

COUNSELOR'S CORNER

Tips to Help Avoid Class Action Litigation

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Taking advantage of recent case law developments can assist financial institution employers in avoiding and/or minimizing their exposure to class and collective action litigation. For example, courts have become increasingly inclined to enforce employment-related arbitration agreements that waive the employee's ability to pursue his or her claims on a class or collective action basis. Further, the U.S. Supreme Court has allowed for the possibility that an offer of judgment to an individual claimant in a Fair Labor Standards Act (FLSA) collective action case may moot not only that individual's claim, but also the claims brought on behalf of the putative collective action members. Developing case law is establishing whether and how this ruling can be applied in the Rule 23 class action context. Financial institutions should consider these increasingly available strategies to help reduce the risk of becoming embroiled in class or collective action litigation.

Class Action Waivers

In a significant victory for employers, the Fifth Circuit Court of Appeals recently affirmed its decision in *D.R. Horton v. NLRB*, where the court considered a prior decision by the National Labor Relations Board (the NLRB). That controversial NLRB decision had held that it was an unfair labor practice for the employer to require its employees to sign mandatory arbitration agreements in the context of their employment agreement, wherein the employees were required to waive their ability to pursue legal claims on a class or collective action basis. In a favorable ruling for employers, the Fifth Circuit's

decision rejected the NLRB's holding. The court relied on the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, wherein the Supreme Court struck down a California rule banning class action waivers in consumer arbitration contracts. The Fifth Circuit's decision in *D.R. Horton* affirmatively expanded the *Concepcion* court's analysis to the employment agreement arena, and now courts are increasingly finding that employers are permitted to include class and collective action waivers in arbitration agreements with their employees. Without question, this is a tool that financial institution employers should consider using in efforts to avoid expensive class and collective action litigation.

As of now, the NLRB has not indicated whether it will appeal the Fifth Circuit's rulings to the U.S. Supreme Court. However, because the great weight of courts are rejecting the NLRB's finding that a class action waiver is an unfair labor practice, financial institution employers should consider whether class or collective action waivers might be a prudent part of their employment and arbitration agreements.

Offers of Judgment

In *Genesis HealthCare Corp. v. Symczyk*, the U.S. Supreme Court held that a defendant's offer to satisfy the named plaintiff's interest in the case mooted her individual claim and the entire collective action she purported to bring under the FLSA. While the court's ruling applied to collective actions — as opposed to class actions — lower courts have been assessing whether and how the



court's ruling in *Genesis* applies to class actions. Currently, the courts are somewhat split. In light of the unsettled nature of the law in this area, defendants considering an early settlement strategy in class actions may want to consider offers of judgment early on in the case. Such offers should be made before class certification, when the interests of the unnamed class members must be considered by the court. Further, in FLSA collective actions, offers of judgment remain viable options for early resolution of those matters.

In light of the increasing ability of financial institutions to take steps to minimize the potential exposure to class and/or collective action litigation, we recommend consulting with counsel about the possibility of including mandatory arbitration provisions in your employment agreements and to consider other available options that can help you avoid costly class and/or collective action litigation. 



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