

SECOND CIRCUIT ENFORCES CLASS ACTION WAIVERS IN TWO WAGE AND HOUR CASES

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The Second Circuit recently issued two decisions holding that class action waivers may be enforceable in Fair Labor Standards Act (FLSA) actions. These decisions, *Sutherland v. Ernst & Young LLP*, 2013 U.S. App. LEXIS 16513 (2d Cir. 2013) and *Raniere v. Citigroup Inc.*, 2013 U.S. App. LEXIS 16765 (2d Cir. 2013), represent a substantial victory for employers.

Southerland and *Raniere* involved employees who had signed employment documents agreeing to pursue any claim against their employers through individual arbitration. In both cases, the employees subsequently filed putative class actions against their employers for alleged violations of wage and hour laws. The employers in *Southerland* and *Raniere* sought to enforce the class action waivers in accordance with the employment agreements the employees had signed. The plaintiffs countered that the waivers were unenforceable because the right to proceed as a collective action under the FLSA cannot be waived. The plaintiffs also argued that the waivers were unenforceable because the costs of pursuing individual claims would effectively preclude them from vindicating their rights since the recovery sought would be substantially exceeded by the costs of individual arbitration.

In both cases, the Second Circuit rejected both arguments and held that the right to proceed as a collective action under the FLSA may be waived contractually. Citing the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Second Circuit also held that the "effective vindication" argument cannot be used to invalidate class action waivers where the recovery sought is exceeded by the costs of individual arbitration. Notably, the Second Circuit, along with the Ninth and the Eighth Circuits, have rejected the National Labor Relations Board's *D.R. Horton* decision, holding that a waiver of the collective right to pursue an FLSA claim violates the National Labor Relations Act.

The Bottom Line for Employers

Carefully drafted employment agreements with class action waivers and arbitration provisions should mitigate employers' exposure to certain class action claims.

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