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Who Gets Notice Of a Collective Action?

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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.

"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."

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.”