

FLSA Alert

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Class Waiver Provision In Severance Agreement Bars Class Representative From Pursuing FLSA Collective Action Or Rule 23 Class Action

An Illinois federal judge recently gave employers the means to defend against an increasing trend in collective actions brought under the Fair Labor Standards Act. In *Brown v. Sears*, the plaintiff signed a severance agreement in which she agreed to give up the right to be "a member of any class" in any lawsuit arising out of her employment. The agreement also included a general employment release, but specifically excluded claims that could not be waived by law.

After the plaintiff filed a federal lawsuit alleging individual, collective, and class claims of violations of the FLSA and Illinois Minimum Wage Law, and asserting herself as the sole class representative, Sears responded by filing a counterclaim arguing that, although the plaintiff's substantive state and federal overtime claims could not be waived, the class waiver barred her ability to participate in a class-wide lawsuit under the FLSA and Rule 23. Early in the litigation, before any discovery was conducted, and before collective or class certification motions were filed, Sears brought a motion for summary judgment on its counterclaim, asking the court to enforce the waiver, thereby reducing the scope of the case to strictly an individual lawsuit.

In a case of first impression in the Northern District of Illinois, the court agreed with Sears and concluded that the waiver barred the plaintiff from acting as the lead plaintiff or otherwise participating in any collective or class action relating to her employment. Noting that although "back wages, liquidated damages, etc., [] constitute rights that cannot be abridged by private agreement," the court emphasized that Section 216 of the FLSA **"does not create a 'right' for the plaintiff to bring a class action"** (emphasis added). The court therefore rejected the plaintiff's argument that she could not, as a matter of law, waive her ability to bring a FLSA collective action, and granted Sears' motion for summary judgment on its counterclaim.

In granting declaratory relief in the company's favor, the court also rejected the plaintiff's argument that the class waiver, as it pertained to her Rule 23 class action, violated Illinois public policy which prohibits contracts wherein an employer agrees to pay employees less than the amount guaranteed by the Illinois Minimum Wage Law. Because the plaintiff fully retained her right to recover wages under the statute on an individual basis, the court reasoned, the waiver in no way compromised "the rights afforded by the statute or the public policy underpinning it."

The Bottom Line

This ruling is a significant victory for employers, and employers are reminded to review their severance agreements, separation agreements, settlement agreements, and the like, to ensure they contain class waiver language that could be used in the future to greatly reduce the scope of class-wide litigation.

Erika Dillon, Paul Garry, and Jason Barsanti of our firm represented Sears. For more information, please contact them at (312) 474-7900.

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