

Second Circuit Rules That Class Action Waivers Are Allowed Under The FLSA

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Employers recently won a major victory in the Second Circuit with the release of *Sutherland v. Ernst & Young, LLP*, in which the court held that class action waivers are not prohibited under the Fair Labor Standards Act (FLSA). Consequently, arbitration agreements with employees that require them to arbitrate their claims individually are lawful in the Second Circuit.

The court previously had invalidated class action waivers in arbitration agreements in *In re American Express Merchants' Litigation (AmEx I)* on the theory that plaintiffs would face prohibitive costs to arbitrate individually and would be deprived of their rights under the FLSA because they could not recover enough to make their pursuit of legal action worthwhile. However, *AmEx I* subsequently was reversed by the United States Supreme Court in *American Express Co. v. Italian Colors Restaurant*. The Supreme Court held that a plaintiff cannot invalidate a waiver of class arbitration by showing that he or she had no financial motivation to pursue claims individually.

Following the Supreme Court's holding, the *Sutherland* court held that just because filing suit individually might not be worthwhile because the expense often outweighs the potential recovery does not mean that an individual plaintiff did not have the right to file such a suit. Moreover, the FLSA does not include any language preventing a class action waiver provision in an arbitration agreement, and the Supreme Court has previously held that such language is necessary to prohibit class action waivers. Moreover, the court reasoned that since the statute requires employees to affirmatively opt into any FLSA class action suit, then it stands to logic that they would also have the power to opt out of any such suit by waiving participation.

The Second Circuit's holding is likely to lead to fewer costly class action lawsuits and fewer challenges to employers' overtime practices, as employees will be less likely to file suit to recover lost overtime because their potential recovery is outweighed by their legal fees if they must pursue their claims individually.

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