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Is a FLSA Collective Action Waiver by Itself in a Severance Agreement Enforceable? Sixth Circuit Says "No."

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Employers have recently enjoyed some victories in the U.S. Supreme Court and in the California Supreme Court regarding the use of class/collective action waivers in employment arbitration agreements (e.g. *Italian Colors* and *Iskanian*). Class/collective action waivers in arbitration agreements generally prohibit the employee from forming or joining a class or collective action litigation or arbitration addressing employment-related claims against an employer, including, for example, violation of the Fair Labor Standards Act. This is an effective tool for employers to limit exposure and liability in wage/hour class and collective action litigation. So, if an employer can utilize a class/collective action waiver in an employment arbitration agreement then it makes sense that the employer can include one in a severance agreement just the same, right? Wrong said the Sixth Circuit, in ***Killion v. KeHE Distributors, Inc.***

Killion addressed whether to enforce a class/collective action waiver included in severance agreements provided to approximately 70 employees terminated in connection with a restructuring. Several employees sought to ignore the waiver when they brought a collective action lawsuit alleging overtime violations under the FLSA.

The employer of course thought it would be able to easily defeat the employees' efforts to proceed collectively given the waiver and based on recent employer-friendly appellate decisions regarding waivers in employment arbitration agreements. And while the district court agreed with the employer regarding the applicability of the class/collective action waiver, the Sixth Circuit Court of Appeals did not.

The Sixth Circuit instead noted that there was no arbitration provision in the severance agreements at issue, and therefore *American Express* and similar cases regarding class/collective action waivers in employment arbitration agreements, were not controlling. Instead, it found that its prior 2013 decision in *Boaz v. FedEx Customer Information Services, Inc.* controlled as it involved the waiver of an employee's FLSA rights. The *Boaz* decision stated that an employment agreement cannot be utilized to deprive employees of their statutory FLSA rights. And in the *Killion* decision, the Court found that "*Boaz* therefore implies that a plaintiff's right to participate in a collective action cannot normally be waived." So, the *Killion* court concluded: "[b]ecause no arbitration agreement is present in the case before us, we find no countervailing federal policy that outweighs the policy articulated in the FLSA."

Killion teaches us that simply putting a FLSA collective action waiver in any type of employment agreement is not going to work. Well, at least not in the Sixth Circuit. If employers are going to use a class or collective action waiver, FLSA or otherwise, in an employment or severance agreement then it should be tied to or part of an arbitration agreement or provision so employers will be in the best position to successfully argue that the waiver is appropriate and enforceable. So, employers, take a look at your employment or severance agreements that have those class or collective action waivers because you may need to make some changes.

Authors