Labor and Employment Alert: Sixth Circuit Upholds Mandatory Arbitration of FLSA Claims

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In August 2018, in *Gaffers v. Kelly Services, Inc.*, the Sixth Circuit Court of Appeals upheld an arbitration agreement that required individual arbitration of claims under the federal Fair Labor Standards Act (FLSA). The Court's decision follows the rationale of the Supreme Court's recent holding in *Epic Systems Corp. v. Lewis*. Read more the Supreme Court's decision in this *Labor and Employment Alert*.

Jonathan Gaffers was employed by Kelly Services, Inc. and alleges that Kelly Services underpaid him and his fellow virtual employees by shortchanging them for time spent logging in to Kelly Services' network, logging out, and fixing technical problems that arise. Gaffers filed a collective action under the FLSA on behalf of himself and some 1,600 co-workers. About half of these co-workers signed an arbitration agreement with Kelly Services stating that individual arbitration is the "only forum" for employment claims, including unpaid-wage claims. Kelly Services moved to compel individual arbitration under the Federal Arbitration Act (FAA). Gaffers argued, and the district court agreed, that the National Labor Relations Act (NLRA) and the FLSA rendered the arbitration agreements unenforceable. In light of the Supreme Court's decision in *Epic*, the Sixth Circuit reversed.

The Court first quickly dispensed with Gaffer's argument that the NLRA makes these arbitration agreements illegal because "the Supreme Court heard and rejected these arguments last term in *Epic*."

Gaffer's next argument that the FLSA precludes these individual arbitration agreements because the FLSA allows collective actions fared no better. A federal statute is preempted by the FAA unless there is a "clear and manifest" congressional intent to make individual arbitration agreements unenforceable. The FLSA provision at issue provides that an employee can sue on behalf of himself and other employees similarly situated. "In other words, it gives employees the *option* to bring their claims together. It does not require employees to vindicate their rights in a collective action, and it does not say that agreements requiring one-on-one arbitration become a nullity if an employee decides that he wants to sue collectively after signing one."

Thus, the Court explained, both statutes can be given effect: "employees who do not sign individual arbitration agreements are free to sue collectively, and those who do sign individual arbitration agreements are not."

The Court also declined Gaffer's request – premised on "policy reasons" – to depart from *Epic's* holding and the FAA's text. "Whether modern arbitration practice is consistent with Congress's goals for the FLSA is a question that only Congress can answer."

Finally, the Court rejected Gaffer's argument that, because the FLSA gives employees a right to pursue a *collective* action, the agreements they signed with Kelly Services requiring *individual* arbitration are illegal and therefore unenforceable. The Court explained individuals can attack an arbitration agreement like they would any other contract, but they cannot attack it simply because it is one involving arbitration. The holding in *Epic* precludes this. Consequently, objecting to an agreement because it requires individualized arbitration instead of class or collective proceedings does not make the agreement illegal and unenforceable.

Employers in the Sixth Circuit (Kentucky, Michigan, Ohio and Tennessee) may want to consider whether having their employees sign arbitration agreements that include FLSA claims makes sense. Contact your Vorys lawyer if you have questions about mandatory arbitration agreements.