CLASS ACTION TRENDS REPORT

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Who gets notice of a collective action?

In the first federal circuit court decision to address a procedural matter of growing importance in class litigation, the U.S. Court of Appeals for the Fifth Circuit, which has jurisdiction over Louisiana, Mississippi, and Texas, held that following the conditional certification phase of a case, notice of a collective action cannot be sent to employees who have entered into arbitration agreements that include class waivers.

The decision was issued in a Fair Labor Standards Act (FLSA) overtime collective action involving a potential class of 42,000 current and former call center employees—about 35,000 (or 85 percent) of whom had consented to arbitration. The appeals court struck down a district court decision that required the employer in this "off the clock" suit to turn over to plaintiffs the personal contact information for its "arbitration employees" in order to send them notice of the pending action.

While district courts have discretion to determine who is to receive notice of a pending collective action, they do not have "unbridled discretion," the appeals court stressed. Their notice-sending authority is limited to notifying *potential plaintiffs*. Alerting those who cannot participate in the collective action by virtue of having waived the right "merely stirs up litigation," the appeals court wrote. Moreover, providing notice to these individuals is inconsistent with their arbitration agreements and contrary to the goals of the Federal Arbitration Act (FAA), the appeals court concluded.

District courts have split over the question. Recently, the question has been presented to the U.S. Court of Appeals for the Seventh Circuit, which has jurisdiction over Illinois, Indiana, and Wisconsin, which granted interlocutory review on May 3 of a case in which a district court in Illinois granted conditional certification.

Why it matters

Whether notice of a collective action may be sent to employees who have entered into arbitration agreements is the latest front in the ongoing legal battle over whether employers and employees can agree to resolve their disputes through individual arbitration, rather than class or collective litigation or arbitration.

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A WORD FROM STEPHANIE, DAVID, AND ERIC

"Neither snow nor rain nor heat nor gloom of night" stays postal carriers from their appointed rounds. Defense counsel facilitates the speedy completion of those rounds by working to keep the weight of those mail satchels light through limiting the scope of notice sent to putative collectives and classes. Indeed, many companies implement expansive arbitration programs with class-action waivers. An effective arbitration agreement may wash away the potential for sizable collectives. However, as a Denzel Washington movie character once aptly noted: "If you pray for rain, you've got to deal with the mud too."

In this issue of our *Class Action Trends Report*, we cover the growing tendency of employers to limit or outright abandon arbitration programs. While an effective arbitration program may wash away the potential for a large collective action, mud may come along with that benefit in the form of repeated arbitrations, higher costs *(e.g.,* legal and arbitration fees), and, to the extent matters are also filed in the courts, imprecise classes or subclasses. Put simply, employers appear to be reconsidering whether the mounting hurdles to enforcing an arbitration agreement undermine the benefits associated with arbitration programs altogether.

Whether an employee had entered into an arbitration agreement is certainly a primary consideration with respect to the scope of a potential collective. One of the first disputes in any collective action is who will receive the court-supervised notice. Among others, the considerations include the potential size of the collective, the likelihood of participation, the potential scope of damages based upon the makeup of the collective, and the breadth of any potential release in the event of a resolution. Additionally, factors such as geography, disparate policies or practices, and the timeframe associated with the alleged violation may be considered in determining who receives notice of the collective action. This obviously begs the question of precisely how counsel and the court finally determine who receives notice. And, as we note in our discussion, "It all starts with notice."

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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.

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"The plaintiffs' bar has been very antagonistic to arbitration agreements and has been trying to do everything they can to invalidate them," notes Stephanie L. Adler-Paindiris, Principal in the Orlando office of Jackson Lewis and Co-Leader of the firm's Class Actions and Complex Litigation Practice Group. "However, decision after decision from the Supreme Court has upheld arbitration from various lines of attack. Absent legislative changes, the door to these legal challenges has been nailed shut with the Court's decision in *Epic Systems Corp. v. Lewis*."

"The plaintiffs' bar has been very antagonistic to arbitration agreements and has been trying to do everything they can to invalidate them."

In the face of numerous Supreme Court defeats, the plaintiffs' bar has changed tactics. "Plaintiffs' attorneys have found creative ways to chip away at the right to a class action waiver to make it extremely unpalatable for employers to use arbitration," Adler-Paindiris observed. "They use any tools available to find every possible plaintiff who has signed an arbitration agreement." One such tool is sending notice of a collective action to employees who have entered into arbitration agreements.

Adler-Paindiris illustrates the issue with the following hypothetical: "Consider a class of 50,000 people and 25,000 of them, for example, may have signed an arbitration agreement. When some potential class members have arbitration agreements and others don't, plaintiffs' attorneys still try to get the coveted list of names so they can file hundreds, if not thousands, of arbitrations—making the employer suffer a death by a thousand cuts." Moreover, arbitrability aside, the scope of notice can be one of the biggest determinants of class size and thus, potential liability. "It all starts with notice," Adler-Paindiris stressed.

"Certainly, the size of the putative class is directly related to the potential liability the employer faces. The real problem, however, is that the inclusion of arbitration-eligible employees as potential class members is likely to both drive up the costs of any settlement entered into before the final certification decision (because such a settlement is usually based on the size of the potential class) and dramatically increase the employer's cost of defense," adds David E. Martin, a Principal in the St. Louis, Missouri, office of Jackson Lewis.

The mini-trial: Is the arbitration agreement valid?

If the purpose of notice is to inform individuals who may want to opt in to a lawsuit about the collective action, then sending notice to individuals with arbitration agreements is improper because they cannot join the collective action, Adler-Paindiris explained. In the case before the Fifth Circuit, the lower court said it could not determine there was *no* possibility that the employees with arbitration agreements would be able to join the collective until the employer filed a motion to compel arbitration against specific individuals. Consequently, the employer was ordered to produce contact information for all 42,000 putative potential members.

However, the appeals court explained that in order for a district court to send notice of a collective action to an employee with an arbitration agreement, the record would have to show that nothing in that agreement would preclude the employee from joining the litigation. That is, a district court cannot order notice if a preponderance of the evidence shows the employee has a valid arbitration agreement waiving the right to participate in a class or collective proceeding.

This leads to the legal question of whether the arbitration agreement is valid. Consequently, before a court will exclude employees with arbitration agreements from receiving notice, the defendants may have to litigate their arbitration agreements first.

Unfortunately, the Fifth Circuit offered little guidance on this issue, "leaving the door open for plaintiffs to challenge the agreements," Adler-Paindiris said. The employer has the burden to show the arbitration agreements are valid and how it will all play out is still unclear. Adler-Paindiris noted, "In addition to signed

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arbitration agreements and an affidavit from a records custodian, what kind of evidence will courts consider? Will it turn into a mini-trial as to whether the employee knowingly entered into the agreement?"

The job of the defense is "to make crystal clear that all of the elements of a valid arbitration agreement are present," Adler-Paindiris advised. This is a matter of state contract law. While arbitration agreements are similar, state laws vary, she noted, so it can be a challenge, especially in a collective action involving a 50-state employer. The best practice for an employer that has implemented a national arbitration program is to evaluate the applicable state laws. Still, the requirement that an employer prove the validity of the arbitration agreement while at the same time they are opposing conditional certification is another hurdle to utilizing a program specifically intended to streamline the resolution of employment disputes.

A question of fairness

"If the idea of notice is to ensure that potential opt-in plaintiffs are informed of a pending lawsuit so that they can choose to participate, there is little point in providing notice to individuals who cannot participate," Adler-Paindiris reasoned. "There is no inherent right for all employees to receive notice of a potential FLSA claim. At some point, sending notice to employees with arbitration agreements is punitive to employers."

The wide dissemination of notice to a company's entire workforce, when the vast majority of the workforce are ineligible to participate in the action, also means the wide circulation of unproven allegations that it has violated the law. "Consider the employer that finds itself facing an allegation it strongly believes to be untrue," Adler-Paindiris posits. "Yet, just on the weight of mere allegations from just one or two disgruntled employees, who aren't required to provide any proof at that initial stage, a court may order that all of your current and former employees be notified of this allegation. To give notice based on such a scarcity of evidence is really a due process concern for the defendant burdened with demonstrating why the claim has no merit."

"It's overwhelming to an employer. Especially a small company, a privately held company," she added. "People think these claims are filed only against Fortune 50 companies, but they're not. They're filed against pizza parlors and cleaning businesses. And they are detrimental on so many levels—to an employer's finances, its reputation. Maybe the employer can stick it out and prove that it did not violate the law in 18 months, but the damage to its business has already been done."

Additional challenges

Exacerbating the challenge for employers is the lack of uniformity in how courts weigh the need to notify potential claimants against the reputational interests of the employer. "There is such a vast disparity throughout the country as to the level of examination courts will undertake before notice is approved," Adler-Paindiris stated, noting the outcome may vary based solely on the jurisdiction. "Having worked on cases throughout the country, it is astounding how the Fair Labor Standards Act's notice provision is interpreted so differently in different courts. For example, some district court judges

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When notice goes viral

Amendments to the Federal Rules of Civil Procedure that took effect December 1, 2018, permit notice by social media for any class certified under Rule 23(b)(3) or to a class proposed to be certified for purposes of settlement. The court is to exercise its discretion to select the appropriate means of disseminating notice.

"The availability of new technologies and new ways to facilitate notifying potential claimants," Adler-Paindiris said, "should not mean that notice of a complaint, which is only an allegation, be routinely distributed on social media platforms. The courts should give some consideration to the impact of using such tools to spread unproven claims."

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in the Eleventh Circuit look very seriously at whether notice should go out," she said. "They really take their time and evaluate the evidence in that initial motion for conditional certification. On the other hand, other Circuits have very different views on when to grant notice, usually erring on the side of providing notice in most cases."

To be clear, arbitration—when used as intended— benefits both employers and employees ...

Plaintiffs' counsel often ask for information and attempt to make it appear to the Court like it is not a problem to produce. Yet, production of such information can be extremely difficult to obtain, particularly when the defendant is a smaller and less sophisticated employer," Adler-Paindiris noted. Courts may not appreciate that gathering certain information may require a manual search of files that are sitting out in storage somewhere, she explained. Consider that, in the underlying Fifth Circuit case, the district court gave the employer just two weeks to produce contact information for 42,000 current and former employees. It is no small task.

Arbitrations by the thousands

If a court permits notice to go out to individuals who have entered into arbitration agreements, then some of those individuals are likely to express interest in asserting a claim. Rather than seek to add these individuals to the collective, the plaintiffs' counsel are likely to file individual arbitrations on behalf of each claimant who signed an arbitration agreement.

Once notice goes out, and the plaintiffs' counsel has unearthed as many claimants as possible, "they can set out to make arbitration as cumbersome as possible for the employer," Adler-Paindiris pointed out. "Sometimes they won't agree to the same arbitrator. In that case, the employer then has to face numerous arbitrators, all issuing different evidentiary rulings. If one arbitrator makes the employer produce certain documents, that now means opposing counsel has those documents in *all* the arbitrations."

"From a practical perspective, it really opens the eyes of the company when they see the real, on-the-ground, nitty-gritty implications of litigating 100 or more arbitrations with seven different arbitrators, and how frustrating and time consuming that process can be," Adler-Paindiris observed.

"Frankly, plaintiffs' attorneys hate it, too," Adler-Paindiris stated. Some of the major plaintiffs' firms are attempting to hire significant numbers of attorneys to handle these hundreds of arbitrations. However, many plaintiffs' counsel may not have the financial resources to pursue hundreds of arbitrations and can face the prospect of financial ruin if they are nevertheless required to prosecute these arbitrations on an individual basis. This may lead to a settlement proposal from plaintiffs' counsel. Class counsel commonly will suggest that the employer simply waive arbitration at this stage, given the costs and complexity involved. (Of course, avoiding arbitration is typically their aim from the start.) "However, some employers fear that if they waive arbitration for one group of claimants, it's a slippery slope, and it could diminish their arbitration programs in general," she explained. "Most companies with arbitration programs in place have already done the difficult cost-benefit analysis and feel quite strongly that arbitration is the better approach for their organization."

To be clear, arbitration—when used as intended—benefits both employers and employees, with its streamlined proceedings and prompt resolution of claims. It is the distortion of the arbitration process that is cause for concern. As the Fifth Circuit pointedly feared that sending notice of a collective action to employees with arbitration agreements "merely stirs up litigation," it is likewise true that this latest tactic by plaintiff's counsel "merely stirs up arbitration." ■

To arbitrate or not to arbitrate?

Despite the latest resounding victory for arbitration at the U.S. Supreme Court in *Epic Systems Corp. v. Lewis*, a growing number of employers have begun to reconsider their arbitration programs. Several high-profile companies announced they will no longer require employees to arbitrate their claims. What has prompted these organizations to rethink the use of arbitration to resolve employment disputes?

"The popularity of arbitration agreements has ebbed and flowed during the last 20 years," said Stephanie L. Adler-Paindiris. Although the use of arbitration rose considerably with the dramatic increase in wage-hour class actions and the growing costs and risks of employment litigation, she explained, several factors in recent years have spurred a move away from arbitration:

- **Public opinion.** In the aftermath of the #MeToo movement, some employers have been swayed to discontinue arbitration of sexual harassment claims. Publicly traded organizations are particularly vulnerable to these social pressures that unfortunately do not fully comprehend the benefits of arbitration. The plaintiffs' bar, too, has entered the fray, because although arbitration benefits their client, it does not benefit their own ambitions to turn their client's case into a class action. "Plaintiffs' attorneys are using social pressure to shame employers into abandoning arbitration, another way for them to erode arbitration agreements," according to Adler-Paindiris.
- **Pre-arbitration litigation.** "The cost of enforcing arbitration when faced with a court challenge can get very expensive. And that's a strategy the plaintiffs' bar uses to make arbitration less attractive and encourage employers to waive the agreement," Adler-Paindiris explained. "There are several pressure points at which the company starts to think, 'Is this really worth it?'"
- **Death by a thousand arbitrations.** Plaintiff's attorneys have adopted a new tactic when their attempts to extract large settlements via collective action are thwarted by a prospective client's having agreed to arbitrate disputes with his employer: They try to "stress the system" by filing dozens of arbitration demands meant to pressure the employer into waiving the arbitration agreement. A lot of companies simply cannot afford the filing fees, much less defend multiple arbitrations," notes Eric R. Magnus, Principal in the Atlanta office of Jackson Lewis and Co-Leader of its Class Actions and Complex Litigation Practice Group.
- **"Splitting the baby."** Arbitrators are often inclined to arrive at a middle-ground resolution. "Arbitrators want to do the right thing and rule definitively. However, unlike judges in court, there is pressure on arbitrators; if you are a full-time arbitrator, you want the parties to continue to select you as an arbitrator and recommend you to colleagues. Consequently, you do not want to issue decisions that will alienate one side or the other. Most arbitrators are also mediators and their natural inclination is 'How can I get these parties to the middle?'" A compromise solution may not be desirable for an employer with a strong defense to a claim.
- **Not the panacea expected.** "One of the key reasons employers favored arbitration was the notion that it was quicker and cheaper—that arbitrating a case was going to be more cost-effective and streamlined, and resolution would come sooner. But, in my experience, that's just simply not the case," Adler-Paindiris said. "The arbitrations I have handled are no less expensive than a court hearing. In an arbitration, you are paying the judge's salary and the rent for the hearing room." Moreover, employers are less likely to obtain summary judgment in arbitration and are more likely to proceed to a hearing when the employer might have won a motion for summary judgment in court. Arbitration is not always an employer-friendly forum and certain of its features, such as limited reviewability of arbitration decisions, can work *against* the employer in some instances.
- **Piling on arbitration.** While the U.S. Supreme Court hands defeat after defeat to those seeking to attack and invalidate arbitration, the High Court's staunch support for arbitration is by no means universal. Several district court judges have voiced their disapproval of mandatory arbitration, even as they enforce arbitration as the law requires. Some state agencies and legislatures have sought to rein in its use. While the Republican-majority National Labor Relations Board would oppose the notion that mandatory arbitration violates the National Labor Relations Act, career staffers

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at the regional level tend to take a more hostile view. Employee-rights activists and plaintiffs' organizations actively advocate against mandatory arbitration. Among the numerous reasons for abandoning or scaling back arbitration programs, "these recent attacks in the public on arbitration absolutely must be on that list," Adler-Paindiris said.

- **Continued uncertainty.** Although the law is squarely on the side of arbitration, other factors have sparked concern. The plaintiffs' bar continues to adjust to adverse court decisions by devising new ways of circumventing, or at least undermining, arbitration, altering the value proposition of employers' arbitration programs. The notice issue in conditional certification of FLSA collective actions, discussed in the lead story of this issue, is a prime example.

"The Supreme Court and the circuit courts have clearly signaled that arbitration is a proper and viable means of resolving disputes," Adler-Paindiris stressed. "So employers that have gone through the difficult analysis of whether or not to implement an arbitration program expect some degree of finality with respect to that decision. Yet a district court's ability to circumvent the employer's arbitration program by having 'discretion' to give notice to employees with arbitration agreements puts into chaos the employer's whole program of arbitration and the certainty that was expected from the Supreme Court consistently upholding arbitration."

Finally, in addition to changing public opinion, arbitration can be vulnerable to shifting political winds. In the Supreme Court, the Federal Arbitration Act (FAA) is sacrosanct, but it is only a statute. Adler-Paindiris cautioned, "Anything that stems from an act of Congress can be undone by an act of Congress."

Benefits of the arbitral forum

Notwithstanding these growing concerns, arbitration, for many employers, remains an essential tool. Arbitration continues to offer numerous advantages over court litigation. To name a few:

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Confidentiality under attack

Attacking the confidentiality provisions of an arbitration agreement is another strategy being used to chip away at arbitration. When litigating in court, complaint filings and trials are open to the public and media. Jury verdicts are searchable through court records and legal publications. In contrast, arbitration proceedings and awards can be made confidential, which means a reduced risk of exposure of sensitive or proprietary business information, and also less potential for attracting "copycat" litigants. The ability to resolve disputes confidentially is one of the key benefits of arbitration, so claimants challenge confidentiality in an attempt to undermine the agreement itself. "It's another creative way for the plaintiffs' bar to pick away at these agreements and make them less attractive to employers," said Adler-Paindiris.

Confidentiality also has drawn fire in the court of public opinion in light of the #MeToo movement. Nondisclosure agreements in sexual harassment settlements have been criticized as attempts to conceal bad behavior—a notion that Adler-Paindiris strenuously rejects. She notes that confidentiality is generally advantageous to both parties. "Getting rid of confidentiality would be detrimental to the claimant," she said, noting that most individuals in these situations seek to avoid the public airing of their allegations. Moreover, eliminating nondisclosure provisions means the parties are less likely to reach a negotiated resolution of the claim, she said.

In the latest wrinkle, a National Labor Relations Board administrative law judge recently held that, while employers may mandate arbitration (the Obama Board's *D.R. Horton* decision to the contrary having been soundly rejected), they cannot mandate that employees maintain confidentiality of arbitration proceedings. The ruling likely will not survive Board or appellate review. However, it signals the next front in the battle over arbitration at the federal labor agency and another skirmish employers may have to face in seeking to enforce their agreements.

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- **Less motive for plaintiffs' counsel.** To be sure, a class waiver in an arbitration agreement is a powerful deterrent. 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 their client's dispute.
- **No jury trials.** The parties avoid the uncertainty and unpredictability of a jury trial, which is generally more expensive to litigate. As laypersons, jurors have a harder time understanding the law and their views can be colored by their own notions of fairness, or the presumption that the company has "deep pockets," Magnus notes. An arbitrator, on the other hand, is likely to be a retired judge or experienced lawyer, and is duty-bound *not* to "dispense his own brand of industrial justice."
- **Informal, streamlined proceedings.** An arbitration case may proceed more rapidly than litigation in court, particularly given increasingly crowded court dockets. The parties play a role in selecting the arbitrator who will resolve their dispute and the procedural rules to be followed in the arbitration hearing. Arbitration proceedings are generally simpler and more informal than in court. The parties can agree to limit the scope of, or shorten discovery—an expensive and time-consuming process in litigation.
- **A less litigious culture.** In addition to containing potential legal liability, arbitration, when adopted in conjunction with a more holistic internal dispute resolution program, can often help employers and employees resolve disputes *before* they become "legal matters."

Making the arbitration decision

In deciding whether to adopt (or continue) an arbitration program, employers must evaluate their unique business risks, as well as the legal climate in which they operate. Here are some considerations:

- **A "bet the company" case?** "What's your biggest fear? What keeps you awake at night? Sometimes the decision whether to implement arbitration depends on the claim the employer prays it will never get," Adler-Paindiris said. When counseling clients on the decision to implement an arbitration program, she asks: "What case, if filed against you, would have a substantially game-changing and significant impact on your business? How would the defense of that case impact your ability to operate your business? Does your business model depend on the compensation practice being challenged? Is the client concerned about an off-the-clock case by thousands of hourly call-center employees? Or is it a tech company in which the majority of employees are highly educated and exempt from overtime and a misclassification collective action would change the nature of the company? What is the likelihood of success if a particular claim is brought in court versus in arbitration?"
- **Jurisdiction is a key factor.** "Perhaps the nature of the claim itself doesn't expose the employer to high risk, but perhaps the employer operates in a jurisdiction where verdicts are very high and, as an employer, the dispute would be better heard before an arbitrator as opposed to a local jury," Adler-Paindiris said. "There are certain jurisdictions in which arbitration makes sense, and other jurisdictions where it does not. In some jurisdictions, employers would prefer to deal with the potential bad publicity of mandating arbitration where the prospect of an adverse jury decision is unpalatable."

Also, rather than abandon arbitration altogether, employers should explore redrafting arbitration agreements to better meet their needs or selectively implementing arbitration.

Consider narrowing the scope. Some employers have revised their arbitration agreements to expressly exclude sexual harassment or similar allegations while insisting on resolving wage-hour claims through arbitration, Adler-Paindiris noted. (However, the approach is unworkable in cases where employees have asserted numerous claims.)

Also, some employers require employees in certain states to sign arbitration agreements while opting not to implement arbitration in other states. In addition to carving out geographic exclusions to an arbitration program, employers may consider entering into arbitration agreements with hourly employees only.

There are several ways to customize an arbitration program to maximize the value of arbitration while minimizing the drawbacks. Consult with counsel to draft an optimal arbitration agreement for your organization or when deciding whether to implement, or discontinue, arbitration. ■

Jackson Lewis' biometric privacy team tracks Illinois developments

The spring 2018 issue of the *Class Action Trends Report* featured an article on biometric privacy—in particular, the Illinois Biometric Information Privacy Act (BIPA), the source of a growing number of biometric privacy class actions. (Biometric information is any information, regardless of how it is captured, converted, stored, or shared, based on an individual's retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry used to identify an individual.)

Joseph J. Lazzarotti, Principal in Jackson Lewis' Morristown, New Jersey office and Co-Leader of Jackson Lewis' Privacy, Data and Cybersecurity Practice Group, discussed a December 2017 decision by an Illinois state appeals court that provided a significant, but short-lived, victory for employers and other businesses that collect biometric information from employees or consumers. In January 2019, the Illinois Supreme Court reversed the appellate decision. *Rosenbach v. Six Flags Entertainment Corp., et al.*, No. 123186 (Jan. 25, 2019).

The Illinois Supreme Court ruled that individuals need not allege actual injury or adverse effect, beyond a violation of his or her rights under the BIPA, to qualify as an "aggrieved" person and be entitled to seek liquidated damages, attorneys' fees and costs, and injunctive relief under the BIPA. The availability of statutory damages makes the Illinois statute particularly attractive to the plaintiffs' bar. The BIPA provides for statutory damages of $1,000 *per* negligent violation or $5,000 *per* intentional or reckless violation of the Act. The state Supreme Court's decision is likely to increase the already significant number of suits, including putative class actions, filed under the BIPA.

"Following this significant decision from the Supreme Court, companies that have not already done so should immediately take steps to comply with the statute," Lazzarotti advised. "Review time management, point of purchase, physical security, or other systems that obtain, use, or disclose biometric information against the requirements under the BIPA. Quickly remedy any technical or procedural gaps in compliance. Examples of such gaps include not providing written notice, obtaining a release from the subject of the biometric information, obtaining consent to provide biometric information to a third party, or maintaining a policy and guidelines for the retention and destruction of biometric information."

Successfully defending these cases will require a well-thought out litigation strategy, informed by a deep understanding of the law and its practical applications. Jackson Lewis has an established group of attorneys that defend employers in biometric privacy claims. Using a collaborative approach with other Jackson Lewis practice groups, the Biometric Privacy Group has been providing compliance advice on biometric privacy since 2008.

Additional information on BIPA compliance can be found at BIPA FAQs. ■

News from the Government Relations team

In February 2019, the New York State Department of Labor withdrew regulations that it had proposed in the fall of 2017 governing "call-in pay" for most nonexempt employees in the state. The proposed regulations would have required employers, among other things, to provide "call-in pay" (ranging from two hours to four hours at the minimum wage) if:

- Employers do not provide employees 14 days' advance notice of their work shift;
- Employers cancel employee shifts without at least 14 days' advance notice;
- Employers require employees to work "on-call"; or
- Employers require nonexempt employees to report to work but then send them home.

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Other class action developments

U.S. Supreme Court

Silence is not consent to class arbitration. Reaffirming that arbitration is a matter of consent, the U.S. Supreme Court has ruled that ambiguity regarding whether parties to an arbitration agreement have agreed to resolve disputes on a class or collective basis must be resolved in favor of individual arbitration. Class action arbitration is such a departure from ordinary, bilateral arbitration of individual disputes that courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement, the Court explained, in a 5-4 decision in a case outside the employment context. Thus, while a standard principle of contract interpretation is to resolve any ambiguity against the party that drafted the agreement in question, that principle does not apply to the interpretation of arbitration agreements under the Federal Arbitration Act. "Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis," the Court stated. Rather, arbitration agreements must clearly and unmistakably state that the parties agree to resolve class and collective actions through arbitration. Without such a clear agreement, a party cannot be compelled to class arbitration.

"Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis," the Court stated.

Deadline to appeal certification decision can't be equitably tolled. In a decision outside the employment context but an important one for class action practice generally, a unanimous U.S. Supreme Court held that Federal Rule of Civil Procedure 23(f), which establishes a 14-day deadline to seek permission to appeal an order granting or denying class certification, is not subject to equitable tolling. Equitable tolling is a legal doctrine providing that a statute of limitations will be suspended or temporarily stopped based on principles of equity. For example, when a plaintiff does not discover an injury until after the statute of limitations has expired, despite reasonable care and diligent efforts, equitable tolling would allow that plaintiff to bring his action even though it was untimely. This decision will prevent a party from filing a tardy Rule 23(f) motion, and the bright line drawn provides clarity for plaintiffs and defendants alike.

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Jackson Lewis' Government Relations Team was actively involved in petitioning the Department of Labor to modify the regulations throughout the process, seeking exemptions for seasonal and weather-dependent employers. While some of the modifications sought by our Government Relations Team were included in the first round of amendments released by the Department of Labor, the Department ultimately withdrew the proposal after significant pushback from both the business community (which felt that the proposal would hurt many industries in New York) and labor advocates (who felt that the regulations did not go far enough to help employees).

Although this regulation is not an active threat to employers, the potential for legislation to gain traction addressing the same issue continues to exist. Our Government Relations Team monitors all regulatory and legislative proposals in New York and engages with the appropriate policymakers as necessary to advocate for the needs of our clients.

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Feuds over employment status continue to trend

Class claims brought by individuals asserting the courts should treat them as employees of defendant companies continue to be a steady source of litigation:

The appeals court concluded that its "primary beneficiary" test ... applied to vocational students as well[.]

- The Second Circuit held that cosmetology students who were required to practice on customers in the cosmetology school's for-profit salon as part of their training and licensing requirements were not employees for Fair Labor Standards Act (FLSA) purposes. The appeals court concluded that its "primary beneficiary" test of trainee status, established in a wage-hour case brought by college student interns, applied to vocational students as well, even when not all of its factors apply to the vocational setting.
- The Third Circuit ruled that the Federal Aviation Administration Authorization Act (FAAAA) did not preempt delivery drivers' putative wage-hour class action claiming they were misclassified as independent contractors under New Jersey wage laws. Their employer, a logistics company, argued that the state's "ABC" test for determining independent contractor status affected the costs, and thus the "prices, routes, and services" of interstate trucking, which the FAAAA was intended to regulate. The appeals court rejected this assertion, as well as the contention that New Jersey's ABC test differs from the FLSA's economic realities test, resulting in a patchwork of laws regulating how motor carriers must perform delivery services and thereby implicating FAAAA concerns.

OTHER CLASS ACTION DEVELOPMENTS **continued on page 12**

Federal agencies find that certain "gig" workers are independent contractors

The U.S. Department of Labor issued an opinion letter finding that a service provider for a virtual marketplace company operating in the on-demand or "gig" economy is not an employee of the company. It found the provider is an independent contractor under the Fair Labor Standards Act (FLSA). The "gig" workers in question provide services to consumers through the company's virtual platform.

The company requires certain basic information from the service provider, who must also self-certify his or her experience and qualifications, complete a background check through an accredited third party, and complete an identity check through a different vendor. The service provider must acknowledge and accept a "terms of use" agreement and a service agreement, which states that the company provides only a platform for connecting providers with customers and disclaims any employment relationship between the company and the service providers. Additionally, these agreements state that only the service providers, and not the company, will provide services to consumers in the virtual marketplace. The agreements also classify the service providers as independent contractors. Applying the DOL Wage and Hour Division's longstanding six-factor balancing test to these facts, the opinion letter concluded that the service providers are not the company's employees but are independent contractors under the FLSA.

Subsequently, an advice memorandum issued by the National Labor Relations Board General Counsel's office concluded that rideshare drivers were independent contractors, not employees, under the common-law agency test applied by the Board to questions of employment status under the National Labor Relations Act.

- The Fifth Circuit vacated an overtime judgment in favor of oil drilling consultants who claimed they were misclassified as independent contractors. The plaintiffs were hired through staffing companies to perform consulting work for the defendant, a company specializing in directional drilling for oil. The appeals court concluded that the defendant did not have an employment relationship with the consultants, finding that the factors described in *United States v. Silk* weighed in favor of independent contractor status. The appeals court noted the defendant's minimal control over the consultants' work, the high level of skill the consultants possess, and their impermanent relationship with the defendant (they worked on a project-by-project basis, and only three plaintiffs worked for the defendant for 10 months or more). The appeals court entered judgment in the defendant's favor.
- In an ERISA class action alleging that several thousand insurance agents were misclassified as independent contractors in order to deny the agents ERISA benefits, a divided Sixth Circuit panel reversed a district court's finding that insurance agents were statutory employees. The Sixth Circuit had yet to clarify the extent to which a court's conclusions as to the individual factors that comprise the Supreme Court's common-law *Darden* standard are factual or legal in nature. Other circuits have treated these factors as purely factual matters subject to review for clear error, but the Sixth Circuit found it appropriate to review the district court's conclusions *de novo*, including the weight assigned to each of the factors. It found the court below had erred by not properly weighing the *Darden* factors that were particularly significant in the legal context of ERISA eligibility—in particular, the financial structure of the company-agent relationship.
- Private security and traffic control officers were statutory employees under the FLSA, the Sixth Circuit held, regardless of whether they were "sworn" officers who held day jobs in law enforcement or nonsworn officers for whom this job was their sole source of income. Although the nonsworn officers were paid less per hour, they performed the same duties for the company's private customers (mainly sitting in a car with lights flashing or directing traffic around a construction zone). In an overtime action brought by the Department of Labor against the security company, a federal court had found that the nonsworn officers were statutory employees, but that the sworn officers were independent contractors, reasoning that they were not economically dependent upon the security company because they were merely supplementing their main income. The appeals court, however, noted that "whether a worker has more than one source of income says little about that worker's employment status." It found the sworn officers also were "employees" entitled to overtime pay.

The appeals court... noted that "whether a worker has more than one source of income says little about that worker's employment status."

- The Ninth Circuit recently dealt California employers another setback when responding to claims of misclassification of independent contractors for violations of the Industrial Welfare Commission (IWC) Wage Order. Almost exactly a year earlier, the California Supreme Court, in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, broadened the definition of "employee" in the context of the IWC Wage Orders when undertaking the employee-versus-independent contractor analysis, by adopting what commonly is known as the ABC test. The Ninth Circuit has held that the recently adopted ABC test must be applied retroactively.

Circuit court decisions

- The Ninth Circuit adopted the common-law agency test for Title VII cases in an Equal Employment Opportunity Commission (EEOC) pattern-or-practice lawsuit alleging that Thai agricultural workers employed under the H-2A guest worker program were subjected to dangerous work conditions and nearly uninhabitable housing based on their race and national origin. The agency sued fruit growers and the labor contractor that recruited the Thai nationals to work in the growers' orchards, contending that the defendants were joint employers. The growers

provided oversight, set work quotas, and inspected their work at the orchards. Their labor contract with the recruiters delegated responsibility for housing, food, transportation, and wages to the recruiter. The district court divided the claims into "orchard-related matters" (working conditions) and "non-orchard-related matters" (housing, meals, and transportation). It held the EEOC plausibly alleged the growers were joint employers as to orchard-related matters, but not as to non-orchard-related matters. However, the appeals court held the growers had sufficient control to be joint employers as to both categories, and reversed the partial dismissal of the EEOC's claims. Noting that it had not yet adopted a test for joint employer status under Title VII, the appeals court explained that the statutory definition of "employer" is circular and, in such cases, the Supreme Court has relied on common-law agency principles to analyze the existence of an employer-employee relationship. This test should be applied in the Title VII context as well, the Ninth Circuit found, rejecting the use of the economic realities test for such claims.

- A district court properly found that two of three groups of commissioned salespersons who sold ownership interests in timeshares for a vacation resort chain were similarly situated. The Sixth Circuit found no abuse of discretion in the lower court's decision certifying a wage-hour collective action and proceeding to trial on the overtime claims of those groups. (Salespersons in the third group were not similarly situated, the appeals court found; it concluded the district court should at minimum have created a separate subclass.) The district court found the employees were similarly situated and had presented sufficient representative evidence to show the employer executed an across-the-board time-shaving policy that prohibited them from recording or recovering overtime. The crux of the matter was whether the employees should be permitted to bring their claims of liability and damages as a group based on representative, rather than personal, evidence. The district court held that representative evidence could establish liability for testifying and non-testifying employees, as similarly situated employees may testify as "representatives of one another." Of the 156 opt-in employees in the class, the district court received testimony from 44 of them (almost 30 percent of similarly situated salespersons, discounting the third group that the Sixth Circuit held should not have been part of the collective action). ■

On the radar

The U.S. Supreme Court will take on a trio of cases that will decide whether Title VII protects employees from discrimination based on sexual orientation and gender identity. Currently, there is a split in the federal circuit courts on how far Title VII's prohibitions on discrimination "because of sex" extend. There is also a split within the federal agencies: The Equal Employment Opportunity Commission and Department of Justice have taken opposing positions on the question. An expansive interpretation by the Supreme Court of Title VII's protections from discrimination based on sex would open the door to a new wave of classwide discrimination claims.

Meanwhile, proponents expanding Title VII to protect employees from discrimination based on sexual orientation and/or gender identity have also pursued a legislative solution: On May 17, the Equality Act of 2019 (H.R. 5; S. 788) was passed in the U.S. House. The legislation, if enacted, would expand the prohibition against employment discrimination based on "sex" to explicitly state "sex (including sexual orientation and gender identity)," and thus moot the question pending before the High Court. H.R. 5 would add sexual orientation and gender identity to other protected classes in existing federal laws. (The bill would explicitly ban discrimination in housing, public accommodations, jury service, access to credit, and federal funding as well.)

H.R. 5 passed the House on a 236-173, with eight Republicans joining a unanimous Democratic caucus to approve the measure. The bill now heads to the Senate, however, where it will face stronger opposition.

On the JL docket

Mark your calendars for these timely and informative Jackson Lewis events:

June 27, 2019	Mitigating Litigation Risk: Top 10 Strategic Initiatives to Implement Now (Riverhead, NY)
July 9, 2019	Webinar: Workplace Diversity, A Multicultural Organization
July 10, 2019	Focus on Connecticut: Harassment Education and Training (Hartford, CT)
July 18, 2019	A Balancing Act - Top 10 Steps to Provide Effective Disability Management to Your Organization (Melville, NY)
July 25, 2019	A Balancing Act - Top 10 Steps to Provide Effective Disability Management to Your Organization (Riverhead, NY)
August 15, 2019	9th Annual South Florida's Premier labor & Employment Law Conference

*Watch for news on important developments affecting class litigation on Jackson Lewis' **Employment Class and Collective Action Update** blog!*