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Management Alert

Shopping For Employer Support? Ninth Circuit Upholds Employee Class Action Waivers

By David D. Kadue and Daniel C. Kim

Two recent Ninth Circuit decisions offer employers some additional stock in dealing with employees who seek to evade class action waivers contained in arbitration agreements. In *Davis v. Nordstrom*, a Ninth Circuit panel upheld Nordstrom's post-*Concepcion* unilateral modifications to its arbitration agreement, which required employees to waive class action claims. The panel rejected the employee's argument that Nordstrom failed to give proper notice of the modifications. On the same day, the same panel, in *Johnmohammadi v. Bloomingdale's, Inc.,* relied on the opt-out feature of an arbitration agreement to reject an argument that the agreement, in waiving class actions, was unlawful under the Norris-LaGuardia Act and the National Labor Relations Act (NLRA).

Davis v. Nordstrom, Inc.—The Facts

Nordstrom's arbitration policy once covered individual disputes while leaving employees free to pursue class actions in court. Then, in April 2011, came the United States Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*, which invalidated a California rule against class-action waivers in arbitration agreements. Following *Concepcion*, Nordstrom twice revised its arbitration policy to provide for a waiver of most class action lawsuits. Notwithstanding these revisions, Nordstrom employee Faine Davis filed a class action lawsuit for nonpayment of wages, failure to provide meal and rest breaks, and unfair competition. Nordstrom moved to compel arbitration under its revised arbitration policy. Davis argued that a valid, revised agreement had never been formed.

The district court ruled for Davis, holding that the parties did not validly revise the arbitration agreement, because Nordstrom had (1) failed to provide the required 30-day notice of the change to its arbitration policy, and (2) failed to inform employees that their continued employment constituted acceptance of the revised policy.

The Ninth Circuit Decision

In reversing the district court, the Ninth Circuit held that employers, under California law, can unilaterally change the terms of employment, including those found in an employee handbook, so long as the changes do not violate the California Labor Code. Further, California law does not require a particular form of notice, although employers should abide by any self-prescribed methods of policy modification and employee notice. The Court found that Nordstrom satisfied its own notice policy by sending a letter to employees, including Davis, informing them of the arbitration policy change, and by not seeking to enforce the arbitration provision during a 30-day notice period. Additionally, the Ninth Circuit rejected the district court's second basis for finding an invalid policy modification—Nordstrom's failure to inform employees that their continued employment constituted acceptance of the change. The Ninth Circuit held that no California law imposed such a notice requirement.

Johnmohammadi v. Bloomingdale's, Inc.—The Facts

Fatemeh Johnmohammadi, a sales associate with Bloomingdale's, received an arbitration agreement informing her that she would be agreeing to resolve all employment-related disputes through arbitration unless she returned an enclosed opt-out form within 30 days. Although Johnmohammadi did not opt out within the 30-day period, she filed a class action lawsuit in state court alleging unpaid overtime wages. Bloomingdale's removed the action to federal court under the Class Action Fairness Act and then moved to compel arbitration under the Federal Arbitration Act (FAA). The district court dismissed the action without prejudice, giving the Ninth Circuit the jurisdiction to hear an appeal.

The Ninth Circuit Decision

The sole issue on appeal was whether the class-action waiver in the arbitration agreement was enforceable in light of the Norris-LaGuardia Act and the NLRA, on a theory that this waiver interfered with, restrained, or coerced Johnmohammadi in the exercise of her right to engage in concerted activity.

The Ninth Circuit found no interference, restraint, or coercion because Bloomingdale's had empowered its employees to choose between (a) resolving all future employment-related claims, including class-action claims, in court, or (b) resolving such disputes through arbitration on a solely individual basis. The Ninth Circuit concluded that Bloomingdale's, by giving employees this choice, could not be said to be interfering with or restraining the employees' right to do anything, especially since the associated advantages and disadvantages of arbitration are so uncertain.

What do *Davis* and *Johnmohammadi* Mean for Employers?

Davis did not have before it the question of whether a *mandatory* arbitration agreement waiving class action claims would be unconscionable. But on the very same day that *Davis* was decided, the California Supreme Court issued *Iskanian v. CLS Transportation Los Angeles, LLC,* which overruled *Gentry v. Superior Cour*t and recognized that a rule against class action waivers is preempted by the FAA.

Davis and *Johnmohammadi* together confirm that employers need not necessarily obtain signatures on arbitration agreements and that they can use other methods to implement or modify those agreements. It remains the case, however, that the best way to prove an employee's assent to an arbitration agreement usually is to secure the employee's signature.

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