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New York State Appeals Court Finds Employee Class Action Waivers Unenforceable

Employers will recall that the National Labor Relations Board (the “Board” or “NLRB”) has repeatedly held that mandatory arbitration agreements barring employees from participation in class, collective, and representative actions unlawfully interfere with employees’ right to engage in protected, concerted activity regarding their terms and conditions of employment under the National Labor Relations Act (the “NLRA”). Although the Second, Fifth, and Eighth Circuit Courts of Appeals have rejected the Board’s position, finding that mandatory employee arbitration agreements that include class action waivers are enforceable under the Federal Arbitration Act (“FAA”), the Seventh and Ninth Circuits have sided with the NLRB and refused to enforce class action waivers in employee arbitration agreements. In January 2017, the Supreme Court granted certiorari to resolve the circuit split, and will hear consolidated appeals from the Fifth, Seventh, and Ninth Circuits. The case is currently pending before the Court.

On July 18, 2017, a five-member panel of New York’s First Department of the Appellate Division (encompassing Manhattan and the Bronx), departing from the Second Circuit, ruled that the NLRA prohibits employers from requiring covered employees to waive their rights to pursue class, collective, and representative claims. [*Gold v. N.Y. Life Ins. Co.*, 2017 NY Slip Op. 05695 \(1st App. Div. July 18, 2017\).](#)

Melek Kartal, previously an insurance agent for New York Life Insurance Company (“NY Life”), joined a lawsuit brought by a number of her former colleagues and sued NY Life in state court on behalf of herself and other insurance agents, alleging that the company made unlawful deductions from their wages and failed to pay certain employees the minimum wage and overtime premiums required by New York’s Labor Law (“NYLL”). NY Life asked the lower court to require Kartal to arbitrate her claims in an individual capacity, citing an arbitration agreement requiring Kartal to arbitrate wage and hour claims and expressly waiving her right to pursue class, collective, or representative actions. NY Life had required Kartal to sign the arbitration agreement as part of the company’s standardized insurance agent contract.

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The New York County Supreme Court granted NY Life's request, enforcing Kartal's arbitration agreement,¹ and a five-member panel of the First Department reversed. In a 3-2 decision, the state appeals court rejected the Second Circuit's holding in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013), and held that the NLRA guarantees employees the right to engage in protected concerted activity, including the collective use of judicial forums, and requiring employees to waive that right violates the NLRA. While the court did not expressly decide whether employees can be required to arbitrate claims on a class or collective basis (Kartal's arbitration agreement expressly provided that class claims would proceed in court should the waiver be unenforceable), the First Department's ruling relied heavily on the Seventh Circuit's reasoning in *Lewis v Epic Sys. Corp.*, 823 F3d 1147 (7th Cir. 2016), where the Seventh Circuit noted that the NLRA would not prohibit agreements to arbitrate class or collective wage and hour claims. Similarly, the First Department did not decide whether the class action waiver would violate the NLRA if the arbitration agreement had been optional, rather than mandatory. The First Department's ruling does not affect the viability of mandatory individual arbitration agreements with workers who do not have collective action rights under the NLRA, such as managers and supervisors.

While we await the Supreme Court's ruling on these issues, employers should be cautious about adopting and enforcing mandatory employee arbitration agreements containing class, collective, and representative action waivers, as these may not be enforceable in the First Department. However, because the state court's decision does not supersede the Second Circuit's interpretation of the NLRA and FAA, federal district courts in New York may continue to follow *Sutherland* and enforce employee class action waivers unless and until that precedent is overturned. The division in the courts created by *Gold* could, however, motivate plaintiffs seeking to avoid the restrictions of individual arbitration agreements to file their claims in state court, while omitting parallel claims under federal law.

As a result, New York employers would be wise to review their employment agreements proactively to assess the continued enforceability of any class action waivers, and more generally their arbitration provisions, and consider appropriate adjustments.

If you have any questions about the First Department's decision in *Gold*, or would like additional information, please contact Nick Bauer at (212) 758-7793, or any other attorney at the firm.

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¹ The lower court did not decide whether the NLRA precluded NY Life's mandatory class action waiver, as Kartal did not raise this argument prior to the appeal.