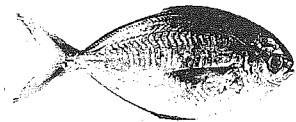


# STR

Employers are piggybacking on recent pro-arbitration decisions to try to prevent Fair Labor Standards Act collective actions. A thorough understanding of the rapidly developing case law will put you in a better position to fend off attempts to force employees into individual arbitration.

# LENGTH IN NUMBERS

By || **JOSEPH JARAMILLO**



**M**ore than ever, employers are requiring workers to enter into predispute arbitration agreements as a condition of employment. Although the flurry of recent Supreme Court decisions enforcing arbitration agreements under the Federal Arbitration Act (FAA) did not involve employment issues, they have emboldened employers to use arbitration as a means of avoiding class and Fair Labor Standards Act (FLSA) collective actions. When bringing an FLSA collective action, you must understand how to use the rapidly developing case law in your favor, whether your case proceeds in court or in arbitration.

FLSA violations are widespread and systemic in the United States. For example, the U.S. Department of Labor identified FLSA violations in 68 percent of more than 500 restaurants it investigated in San Francisco from 2006 to 2011.<sup>1</sup> Individual wage-and-hour claims are often too small to support litigation, and a worker's ability to secure legal representation depends on the availability of collective claims. Potential opt-in plaintiffs are entitled to notice of the action once the named plaintiffs have made a showing that there are "similarly situated" employees.<sup>2</sup> Without such notice, many aggrieved workers may never even realize they have been wronged. When an FLSA plaintiff is forced to proceed individually, the arbitration forum can be prohibitively expensive

and deprive him or her of many protections available in court, such as broad discovery, evidentiary safeguards, and the right to appeal based on legal error.

In the last few years, the Supreme Court has issued three opinions with far-reaching impact on arbitration clauses in general. In the antitrust case *Stolt-Nielsen v. AnimalFeeds International Corp.*, the Court held in 2010 that class-wide arbitration is not available under the FAA unless the parties agreed to it.<sup>3</sup> In 2011, the Court held in *AT&T Mobility LLC v. Concepcion* that the FAA preempts a state law rule against consumer class action waivers.<sup>4</sup> When the Ninth Circuit subsequently refused to enforce a class action waiver in *Greenwood v. CompuCredit Corp.*, a case brought under the federal Credit Repair Organizations Act, the Court reversed last year, finding that that the federal statute lacked a clear “congressional command” to the contrary.<sup>5</sup>

In each case, the Court emphasized the FAA’s goal to enforce arbitration agreements according to their terms. This trend cuts against the important congressional goal embodied in the FLSA to promote effective enforcement of wage-and-hour protections through group action.

Plaintiff attorneys must be creative and flexible to ensure a fair forum for their clients to pursue FLSA claims in this climate. If colorable grounds exist to challenge an arbitration clause’s enforceability, there is little downside to filing a collective action in court and facing the employer’s motion to compel, unless the employer is willing to stipulate to collective arbitration before a mutually agreeable arbitrator.

You should first determine whether there is a signed written agreement between the parties. These arbitration clauses often are included in employee handbooks that contain an employee’s acknowledgment of receipt but do not

bind the employee to the arbitration agreement. Sometimes an employer seeks to impose arbitration by emailing its employees a link to the agreement, without obtaining any consent to the new policy. These circumstances may show the lack of an agreement.<sup>6</sup> Even after *Concepcion*, arbitration agreements are still subject to generally applicable contract defenses such as unconscionability. Under most state laws, an agreement is unenforceable if it is both procedurally and substantively unconscionable. Procedural unconscionability may be satisfied if the employee has no meaningful opportunity to negotiate the terms of the agreement or the employer failed to attach any arbitration rules referenced in the agreement.<sup>7</sup>

Numerous substantively unconscionable provisions may exist in the

not all of the employer’s claims—are often found unconscionable.<sup>9</sup> Given the uncertainty about whether a court will invalidate class or collective action waivers, plaintiff attorneys should scrutinize arbitration clauses carefully to identify terms that may run afoul of the applicable contract laws and render the agreement unenforceable.

### Challenging Collective Action Waivers

Since *Concepcion*, lower courts have relied on at least four distinct grounds to find collective action waivers unenforceable in FLSA cases. *Concepcion* should not apply to any of these grounds because the grounds are not state law rules preempted by the FAA. In *Raniere v. Citigroup Inc.*, a New York federal court concluded that the right to proceed

**THE COURT EMPHASIZED THE FEDERAL ARBITRATION ACT’S GOAL TO ENFORCE ARBITRATION AGREEMENTS ACCORDING TO THEIR TERMS. THIS TREND CUTS AGAINST THE IMPORTANT CONGRESSIONAL GOAL TO PROMOTE EFFECTIVE ENFORCEMENT**

employment context. Arbitration clauses in employee handbooks often allow the employer to unilaterally modify or revoke the handbook’s terms, including the arbitration agreement. Courts find arbitration agreements subject to such unilateral modification clauses unenforceable because they are illusory promises that bind only the employees and not the employer.<sup>8</sup> Other provisions—undue limits on discovery, requirements that the employee pay costs unique to arbitration, restrictions on the statute of limitations and remedies, confidentiality clauses, and provisions requiring arbitration of all of the employee’s but

collectively under the FLSA is substantive and cannot be waived.<sup>10</sup> It distinguished statutorily created FLSA collective actions from class actions because the former requires each employee to affirmatively join the case. The grouping together of small claims is necessary to ensure the statute satisfies Congress’s goal of preventing substandard wages and private contracts that endanger national health and efficiency. At press time, *Raniere* was on appeal before the Second Circuit. Any favorable ruling by the Second Circuit will conflict with the Eighth Circuit’s recent decision in *Owen v. Bristol Care, Inc.*, which concluded

that employees can waive their right to participate in an FLSA collective action.<sup>11</sup>

Last year, the National Labor Relations Board (NLRB) issued a landmark ruling in *In re D.R. Horton, Inc.*, that an employer interfered with employees' concerted activities in violation of the National Labor Relations Act (NLRA) "by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial."<sup>12</sup> While the NLRB provides only affirmative relief, courts cannot enforce contracts that violate the NLRA, and they must defer to the NLRB's interpretation of the act.

At least one federal court has applied *In re D.R. Horton* to find prohibitions on FLSA collective actions unenforceable.<sup>13</sup> Several courts have declined to apply *In re D.R. Horton*, and at press time, the NLRB's decision itself was headed for appeal in the Fifth Circuit.<sup>14</sup> Plaintiff attorneys should continue to assert their clients' NLRA rights when confronted with collective action bans and should consider filing unfair labor practice charges with the NLRB to prevent the

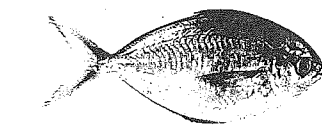
all its workers while an FLSA collective action was pending.<sup>16</sup> In *Billingsley v. Citi Trends, Inc.*, the court ordered that any potential opt-in plaintiffs who signed an arbitration agreement under duress during the litigation could still join the collective action.<sup>17</sup>

Some courts have considered whether collective action waivers are invalid where proceeding individually would be prohibitively expensive. In *Sutherland v. Ernst & Young LLP*, the plaintiff alleged that her employer misclassified her and others as exempt from the FLSA's overtime requirements.<sup>18</sup> Her individual overtime back-pay claim was less than \$2,000, but she submitted evidence that the expenses required for individual arbitration would total \$200,000, including attorney and expert fees and costs. The court denied the defendant's motion to compel arbitration, finding that the waiver would prevent the plaintiff from vindicating her statutory rights under the FLSA because the expenses required to arbitrate individually were disproportionate to the small value of her claim.

## OF WAGE-AND-HOUR PROTECTIONS THROUGH GROUP ACTION.

waiver from being enforced.

Courts have also rejected employers' imposition of arbitration agreements with collective action waivers after a collective action has been filed. The Supreme Court has said that courts have a duty to ensure fair communications and prevent confusion when an FLSA action is pending.<sup>15</sup> In *Williams v. Securitas Services USA, Inc.*, a federal court ordered the employer to rescind the collective action waiver it distributed to



The court relied on the Second Circuit's decision in *In re American Express Merchants' Litigation* ("Amex"),<sup>19</sup> an anti-trust case in which the court held that a class action waiver is unenforceable where it is prohibitively expensive for plaintiffs to bring their claims individually, preventing them from vindicating their federal statutory rights. Courts have interpreted the holding differently. The court in *Raniere* read *Amex* to render collective action waivers unenforceable

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where any potential opt-in plaintiff proves that individual arbitration is cost prohibitive.<sup>20</sup> Other courts have applied *Amex* to uphold collective action waivers where the potential costs of individual arbitration were not disproportionate to the potential recovery.<sup>21</sup>

The Supreme Court heard oral arguments in *Amex* in February to consider whether the FAA allows courts to invalidate arbitration agreements that do not permit class arbitration of a federal claim.<sup>22</sup> Until the Court provides clarification on this issue, plaintiff attorneys should follow the road map in *Sutherland* and submit evidence showing the small potential individual recovery relative to the high arbitration expenses. You should also argue that, if the court invalidates the collective action waiver, *Stolt-Nielsen* requires the matter to proceed in court, not arbitration, because the employer's failed imposition of a waiver means there was no agreement regarding collective arbitration between the parties.

Certain classes of employees may be immune from collective action waivers altogether. Employees can avoid *Concepcion* if the arbitration agreement or the class of work they perform is not covered by the FAA.<sup>23</sup> Also, many securities employment contracts require arbitration before the Financial Industry

Regulatory Authority (FINRA), which precludes the arbitration of FLSA collective actions in that forum, forcing them to proceed in court.

### Arbitrating FLSA Collective Actions

FLSA actions may proceed collectively in arbitration, particularly where the arbitration agreement is silent on the

matter. Despite *Concepcion*, many arbitration agreements do not explicitly ban collective actions. The employers argue that *Stolt-Nielsen* precludes collective arbitration because there is no agreement between the parties to allow it. However, *Stolt-Nielsen* does not require that the contractual basis supporting the permissibility of collective arbitration be explicit. The Supreme

Court declined to elaborate on the contractual grounds necessary to support a finding that the parties agreed to class arbitration in *Stolt-Nielsen*. However, the Court may clarify this issue in its review of the clause-construction determination in a non-employment case, *Sutter v. Oxford Health Plans LLC*.<sup>24</sup> Whether a facially “silent” agreement provides for collective arbitration is generally

## FLSA ARBITRATION STRATEGIES

By Rick Paul and Ashlea Schwarz

Arbitration is generally a tougher forum for plaintiffs than court, but if you start to prepare for arbitration when you first take on a case, you can prevail. Several strategies can help you prepare to arbitrate a Fair Labor Standards Act (FLSA) collective action.

First, you must select an arbitrator who has experience litigating FLSA actions, even if your roster of arbitrators is dominated by defense attorneys. These arbitrators will understand the core concepts in an FLSA action: representative discovery, willfulness, good faith, and the complexities of trying a large-scale action. They will also know a good case from a bad case. If your roster does not include an arbitrator experienced in these actions, strike them all and request a new list.

If your proposed class is not confined to a single jurisdiction, request a roster of arbitrators nationwide—not limited to the jurisdiction of your named plaintiff. Unless specified in the arbitration clause, you will not be limited to any specific district’s law. Choose an arbitrator who practices in a jurisdiction with favorable law on both liability and attorney fees. Arbitrators are most comfortable with the law they already know.

The key to winning an arbitration hearing is to identify good representative witnesses. Regardless of the case’s size, you will want five to 10 solid witnesses who can address the employment differences within your class, such as differences in job locations, job titles, and management. Use

the opt-in and discovery processes to identify these potential representative witnesses. As employees opt in, send them a questionnaire asking simple things about themselves and their claims. Give them an “other comments” section to vent about any other issues they have with their employers. Record everything you learn about your class members from those chosen to participate in representative written discovery and/or depositions. While answering written discovery or preparing for deposition, consider how that person might perform as a witness and make notes that you can look back to when the time comes.

The best witness is one who is willing but not overly eager. The most eager witnesses usually have a vendetta against the defendant for something other than your claim. They often get off message and are subject to a defendant’s bias claim. On the other hand, an unwilling witness, even one with a great story to tell, presents a dangerous risk of backing out at the last minute or refusing to cooperate in preparation.

Remember, the defendant will likely be able to depose the people you choose to testify at the hearing. Even if you fought to limit the number of depositions in discovery, offer up your best witnesses for depositions in addition to the depositions the arbitrator orders. Keep in mind, however, that if one of your chosen witnesses melts down at the deposition and you do not call the witness at trial, the

defendant may submit the deposition testimony anyway.

While you want witnesses who can tell the same basic story, you increase your credibility and your odds of beating decertification by showing how all class members have been deprived of the wages they are owed despite the different employment experiences they might have had. Anticipate your opponent’s decertification arguments, find witnesses to address each argument, and prepare them early. You also want witnesses who have significant damages, but not outliers—you are looking for representative testimony.

Make sure you search for witnesses who made pre-suit complaints about the conduct at issue. You need to begin thinking early in the discovery process about how you will prove willfulness to extend the statute of limitations from two to three years. Witnesses who can testify about how their pre-suit complaints fell on deaf ears or how they were threatened into silence are particularly effective. Calling a witness who will demonstrate the company’s knowledge of its misconduct through experiences with a poor manager will likely force the employer to risk calling a subpar witness—giving you the opportunity to score major points on cross-examination.

Your witnesses need to testify about the employer’s practices throughout the entire time period at issue. Limiting testimony to only current or only former employees may detrimentally affect your damages, especially if the employer made changes after the lawsuit was filed. The collective action notice will have been mailed to employees going back three years to account for the two-year statute

## PLAINTIFF ATTORNEYS MUST BE CREATIVE AND FLEXIBLE TO ENSURE A FAIR FORUM FOR THEIR CLIENTS TO PURSUE FLSA CLAIMS IN THIS CLIMATE.

a question for the arbitrator, and this clause-construction determination typically is the first order of business in

of limitations and the additional third year that is applicable if plaintiffs prove the defendant acted willfully. You need a witness who worked in that third year. Preferably, that witness also worked during the two-year statute of limitations, but if not, prepare the witness ahead of time for the possibility that he or she might recover nothing even though most other class members get a recovery.

Unlike jurors, arbitrators come to the hearing with an in-depth knowledge of not only the claims and defenses but likely most of each side's evidence as well. You do not need to over-try your case. Defense counsel often feel compelled to justify taking so many depositions by submitting designated deposition testimony for the arbitrator to read. This testimony will carry less weight than calling live witnesses, but you need to prepare accordingly when your clients are being deposed. Have a short list of prepared questions that capture the essence of your case and that your client is prepared to answer. At the end of defense counsel's deposition, ask your client those questions so that no matter how many immaterial differences defense counsel has been able to highlight, you can demonstrate that each class member is similarly situated to other class members with respect to the key issues.

Next, call the employer's witnesses in your case, even if you have not deposed them. Unlike a jury, the arbitrator will know who has been deposed and who has not and may cut you more slack in dealing with answers you did not anticipate. More important, the employer's witnesses can deny everything but are likely to admit certain facts that you can use to establish liability, damages, and willfulness. In our

litigating a putative collective arbitration.

Assuming the forthcoming decision in *Sutter* does not alter the long-standing

experience, in arbitration, the advantage of blind cross-examinations goes to the attorney. Albeit risky, cross-examination on the fly allows you to go against an unprepared and untested witness. Without a jury present, one bad question will not kill you.

Throughout the arbitration, keep focused on your audience. As a broad generalization, arbitrators are looking for ways to "do the right thing" without one side gloating, so compromise where possible and treat everyone with respect. Speeches and righteous indignation may work with a jury but not with an arbitrator. Also, you do not need to be as repetitive with important points as you might be with a jury—as an experienced lawyer, your arbitrator will likely understand your points the first time. In your opening statement, briefly take the opportunity to remind the arbitrator of the legal standards, especially the broad public policy goals behind the FLSA and areas where the employer bears the burden of proof. If you have a good case, submit a brief after the hearing to put all your evidence in context and show how you have proved your case under the applicable legal standards.

Preparation is key when arbitrating an FLSA collective action. If you keep these strategies in mind from the beginning, you can convince an arbitrator to find in your favor.

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principle that arbitration agreements are to be construed as any other contract, there are several contractual grounds that could support a finding that collective arbitration is available where not expressly agreed upon by the parties. The arbitrator should construe ambiguities in the arbitration agreement against the employer that drafted it. Broad language that all claims are subject to arbitration and that the arbitrator may award all relief available in court tends to show that class claims are included within the scope of the agreement. Likewise, contractual language excluding some specific types of claims but not class claims would bolster such a finding.<sup>25</sup>

Other contractual grounds supporting the permissibility of class arbitration are the contract's incorporation of procedural rules that include class certification;<sup>26</sup> the arbitration clause's presence in an employee handbook that lists FLSA rights that are subject to collective treatment;<sup>27</sup> the tradition, custom, or usage of collective treatment of FLSA claims;<sup>28</sup> the employer's subsequent insertion of an explicit collective action waiver into the arbitration agreement; and the parties' reasonable expectations under the circumstances.<sup>29</sup>

After a favorable clause-construction determination, you should carefully consider the discovery necessary to prove the collective claims and consider requesting a sufficient discovery period at the initial scheduling conference. Arbitration tends to move more quickly than court litigation toward a merits determination, and plaintiff attorneys should make creative use of the arbitrator's willingness to streamline proceedings.

If the American Arbitration Association (AAA) or JAMS supplementary class action rules apply, an "opt-out" collective action may also be available under the Fourth Circuit's decision in *Long John Silver's Restaurant, Inc. v.*

*Cole* on the basis that the incorporation of those rules and their provision of opt-out class actions supersede the default FLSA opt-in requirement.<sup>30</sup> This would cover more aggrieved workers, because opt-in rates are low, typically about 15 to 30 percent of the potential class.<sup>31</sup>

If the normal opt-in requirement

selecting an arbitrator, and the delay between the arbitration's initiation and the mailing of the arbitrator-approved notice.

Assuming the motion for arbitrator-facilitated notice is granted, the parties should ask the arbitrator to set a second status conference after consents to join

FAA's goal of speedy and efficient claim resolution.

Employers typically move for summary judgment of some or all of the claims and to decertify the collective action, but arbitrators generally are less likely than courts to grant dispositive motions.<sup>34</sup> The AAA permits dispositive motions only after a showing of "substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."<sup>35</sup> Thus, once in arbitration, the collective action is likely headed for a hearing on the merits.

Take advantage of the informal nature of the merits hearing. Arbitrators are particularly reluctant to exclude evidence because one of the grounds for vacating an arbitration award is "refusing to hear evidence pertinent and material to the controversy."<sup>36</sup> While live testimony is usually more compelling, testimony also may be introduced by declaration, interrogatory responses, or deposition transcript. You may want to submit such testimony where live testimony would be repetitive or uncontroversial.

The attention arbitrators pay to briefing can vary, particularly because they are typically staffing the case alone, without the assistance of law clerks. It can be advantageous to present opening and closing statements and find opportunities to argue the case's merits throughout the hearing. Keep in mind that the grounds for vacating an award are extremely limited and narrow and do not include legal and factual error. Therefore, the hearing may be a party's last shot to prevail in the case.

If the action is compelled to arbitration on an individual basis, there may still be ways to proceed advantageously despite the deflation in the case's value. As one blogger has suggested, claimants can still attempt to seek court-approved notice of pending arbitration despite the inability to proceed as a collective action.<sup>37</sup> Also, some arbitration rules




**ARBITRATORS ARE PARTICULARLY RELUCTANT TO EXCLUDE EVIDENCE BECAUSE ONE OF THE GROUNDS FOR VACATING AN ARBITRATION AWARD IS 'REFUSING TO HEAR EVIDENCE PERTINENT AND MATERIAL TO THE CONTROVERSY.'**

applies, under the FLSA's two-stage class certification process, plaintiffs (called "claimants" in arbitration) will move for facilitated notice to similarly situated employees under the initial lenient standard, subject to a more rigorous standard if the employer moves to decertify the collective action after discovery. You should determine whether to support the motion solely with declarations from claimants and potential opt-ins or whether corporate representative depositions are necessary, and how long the notice period must be to obtain consents to join the arbitration. Because the statute of limitations continues to run on FLSA claims until consents to join are filed, you should request equitable tolling that takes into account the delays inherent when a court compels arbitration, including the time between filing the court complaint and an order compelling arbitration, the time spent

are returned to determine the scope of post-notice discovery. The use of representative testimony is well established in FLSA collective actions. Courts have rejected employers' arguments that the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,<sup>32</sup> reversing the Rule 23 certification of an employment discrimination class, forecloses the use of representative testimony in FLSA cases.<sup>33</sup> You should seek an order from the arbitrator designating a randomly selected discovery sample from among the opt-in claimants to respond to the employer's written discovery, as well as a smaller sample to sit for depositions. The employer typically argues for a larger sample size or its alleged due process right to conduct discovery on all opt-in claimants. However, the arbitrator usually has wide discretion to set discovery parameters and should be interested in streamlining the process to further the

provide for consolidation of individual arbitrations where they are factually and legally related. If numerous employees join the putative collective action before plaintiffs are compelled to individual arbitration, they could pursue their claims individually in a consolidated arbitration with the named plaintiffs. Even if they proceed separately, they can be staged so that an initial victory or two may lead to settlement of the remaining claims.

The Supreme Court's recent bolstering of arbitration has encouraged employers to use arbitration clauses as a means to avoid FLSA collective actions. But there are still approaches to combat a pro-arbitration landscape, and if your case proceeds to arbitration, you can still maintain it as a collective or multi-plaintiff action if you know how to use the law in your favor. 

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#### NOTES

1. *WHD Launches Enforcement Initiative to Find Wage Infractions in San Francisco Eateries*, 10 Workplace L. Rpt. (BNA) 553 (Apr. 6, 2012).
2. See e.g. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172-73 (1989).
3. 130 S. Ct. 1758, 1775 (2010).
4. 131 S. Ct. 1740, 1746, 1753 (2011).
5. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 670 (2012).
6. See e.g. *Campbell v. Gen. Dynamics Govt. Sys. Corp.*, 407 F.3d 546, 557-58 (1st Cir. 2005) (email with link insufficient to create binding arbitration agreement); *Mitri v. Arnel Mgt. Co.*, 69 Cal. Rptr. 3d 223, 230 (Cal. App. 2007) (handbook receipt acknowledgment insufficient to create binding arbitration agreement).
7. See e.g. *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010).
8. See e.g. *Carey v. 24 Hour Fitness USA, Inc.*, 669 F.3d 202, 207 (5th Cir. 2012).
9. See e.g. *Armendariz v. Found. Health Psychare Servs. Inc.*, 6 P.3d 669 (Cal. 2000); *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 499-500 (Cal. App. 2012);

- Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Cal. App. 1997).
10. 827 F. Supp. 2d 294, 314 (S.D.N.Y. 2011).
  11. 702 F.3d 1050 (8th Cir. 2013).
  12. 357 NLRB No. 184, 2012 WL 36274 at \*17 (Nat'l. Lab. Rel. Bd. Jan. 3, 2012).
  13. See e.g. *Herrington v. Waterstone Mortg. Corp.*, 2012 WL 1242318 at \*6 (W.D. Wis. Mar. 16, 2012).
  14. *D.R. Horton, Inc. v. NLRB*, No. 12-60031 (Nat'l. Lab. Rel. Bd. oral arg. Feb. 5, 2013).
  15. See *Hoffman-La Roche*, 493 U.S. 165.
  16. 2011 WL 2713741 (E.D. Pa. July 13, 2011).
  17. 2013 WL 246115 at \*3 (N.D. Ala. Jan. 23, 2013).
  18. 768 F. Supp. 2d 547 (S.D.N.Y. 2011).
  19. 554 F.3d 300, 304 (2d Cir. 2009), *vacated*, 130 S. Ct. 2401 (2010), *aff'd on*

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- reconsideration in *Amex II*, 634 F.3d 187 (2d Cir. 2011) (finding original analysis unaffected by *Stolt-Nielsen*) and in *Amex III*, 667 F.3d 204 (2d Cir. 2012) (finding original analysis unaffected by *Concepcion*), cert. granted, 133 S. Ct. 594 (2012).
20. 827 F. Supp. 2d at 317.
  21. See e.g. *LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590 at \*7 (S.D.N.Y. Jan. 13, 2012) (plaintiff's estimated overtime claims of \$127,000 not disproportionate to potential costs).
  22. 133 S. Ct. 594 (2012).
  23. See 9 U.S.C. §1 (2011) (FAA does not apply to classes of workers engaged in foreign or interstate commerce); *Hoover v. Am. Income Life Ins. Co.*, 142 Cal. Rptr. 3d 312, 323-24 (Cal. App. 2012) (FAA does not apply to contract at issue).
  24. 675 F.3d 215 (3d Cir. 2012), cert. granted, 133 S. Ct. 786 (2012).
  25. See Partial Final Clause Construction Award in *Benson v. CSA-Credit Solutions of Am., Inc.*, Am. Arb. Assn. No. 11-160-M-02281-08, at 6-7 (July 6, 2010).
  26. See e.g. *Mork v. Loram Maint. of Way, Inc.*, 844 F. Supp. 2d 950, 954-55 (D. Minn. 2012).
  27. See Partial Final Clause Construction Award in *Colquhoun v. Chemed Corp.*, Am. Arb. Assn. No. 11-160-001581-10, at 16-18 (May 6, 2011).
  28. *Id.* at 21.
  29. *Id.* at 18-19.
  30. 514 F.3d 345 (4th Cir. 2008).
  31. Andrew C. Brunsten, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269, 294 (2008) (finding an average opt-in rate of 15.71 percent for sample of FLSA collective actions); see also Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering Dual Filed FLSA Collective Action and State-Law Wage Class Action*, 20 Lab. Law. 311, 313-14 n.18 (2005) (citing Victoria Roberts, *Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits, Offer Strategies*, 239 Daily Lab. Rep. (BNA) C-1 (Dec. 12, 2002) and Victoria Roberts, *Attorneys Discuss Strategies for Bringing, Defending FLSA Collective Action Lawsuits*, 156 Daily Lab. Rep. (BNA) C-1 (Aug. 13, 2002)).
  32. 131 S. Ct. 2541 (2011).
  33. See e.g. *Romero v. Fla. Power & Light Co.*, 2012 WL 1970125 at \*4 (M.D. Fla. June 1, 2012).
  34. See Michael D. Young & Brian Lehman, *Arbitrators Less Prone to Grant Dispositive Motions Than Courts*, N.Y. L.J. (June 26, 2009), [www.jamsadr.com/files/Publication/d2148223-c362-4fe1-8545-02f3be68e5da/Presentation/PublicationAttachment/9f1ad6d7-781f-4e32-9928-00e1ee720a67/Young\\_Lehman\\_NYLJ\\_June%202009.pdf](http://www.jamsadr.com/files/Publication/d2148223-c362-4fe1-8545-02f3be68e5da/Presentation/PublicationAttachment/9f1ad6d7-781f-4e32-9928-00e1ee720a67/Young_Lehman_NYLJ_June%202009.pdf).
  35. Am. Arb. Assn., *Empl. Arb. R. & Mediation Procs. R. 27*.
  36. 9 U.S.C. §10(a)(3).
  37. See Andrew Frisch, *Overtime L. Blog, FLSA Decisions, S.D. Cal.: Although Arbitration Agreement With Class Waiver Enforceable, Confidentiality Provision Stricken as Unconscionable Because Overbroad* (Sept. 25, 2011), <http://flsaovertimelaw.com/2011/09/25/s-d-cal-although-arbitration-agreement-with-class-waiver-enforceable-confidentiality-provision-stricken-as-unconscionable-because-overbroad>.

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