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FOCUS ON WAGE & HOUR

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EIGHTH CIRCUIT ENFORCES AGREEMENT REQUIRING EMPLOYEE TO ARBITRATE WAGE CLAIMS ON A NON-CLASS BASIS

The U.S. Court of Appeals for the Eighth Circuit has enforced an arbitration agreement requiring an employee to arbitrate – on a non-class basis – her wage claims under the Fair Labor Standards Act. This decision is in line with the decisions of several other federal courts of appeal to consider whether the FLSA's collective action provisions provide employees a federal right that cannot be waived in the context of an arbitration agreement.

In *Owen v. Bristol Care, Inc.,* the Eighth Circuit held that an employee can contractually waive any such "right" to collectively pursue wage claims in court proceedings. The court based its decision on the strong federal policy favoring arbitration, embodied in the Federal Arbitration Act and highlighted in numerous pro-arbitration decisions from the U.S. Supreme Court and other courts. The Eighth Circuit distinguished a recent NLRB decision refusing to enforce an arbitration agreement, noting that the NLRB's decision involved a broader set of prohibitions than the arbitration provision at issue in *Bristol Care*. Because the *Bristol Care* agreement did not forbid *all* concerted activity and, in particular, would still allow an employee to report concerns to the Department of Labor for broader enforcement proceedings, the court found there was no conflict with the National Labor Relations Act.

Yesterday's decision in *Bristol Care* will continue to drive employers' interest in ADR programs, and particularly mandatory arbitration clauses that prohibit class proceedings. The steady and continuing rise in the number of collective wage-and-hour claims, coupled with a relatively lax initial certification standard and resulting costly discovery efforts, have made these types of claims burdensome for many employers. More of these employers will likely consider non-class arbitration as a possible condition of employment in light of *Bristol Care* and similar decisions.

Class action waivers in arbitration agreements have been a hot topic since the Supreme Court's 2011 decision in *AT&T v. Concepcion*. Since *Concepcion*, the decisions in the employment arena have continued to favor enforcement of arbitration agreements, including those that contain class action waivers. But the cases are not unanimous and, in light of the plaintiffs' argument that a conflict exists among various federal statutory schemes (FAA, FLSA, and NLRA), there is a chance that the Supreme Court may take up this issue in the near future.

For a full copy of the Eighth Circuit's decision, click here.

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