arbitrator and arbitration fees).

Decisions enforcing—and invalidating—arbitration agreements are issued with increasing regularity and it is paramount that employers consider carefully the state laws at issue, as well as the various provisions to include in their well-drafted agreements.

Other issues to consider

There are other, important issues to consider for a well-drafted arbitration agreement:

Class arbitration: who decides? It is very important that the agreement state clearly that it prohibits class arbitration. The agreement also should contain an unambiguous severability clause, which delineates what happens if a class waiver is invalidated for any reason. In particular, the agreement should state that arbitration is only for individual claims, and that if the class waiver is not upheld then any class claims must be litigated in court, not arbitrated.

What happens if an agreement is silent on the question of class arbitration? Silence does not equal consent, the Supreme Court has held, concluding that parties cannot be forced into class arbitration unless they expressly indicate their willingness.

However, if there is ambiguity on the point, and if the arbitrator is empowered to construe the agreement, some arbitrators are more likely to interpret the agreement to authorize class arbitration. And if an arbitrator who is acting within his or her authority to construe the parties' agreement determines that class arbitration is proper, a court is not likely to disturb that ruling—*even* if the decision is clearly unfounded. In that situation, an employer will find itself defending class claims before the arbitrator.

Claims not covered. When drafting an arbitration agreement, employers also should include provisions articulating which claims are covered and those that are not covered by the agreement. Importantly, an arbitration agreement will not insulate employers from administrative agency charges, as it cannot preclude employees from filing charges (either individually or on a classwide basis) with agencies like the federal Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), NLRB, or their state counterparts. Nor will the arbitration agreement bar the agencies from suing on employees' behalf.

Similarly, there are other claims that also must be "carved out" of a mandatory arbitration agreement because, as a matter of public policy or statute, employers are prohibited from requiring employees to arbitrate such claims. For example, these include certain whistleblower claims under the Dodd-Frank Act and worker's compensation and unemployment claims. The agreement also should contain a properly drafted "savings clause" to anticipate future changes in the law and to preserve the core agreement even if future legal developments exclude some claims from arbitration.

The bottom line

Despite the potential advantages and disadvantages of arbitration as a forum, employers should take seriously the option of instituting an arbitration agreement with a class waiver for all or some of their employees. If a decision is made to proceed with an arbitration agreement, the agreement must be carefully drafted and regularly reviewed in light of the considerations described above and in anticipation of evolving law. ■

Drafting the arbitration agreement

An arbitration agreement is a critical tool for reducing the potential costs of litigation and containing liability—but only if the agreement is enforceable and clearly sets forth procedures that will maximize arbitration's dual goals of efficiency and fairness. In drafting an arbitration agreement, employers must include certain provisions to ensure that the contract will pass judicial muster, if challenged, and that the arbitration proceeding itself will unfold in optimal fashion.

For example, a court will be less inclined to enforce an arbitration agreement that could be seen as illusory; consequently, employer and employee alike must be bound by its terms. An employer likely won't succeed in compelling arbitration if the agreement mandates that common employee claims like discrimination or wage-hour violations must go to arbitration while suits typically initiated by employers, such as for trade secret misappropriation or breach of a noncompete agreement, are excluded. Also, certain claims are simply off the arbitrator's table as a matter of law and must be carved out of your agreement for it to be enforceable.

In addition, an overly broad agreement that would mandate arbitration of *all* claims—including proscribed causes of action such as worker's compensation, unemployment claims, or other suits, as dictated by state law—likely would be met with judicial disfavor. An arbitration agreement that fails to specify that employees may still file a charge with administrative agencies would not be enforced, at least as to those claims.

Moreover, the arbitration agreement should outline the procedures that the arbitrator is to utilize in resolving a dispute. The parties are constrained by basic notions of fairness, of course, and the arbitrator's own interest in maintaining the integrity of the proceedings, so employers are cautioned against overreaching.

What to include. Your arbitration agreement should contain these terms:

- A provision clearly stating which claims are covered and which are not, making clear that the agreement is bilateral and covers claims that may be brought by either the employee or the employer
- A waiver of class, collective, and representative actions
- That the agreement is governed by the Federal Arbitration Act
- That a court will determine whether a particular dispute is arbitrable or, in the event of uncertainty (despite the above waiver), whether class arbitration is permitted
- That if the class waiver is deemed unenforceable, then any class, collective, or representative action would proceed in court, not before an arbitrator
- A carve-out provision ensuring employees that they may pursue charges with the EEOC, NLRB, DOL, or state administrative agencies
- That a neutral arbitrator will be selected by the parties, and the manner of selection
- That the employer will pay the costs of the proceedings (to the extent costs exceed what it otherwise would have cost the employee to litigate his or her claim in court), including the arbitrator's fees

Presumably, your employee handbook contains a disclaimer expressly providing that it is not to be construed as a contract. (And with good reason, lest your employees think the notion of employment-at-will does not apply in your organization.) This is why your arbitration agreement must be a separate document, entirely independent of the handbook: it *is* a contract, and you want to ensure that it is enforceable as such. Including the arbitration agreement in a "this is not a contract" document makes it much harder to do so.

For good measure—particularly for California employers—include a provision in the body of the arbitration agreement stating that the agreement itself does not alter employees' at-will employment status. (We'll discuss California's "outlier" arbitration jurisprudence in our next issue of the *Class Action Trends Report*.)

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- The specific rules or procedures that an arbitrator will utilize (or a statement that the American Arbitration Association or other established rules will be followed), including the scope of discovery to be permitted
- That a written award is required (for purposes of judicial review, should the employer seek to overturn an adverse award)
- That amendments to the agreement will take effect only after 90 days' notice
- A severability clause, which provides that any objectionable terms will be stricken and the remainder of the agreement may be enforced
- A signature line for both employee and employer—reflecting the bilateral nature of your agreement.

Be mindful, too, of the circumstances in which employees sign the agreement. This goes to concerns of contract enforcement. Employees should be invited to sign the arbitration agreement under pristine conditions after being sufficiently apprised of its terms.

What *not* to include. With an eye to surviving a potential challenge to enforceability, your arbitration agreement should exclude:

- Terms limiting the scope of potential relief that would otherwise be available in a court of law
- Terms limiting the standard time period for bringing a claim
- A provision reserving the right to amend or terminate the agreement (which would render the agreement illusory in the eyes of a court)
- Any requirements obligating an employee to pay costs over what he or she would otherwise expend in court.

The roll-out

Introducing a new arbitration policy within an organization is as much an employee relations issue as a legal one. Consider implementing arbitration as one prong of a more expansive dispute resolution procedure, which gives employees the confidence that they can first pursue any concerns they may have internally, informally, and, of course, without risk of retaliation. Given that some employees may be hesitant to sign an arbitration agreement, such a program can help ensure buy-in. It may also serve important HR goals in itself.

Start at the top? One strategy employers utilize is a phased roll-out, beginning at the upper levels of the organization. Consider having your executive team and human resources officials sign on to arbitration first, and then departmental managers, in order to "test the waters."

As the arbitration policy is implemented organization-wide, proper communication will be critical to ensure that employees understand the nature of the contract and clearly indicate their assent. In addition to the "legalese" setting forth the terms of the agreement, distribute a brief "FAQ" that explains the essential provisions and clearly illustrates the procedure for invoking the policy.

Be mindful, too, of the circumstances in which employees sign the agreement. This goes to concerns of contract enforcement. Employees should be invited to sign the arbitration agreement under pristine conditions after being sufficiently apprised of its terms. Such efforts will go a long way in assuaging a judge in the event that questions of duress or mistake are raised. For example, if your employees speak Spanish and the arbitration agreement is drafted in English, a court may find that the employees did not in fact knowingly assent to the contract (at least without evidence of a translator's presence). Perhaps the starkest example of an arguably compromised position: In one wage suit, exotic dancers were able to avoid their employer's motion to compel arbitration because they had been made to sign a mandatory arbitration agreement while in a state of undress! ■

The legislation

A discussion of the key legislation relating to employment arbitration centers, of course, on the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. The statute was enacted in 1925 in response to widespread judicial hostility to private arbitration agreements, and its main purpose was to ensure that such agreements are enforced according to their terms.

As it reiterated in its landmark decision, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the U.S. Supreme Court has described the FAA as reflecting both the "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." In line with these principles, courts must place arbitration agreements "on equal footing" with other contracts and rigorously enforce the terms of arbitration agreements that specify with whom the parties agree to arbitrate, as well as the rules under which arbitration will be conducted.

The statute. Here are the FAA's key provisions related to arbitration generally and the enforceability of arbitration agreements:

- Section 1 exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the FAA's coverage. The "engaged in commerce" language in this exemption is construed narrowly (unlike other statutes containing similar provisions, such as the Fair Labor Standards Act—where such language is read to broadly cover a large number of the nation's employees and employers). The FAA excludes from its reach only those workers who are directly involved in the transportation of goods. Were there any room for doubt, the Supreme Court made it clear in its 2001 decision in *Circuit City Stores, Inc. v. Adams* that an agreement to arbitrate federal statutory claims is enforceable under the FAA.
- Section 2, the statute's main substantive provision, makes arbitration agreements "valid, irrevocable, and enforceable" as written, save "upon such grounds as exist at law or in equity for the revocation of any contract." With this savings clause, as it has come to be known, arbitration agreements *may* be invalidated, but only by "generally applicable contract defenses, such as fraud, duress, or unconscionability." A court cannot deem an arbitration agreement unenforceable by defenses that would apply *only* to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. That is, the savings clause may *not* be applied in a manner that disfavors arbitration.
- Section 3 requires courts to stay litigation of "any issue referable to arbitration" under an arbitration agreement pending arbitration of those claims "in accordance with the terms of the agreement."
- Section 4 requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement (assuming that the "making of the arbitration agreement or the failure . . . to perform the same" is not at issue).

The remaining sections of the statute primarily set forth the procedural elements of arbitration under the FAA.

[T]he U.S. Supreme Court has described the FAA as reflecting both the "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract."

The FAA reigns supreme. The FAA preempts state law rules that prohibit arbitration of a particular type of claim. State provisions that are inconsistent with the FAA are preempted as well. Additionally, state rules that stand as an obstacle to the accomplishment of the FAA's goals are preempted. In enacting the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," the Supreme Court has stated in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). For example, the FAA has been found to preempt state rules that find arbitration agreements unconscionable because they do not abide by the Federal Rules of Evidence, or disallow jury trials, or require judicially monitored discovery. These provisions have a

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disproportionate impact on arbitration and, thus, are inconsistent with the FAA.

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. The inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or unconscionability, is alleged to have been applied in a fashion that "disfavors" arbitration. However, in *Perry v. Thomas,* 482 U.S. 483 (1987), the Supreme Court has stated that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."

[A]s the Supreme Court noted in Concepcion*, when Congress passed the FAA, it did not even envision class arbitration.*

The FAA and class arbitration. When enforcing an arbitration agreement or construing an arbitration clause under the FAA, courts and arbitrators must give effect to the parties' intentions when discerning whether the parties envisioned that arbitration would (or could) proceed on a class basis. This rationale has its basis in contract law. There are policy arguments to be made here as well. The overarching purpose of the FAA is to ensure that arbitration agreements are enforced according to their terms in order to facilitate a streamlined resolution of disputes. Class arbitration interferes with the fundamental attributes of arbitration and, thus, creates a scheme that is inherently inconsistent with the Act. Indeed, as the Supreme Court noted in *Concepcion*, when Congress passed the FAA, it did not even *envision* class arbitration.

Congress speaks again. Yet the FAA was not Congress' last word on the matter. Congress passed the Civil Rights Act of 1991 to expand the rights and civil remedies of employees victimized by workplace discrimination. Notably, Section 118 of the statute expressly provides for the use of arbitration and other means of dispute resolution, "where appropriate and to the extent authorized by law," to resolve claims under the federal discrimination statutes. In so doing, Congress once again evinced its clear intent to encourage arbitration—reaffirming the "liberal federal policy favoring arbitration"—even while enacting legislation aimed at ensuring the rights of employees, thus tacitly acknowledging that the use of arbitration is no impediment to the vindication of employee rights. ■

Jackson Lewis success story

In a nationwide class action brought by security guards who alleged they were misclassified as independent contractors, a federal district court granted the defendant's motion to compel arbitration of their ERISA, FLSA, and various state law claims. It was for the arbitrator to decide in the first instance whether the dispute was arbitrable, the court said, noting that the service agreements between the parties included specific language incorporating the American Arbitration Association's arbitration rules. That was "clear and unmistakable evidence" that the parties intended the dispute to be resolved by an arbitrator. With the assistance of Jackson Lewis attorneys, the defendant successfully fended off a challenge to the validity of those service agreements, with the court rejecting the plaintiffs' claims they were unconscionable or the product of a mistake. The plaintiffs were seeking hundreds of millions of dollars in damages on behalf of the class; however, they now must pursue their claims on an individual basis through private arbitration.

The caselaw

The key cases related to employment arbitration center largely around decisions construing the Federal Arbitration Act (FAA). Of primary importance, of course, are U.S. Supreme Court decisions interpreting the statute. The Supreme Court has had many opportunities to interpret the FAA, particularly in recent decades. Much of the Court's caselaw has originated outside the employment context, involving commercial and consumer arbitration. Nonetheless, these decisions apply to employment arbitration as well—to considerable effect.

The Supreme Court consistently has favored arbitration and the enforcement of arbitration agreements according to their terms. As the Fifth Circuit reiterated in its decision in *D.R. Horton, Inc. v National Labor Relations Board,* 737 F.3d 344 (2013): "In every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA." More importantly, for our purposes: "[T]he FAA requires not just compelling arbitration, but compelling arbitration on an individual basis in the absence of a clear agreement to proceed on a class basis." (*Jasso v. Money Mart Express, Inc*., N.D. Cal. 2012) F.Supp.2d.

The Supreme Court consistently has favored arbitration and the enforcement of arbitration agreements according to their terms.

Statutory claims covered. The first Supreme Court decision to address whether the FAA applies to the employment relationship (outside of the labor arbitration context) was *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), an opinion that may well have ushered in the modern era of employment arbitration. *Gilmer* held that an Age Discrimination in Employment Act (ADEA) claim could be subject to compulsory arbitration pursuant to an arbitration agreement. The Court found no inherent conflict between enforcing arbitration agreements purporting to cover ADEA claims and the important social policies embodied in that statute. Thus, it enforced the arbitration agreement despite the ADEA's directive that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." The Court reasoned: "The fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."

Were there any room for doubt, the Supreme Court made its position clear in 2001 with a 5-4 decision in *Circuit City Stores, Inc. v. Adams*. There, it held the FAA's reach extends to pre-dispute arbitration agreements and to all but a narrow group of seamen, railroad workers, and other transportation employees (narrowly construing the statutory exemption from coverage for workers engaged in interstate commerce). Staying the course, the Court in *CompuCredit Corp v. Greenwood,* 132 S. Ct. 665 (2012), held claims brought under the Credit Report Organizations Act (CROA) were arbitrable. This consumer credit case had important implications for arbitration in general. Again, the Court rejected the notion that certain federal statutes are inherently inconsistent with arbitration—unless Congress expressly says so. Because the CROA is silent on whether claims under the Act can be arbitrated, the FAA and its "liberal federal policy favoring arbitration" required that the disputed arbitration agreement be enforced on its terms.

Silence is not (class) consent. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), a case involving commercial arbitration, proved to be a seminal Supreme Court case regarding class arbitration. In this decision, the Court held that an arbitration panel exceeded its power under the FAA by imposing class procedures based on policy judgments rather than on the arbitration agreement itself. Underscoring the consensual nature of private dispute resolution, the Supreme Court held that parties are "generally free to structure their arbitration agreements as they see fit," and that parties may specify with whom they choose to arbitrate their disputes. However, the arbitration clause in question was silent on the issue of class arbitration. (The parties had stipulated, in fact, that there was no agreement in place regarding the availability of class arbitration.)

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The party favoring class arbitration urged that class arbitration was allowed unless expressly prohibited by the terms of an arbitration agreement. Put differently, it argued that silence should be construed as permitting class arbitration as a matter of public policy and, if class arbitration were *not* allowed, then the arbitration clause would be unconscionable and unenforceable. The Supreme Court disagreed, holding that silence could not be interpreted to allow class claims because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental."

Therefore, a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. The differences between bilateral and class action arbitration are too great for arbitrators to presume that the parties' mere silence on the issue of class arbitration constitutes consent to resolve their disputes in class proceedings.

My arbitrator, right or wrong. The Supreme Court unanimously held in *Oxford Health Plans, LLC v. Sutter,* 133 S. Ct. 2064 (2013), that an arbitrator's ruling that an arbitration agreement authorized class arbitration must be upheld—even if this interpretation of the arbitration agreement was incorrect. The Court held that the arbitrator's decision must be upheld so long as the arbitrator construed the parties' contract.

This somewhat paradoxical decision stems from the limited scope of judicial review of arbitration decisions allowed by Section 10(a)(4) of the FAA. Under that limited review, the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at *all*. *Stolt-Nielsen* did not mean that a court must overturn an arbitral decision for misconstruing a contract to approve a class proceeding. Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances," the Court said. Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its merits.

Stolt-Nielsen, then, tells the arbitrator the correct way to interpret an arbitration agreement, but does not allow a court to overturn an arbitrator's decision that gets it wrong and mistakenly approves a class proceeding.

Class waivers are valid. The most contentious issue on the employment class arbitration front is the validity of class arbitration waivers. While some skirmishes remain, the Supreme Court largely settled the dispute in *AT&T Mobility LLC v. Concepcion*, holding that the FAA preempts states from refusing to enforce arbitration agreements that bar classwide arbitration of disputes. The Ninth Circuit had ruled that a class arbitration waiver in AT&T Mobility's wireless service agreement was unconscionable and unenforceable under California law. But a sharply divided High Court reversed. In a 2011 decision, it found that California's law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA. But the majority went even further: It expressly disfavored classwide arbitration itself as inconsistent with the FAA.

In *American Express Co v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), a commercial arbitration case, the Court made it clear that arbitration could not be avoided merely because a class action waiver reduced the economic incentive to bring an antitrust claim, dismissing the contention that such a waiver precluded the "effective vindication" of federal statutory rights under the antitrust laws. The Court held that an arbitration agreement with a class waiver was sufficient to vindicate one's statutory rights so long as it did not eliminate an individual plaintiff's right to pursue his or her own statutory remedies. The lesson of *Italian Colors* is that courts may not invalidate class arbitration waivers merely because a plaintiff's cost of arbitrating a dispute individually would exceed the potential recovery.

Most recently, in its December 2015 decision in *DirecTV v. Imburgia*, the Supreme Court ruled in a 6-3 decision that a California appeals court erroneously upheld a lower court order refusing to enforce an arbitration agreement that included a class waiver. The intent of the parties in this particular case was unclear, as the arbitration agreement in the consumer contract referenced California law on class waivers which, since the contract's drafting, had been invalidated by *Concepcion*. At bottom, the majority reasoned that the state appeals court had not interpreted the arbitration agreement on equal footing with other contracts—which the FAA does not abide. Continuing to chip away at California's outlier arbitration jurisprudence in a consumer arbitration case, the High Court once again reaffirmed the preemptive supremacy of the FAA. ■

Other class action developments

A sampling of important developments in class litigation since our last issue:

Supreme Court

In a consumer case of great interest to employers, a divided U.S. Supreme Court hampered the ability of defendants to head off individual and class claims by way of an offer of judgment or settlement prior to plaintiff's request for class certification under Rule 23 of the Federal Rules of Civil Procedure. In a 6-3 decision, the Court held a plaintiff's individual and class claims are *not* rendered moot by a rejected settlement offer tendered before he moves to certify the class. The underlying suit, against a national marketing firm, was brought under the Telephone Consumer Protection Act (*Campbell-Ewald Co. v. Gomez*, January 20, 2016).

A new ERISA cause of action?

A former Dave & Buster's employee may proceed with a putative class action suit alleging that her work hours were cut to part-time so that the restaurant chain could avoid paying the looming increase in health insurance costs brought on by the Affordable Care Act, a federal district court in New York held. Moreover, the employee plausibly alleged that Dave & Buster's specifically intended to interfere with employees' benefits and that it acted with an "unlawful purpose." Denying the employer's motion to dismiss her claim for lost wages and salary incidental to the reinstatement of benefits, the district court found the employee stated a plausible claim under ERISA, Section 510, and rejected the notion that her theory of liability failed as a matter of law (*Marin v. Dave & Buster's, Inc.*, S.D.N.Y., February 9, 2016).

Discrimination claims

Denying a motion to dismiss Americans with Disabilities Act (ADA) failure-to-accommodate claims brought by the Equal Employment Opportunity Commission (EEOC) on behalf of 17 deaf or hard-of-hearing package handlers (or applicants for package handler jobs) along with "other similarly aggrieved individuals," a federal district court in Pennsylvania held the agency was not required to bring the claims as multiple individual lawsuits, nor did it need to identify any singular discriminatory procedure or policy, to litigate a systemic claim of disability discrimination. Although establishing that individuals are "qualified" is a predicate to ADA

Student athletes aren't "employees"

One of the most significant recent trends in employment litigation is a growing effort to impart "employee" status on individuals who are engaged in a relationship, economic or otherwise, with organizations that are not, traditionally speaking, "employers." Student interns, independent contractors, "gig" economy participants—all have filed suit seeking to be declared "employees" and hoping to extract wage concession from the institutions with which they have engaged, to their mutual benefit.

Similarly, in a collective action brought against the National Collegiate Athletic Association (NCAA) and its 123 member institutions with Division I athletic teams, a federal district court in Indiana ruled that former members of the University of Pennsylvania women's track team were not "employees" of the university under the Fair Labor Standards Act (FLSA), and were not entitled to be paid a minimum wage for their involvement in student athletics (*Berger v. National Collegiate Athletic Association*, S.D. Ind., February 16, 2016).

The athletes argued that their employment status was governed by the test set forth in a 2010 Department of Labor (DOL) "fact sheet" for determining whether certain internships qualify as employment under the FLSA. Rejecting their contention, the court noted that the fact sheet was not intended to be applied to student athletes.

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claims, that did not make proceeding collectively inappropriate here, where all claimants and potential claimants shared a common disability and sought or held a common package handler position, which itself had commonly applicable, easily identifiable, and easily provable qualification standards. Moreover, the EEOC is not subject to Rule 23's requirements, the court said (*EEOC v. FedEx Ground Package System, Inc.*, W.D. Pa., January 25, 2016).

The EEOC's decade-long "pattern or practice" suit alleging that Cintas Corp. unlawfully failed to recruit and hire female sales reps at its rental facilities in Michigan drew to a close with the filing of a consent decree under which the company agreed to pay $1.5 million to a class of women who were rejected for positions between 1999 and 2005. The long-running case was marked by an appeals court ruling on an issue of first impression as to whether the EEOC could even bring the case under Section 706 of Title VII of the Civil Rights Act of 1964. The settlement came after a district court rejected Cintas' bid for sanctions against the EEOC based on the agency's delayed response to requests for the identity of some 800 claimants for whom it was seeking damages. The court also refused to judicially estop the EEOC from pursuing monetary damages for more than 125 plaintiffs based on statements the agency had made in its briefings to that effect (*EEOC v. Cintas Corp.*, E.D. Mich., consent decree entered November 25, 2015).

AutoZone's motion to limit the scope of an EEOC disability discrimination suit to the three stores where named individuals had worked was denied by a federal district court. The employer contended that the agency failed to conduct a nationwide investigation to support its class allegations; however, the court said the EEOC's obligation to conduct an investigation is not subject to judicial review as to its sufficiency in order to limit the scope of the litigation. The EEOC challenged Autozone's "no fault" attendance policy after three claimants filed charges asserting that the policy adversely affected employees with disabilities. The agency found reasonable cause not only as to those individuals but also as to a "class of other employees at its stores throughout the United States." (*EEOC v. AutoZone, Inc.*, N.D. Ill., November 2, 2015).

Employee? Employer?

A federal district court in California approved a settlement resolving FLSA minimum wage claims brought

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Unlike student athletes, internships are carried out in a traditional employment setting, not an educational setting. What's more, the court added, appellate courts have long eschewed the DOL test in favor of a more flexible "primary benefit" test for determining whether a trainee is an employee under the FLSA and, under this approach, the student athletes could not be considered university employees.

Moreover, the district court relied on the Supreme Court's recognition of the country's "revered tradition of amateurism in college sports." The court also observed that, while it's no secret there are thousands of unpaid college athletes on college campuses each year, the DOL has never stepped in to apply the FLSA to them.

Ultimately, the court looked to the economic realities of the Penn athletes' relationship with their university, and concluded they were not statutory employees. "We are very pleased that the court rejected the plaintiffs' tortured efforts to analogize student-athletes to interns, instead choosing to follow well-settled case law and Department of Labor guidance establishing the absence of an employment relationship arising from mere participation in interscholastic athletics," said Paul DeCamp, a Principal in Jackson Lewis' Washington, D.C. office. Jackson Lewis represented 30 of the defendant universities in this case at the time of the court's final ruling, as well as a number of public institutions dismissed earlier in the litigation based on Eleventh Amendment immunity.

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by a class of "crowdsourcing" contributors who said they were misclassified as independent contractors. CrowdFlower gets project assignments from various customers, breaks those projects into small pieces, and assigns those pieces to "contributors." Via a website, the company distributes simple, repetitive tasks to contributors and pays them on a per-task basis, a practice known as "crowdsourcing." The company classified its contributors as independent contractors. A group of contributors brought an FLSA collective action alleging they were misclassified and unlawfully paid a rate that fell below the minimum wage. After rejecting two previous proposed settlement agreements, the court approved a second modified agreement (*Otey v. CrowdFlower, Inc.*, N.D. Cal., January 26, 2016).

[A] federal district court in California granted J.C. Penney's motion to decertify the class in a suit alleging that the retailer's "My Time Off" (MTO) policy violated the California Labor Code.

In a putative class action brought by former unpaid interns for Lions Gate Entertainment, a district court granted preliminary approval to a $1.3 million settlement resolving claims that they should have been paid for their work as statutory employees under the FLSA and state labor law. Agreeing that the company's internship policies gave rise to common questions, the court also provisionally certified the class and conditionally certified an FLSA collective action for settlement purposes only, granting the plaintiffs' unopposed motion. Under the deal, each of the estimated 1,000 class members would receive a check for either $530 or $600. The class certification ruling was informed by the Second Circuit's July 2015 decision in *Glatt v. Fox Searchlight Pictures, Inc.*, which held that the proper classification of an unpaid intern should be evaluated under the "primary beneficiary" test—a "highly individualized" inquiry that turns on several factors. Recently, the appeals court rejected the plaintiffs' request for *en banc* review in *Glatt*, giving employers within the Second Circuit greater certainty as to controlling law on the status of interns (*Tart v. Lions Gate Entertainment Corp.*, S.D.N.Y., October 13, 2015).

Wage-hour suits

Concluding that a proposed wage-hour class was overbroad because it included current employees, management associates, and employees subject to arbitration provisions, and because it was so ambiguously defined that three of the four named plaintiffs did not appear to be class members, a federal district court in California granted J.C. Penney's motion to decertify the class in a suit alleging that the retailer's "My Time Off" (MTO) policy violated the California Labor Code. The court had previously certified a class of almost 65,000 J.C. Penney employees in California, in a suit alleging that the company's vacation policy caused part-time non-management associates and management associates to forfeit vacation benefits if they were not employed on the first day of the calendar month following the month(s) during which the paid vacation benefits were earned (*Tschudy v. J.C. Penney Corp.*, S.D. Cal., December 9, 2015).

A federal court certified a Rule 23 class of some 8,250 current and former Ulta employees in a state-law wage suit contending that the national retailer unlawfully failed to compensate store employees for the time they spent waiting to have their bags inspected upon leaving the store for a rest break, meal break, or at the end of a shift. Although they conceded that an inspection itself took "about two minutes or less to complete," the employees alleged they often faced "considerable delay in getting a manager to the front of the store to conduct the inspection." They asserted a variety of California Labor Code claims, including meal and rest period and waiting time violations (*Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, C.D. Cal., November 16, 2015).

A federal court gave preliminary approval to a $5 million settlement in a wage-hour class and collective action alleging that a paint manufacturer's business development representatives were improperly classified as exempt under the FLSA and California law. The settlement is expected to pay more than $29,000 on average to each of 106 reps whose job was to visit Home Depot stores and ensure that the manufacturer's products were properly stocked and

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displayed and to train Home Depot employees and customers in how to use them. The parties disputed whether the reps fell within the "outside sales" exemptions from overtime under federal and state law. The reps claimed they were not involved in making sales, as the exemptions required, because they never rang up any sales themselves; they merely helped to stimulate sales by encouraging Home Depot to reorder products and ensuring that the products were marketed advantageously in the stores. Moreover, they performed largely manual work, they contended—moving paint, straightening the company's inventory on Home Depot shelves, checking that the color sample display in each store was fully stocked—and none of these tasks was per se "selling" (*Talamantes v. PPG Industries, Inc.*, N.D. Cal., October 16, 2015).

A federal court in Nevada signed off on a $2.8 million settlement of FLSA claims by foreign workers over unreimbursed expenses incurred in obtaining H-2A visas and coming to the U.S. to cultivate and harvest onions for an agricultural employer.

Immigration

In long-running human trafficking and discrimination litigation brought by Indian guest workers who were allegedly recruited for temporary work in the U.S., a ship building company agreed to pay an estimated $5 million to 476 workers to settle the EEOC's race and national origin discrimination lawsuit. According to the complaint, the employer recruited the workers from India through the federal H-2B guest worker program to work at its facilities in Texas and Mississippi in the aftermath of hurricanes Katrina and Rita. The EEOC alleged the employer subjected the men to a pattern or practice of race and national origin discrimination, including unfavorable working conditions and being compelled to pay $1,050 a month to live in overcrowded, unsanitary, guarded camps. As many as 24 men were forced to live in containers the size of a double-wide trailer, while non-Indian workers were not required to live in these camps (*EEOC v. Signal International, LLC*, E.D. La., settlement announced December 18, 2015).

A federal court in Nevada signed off on a $2.8 million settlement of FLSA claims by foreign workers over unreimbursed expenses incurred in obtaining H-2A visas and coming to the U.S. to cultivate and harvest onions for an agricultural employer. After taking into account the previously undisclosed attorneys' fees already paid to plaintiffs' counsel by the Mexican government, the court also found the $386,145 to be paid from the settlement fund for attorneys' fees, costs, and litigation expenses to be fair and reasonable. Peri & Sons Farms, an agricultural employer, hired foreign workers under the DOL's H-2A program to cultivate and harvest onions. The workers had to pay the cost of obtaining H-2A visas from the U.S. consulate in Mexico and the costs of lodging where the consulate was located. Upon entering the country, they had to pay for a Form I-94 from U.S. Citizenship and Immigration Services. En route, they incurred travel expenses of more than $400, and at least $100 in traveling from the employer's Nevada farm back to Mexico. Some also paid a hiring or recruitment fee of between $100 and $500 to current workers in order to be considered for employment, according to the complaint allegations (*Rivera v. Peri & Sons Farms, Inc.*, D. Nev., December 15, 2015).

Class arbitration

Noting that an arbitrator had interpreted the parties' contract and cited Eighth Circuit law as well as the standard under the FLSA for conditional certification, a federal court declined to vacate the arbitrator's decision to certify a putative collective action. The employer first moved to compel arbitration of the collective action, originally filed in federal court, but then sought to vacate the arbitrator's decision. The court refused to do so because even if the arbitrator's conclusions were erroneous, he had acted within his delegated authority (*Capital Pizza Huts, Inc. v. Linkovich*, W.D. Mo., November 24, 2015). ■

On the radar

A few of the important developments we're tracking:

Pending in the Supreme Court. The Supreme Court will review the Eighth Circuit's reversal of a district court order awarding $4.69 million in attorneys' fees and costs against the Equal Employment Opportunity Commission (EEOC) in *CRST Van Expedited, Inc. v. EEOC*. The appellate ruling was the "second major litigation" over attorneys' fees in the EEOC's sexual harassment suit against CRST, originally brought on behalf of 270 female truck drivers. According to the Eighth Circuit, the lower court erred in assuming that the EEOC had asserted a "pattern or practice" claim, dismissing that claim, and including that assumed claim as a basis for fees. The lower court also erred in concluding that the dismissal of 67 claims, based on the EEOC's failure to satisfy pre-suit obligations like conciliation, was a ruling on the merits, the appeals court found. In its petition for certiorari, the employer challenged the reversal of the hefty award, which came after CRST managed to get the pattern-or-practice case narrowed to just one claimant. Oral argument is scheduled for March 28.

The Supreme Court also has agreed to review the Ninth Circuit's determination in *Encino Motorcars, LLC v. Navarro* that an auto dealership's service advisors did not fall within the Fair Labor Standards Act (FLSA)'s overtime exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." In reaching its conclusion, the Ninth Circuit departed from the approach taken by the Fourth and Fifth Circuits, granting deference to the Department of Labor (DOL)'s regulatory definitions in the face of statutory ambiguity and reversing the district court's dismissal of the service advisors' FLSA and state-law overtime claims. Oral argument is scheduled for April 20.

The Court heard oral arguments in November 2015 in *Tyson Foods, Inc. v. Bouaphakeo*, a case in which the Eighth Circuit rejected a bid by Tyson Foods to overturn a district court order certifying an FLSA collective action and a Rule 23 class action in an overtime suit. Hourly production workers at a pork processing plant brought suit, alleging they should have been paid for time spent donning and doffing personal protective equipment. According to Tyson, the appeals court sanctioned the use of "seriously flawed procedures" to certify FLSA collective and Rule 23(b)(3) class actions. The district court had certified the class based on the existence of common questions about 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 court allowed the plaintiffs to prove liability and damages with "common" statistical evidence. According

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According to Tyson, the appeals court sanctioned the use of "seriously flawed procedures" to certify FLSA collective and Rule 23(b)(3) class actions.

The DOL's Wage and Hour Administrator issued an Administrator's Interpretation on "joint employment" under the FLSA. Released in January 2016, the document sets forth a sweeping definition of joint employment—broader than both the "common law" test and a much maligned standard recently adopted by the National Labor Relations Board in its controversial August 2015 decision in *Browning-Ferris Industries*. The expanded definition also applies to the Migrant and Seasonal Agricultural Worker Protection Act and, according to a fact sheet released in conjunction with the document, to the Family and Medical Leave Act as well.

The implications for class litigation of the DOL's new standard, and the increasingly sweeping scope of "joint employment" among the federal agencies generally, will be the subject of a forthcoming issue of the *Class Action Trends Report*.

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to Tyson, that decision "erroneously presumed all class members are identical to a fictional 'average' employee."

Does a person suffer an injury solely because a consumer reporting agency has published inaccurate information about him? Can Congress give him the ability to sue for a violation of a statutory right if he had no concrete injury? The issue is a significant one for employment lawyers: An individual's standing to sue an employer for a statutory violation involving no actual damages is critical for assessing potential liability, especially in the context of class action lawsuits. And it's the issue that the High Court must grapple with in *Spokeo, Inc. v. Robins*. Oral arguments in the case, held in November 2015, explored what a person must show to demonstrate a concrete injury, which is necessary to establish federal court jurisdiction. The 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.

Only in California. One oddball provision of California law requires employers to provide "suitable seats" for employees if the nature of the employee's duties "reasonably permits the use of seats." In recent years, a wave of class action suits arose under these "suitable seating" provisions, embodied in California's wage orders, with employees challenging big-name companies in retail, banking, and other industries for allegedly failing to comply. While the issue may seem inconsequential at first blush, this is high-stakes, multi-million dollar litigation for employers facing large class actions alleging longstanding violations. The Ninth Circuit asked the California Supreme Court to provide guidance on how to interpret the state's suitable seating requirement. To this end, the state high court heard oral arguments in January in two cases against CVS Pharmacy and JP Morgan Chase. The decision, to be issued within the next few months, could well spur further class litigation on this issue.

Agency rulemaking. Certain to invite more wage-hour collective actions—and much greater potential liability to employers—the Department of Labor's revised overtime regulations are currently slated for July 2016 issuance, according to recent indications from Patricia Smith, Solicitor of Labor. (The release date has been a moving target, but the latest comments appear to be solidifying consistently around July publication.) Among other provisions, the proposed rule would sharply increase the standard salary level that an employee must earn before the "white collar" exemptions from overtime pay would apply. ■

Up next...

We will continue to explore class arbitration in our next issue of the *Class Action Trends Report*, looking at the "nuts and bolts" of the process and how it differs from trial, strategies used by plaintiffs' attorneys, and tips for auditing your arbitration agreements and practices to ensure they are effective and enforceable.