South Carolina Bar
Continuing Legal Education Division

2019 Recent Developments in Employment Law

#19-51

Friday, May 17, 2019

presented by
The South Carolina Bar
Continuing Legal Education Division

http://www.scbar.org/CLE

SC Supreme Court Commission on CLE Course No. 194537

2019 Recent Developments in Employment Law

May 17, 2019

This program qualifies for 6.0 MCLE Credit Hours, including up to 6.0 Employment & Labor Law Specialization Credit Hours
SC Supreme Commission on CLE Course #: 194537

8:30 a.m. **Registration**

8:55 a.m. **Welcome and Opening Remarks**
Jennifer K. Dunlap
Parker Poe Adams & Bernstein, LLP – Charleston

9 a.m. **ADR**
Regina H. Lewis
Gaffney Lewis & Edwards, LLC – Columbia

9:30 a.m. **Obligations of Government Contractors**
Leigh M. Nason
Ogletree Deakins Nash Smoak & Stewart, PC – Columbia

10 a.m. **Covenants Not to Compete**
Jimmy A. Byars
Nexsen Pruet, LLC – Columbia

10:30 a.m. **Morning Break**

10: 45 a.m. **Occupational Safety and Health**
Elizabeth B. Partlow
Law Offices of Elizabeth B. Partlow, LLC – Columbia

11:15 a.m. **Special Problems Relating to Sex Discrimination**
McKinley H. Hyman
Wyche, PA – Greenville

11:45 a.m. **Fair Labor Standards Act**
Amy Y. Jenkins
McAngus Goudelock & Courie, LLC – Mount Pleasant

12:15 p.m. **Lunch (included)**
Columbia Attendees Only – Sponsored by the SC Bar Employment & Labor Law Section

1:15 p.m. **Employee Reputation, Privacy and Dignity**
D. Michael Henthorne
Ogletree Deakins Nash Smoak & Stewart, PC – Columbia

1:45 p.m. **Public Employees**
David T. Duff
Duff & Childs, LLC – Columbia

2:15 p.m. **Whistle Blower Protection**
Tucker S. Player
Player Law Firm, LLC – Columbia

2:45 p.m. **Afternoon Break**

3 p.m. **Employment-Related Torts**
C. Frederick W. Manning II
Fisher & Phillips LLP – Columbia

3:30 p.m. **Special Problems Relating to Race Discrimination**
Stephanie N. Ramia
Young Clement Rivers – Charleston

4 p.m. **Retaliatory Discharge**
Joseph D. Dickey, Jr.
Dickey Law Group, LLC – Columbia

4:30 p.m. **Adjourn**

2019 Recent Developments in Employment Law

SPEAKER BIOGRAPHIES
(by order of presentation)

Jennifer "Jenni" K. Dunlap
Parker Poe Adams & Bernstein, LLP
Charleston, SC
(course planner)

Jenni Dunlap is a versatile litigator and advisor who focuses on getting her clients what they need so they can get back to business. Jenni handles employment and business disputes in federal and state courts for clients in the banking, utility, manufacturing, and health care industries. She is a no-nonsense counselor for businesses who want straightforward and practical advice consistent with their big-picture goals.

Jenni's clients benefit from the variety of cases she has handled. By working with clients in a broad range of industries, Jenni knows that every case and every client is unique. She takes a tailored and results-oriented approach for each case to fit each client's desired outcome.

After graduating from Vanderbilt University School of Law in 2000, where she was a managing editor of the Vanderbilt Law Review, Jenni practiced law for two large international law firms in Atlanta. While in Atlanta, Jenni focused on a wide array of employment and tort matters, as well as working on high-profile class action lawsuits. Since moving to South Carolina in 2006, Jenni has continued to handle employment matters in addition to representing clients in general business, unfair trade practices, and tort lawsuits.

Regina H. Lewis
Gaffney Lewis & Edwards, LLC
Columbia, SC

Regina Hollins Lewis is a member of the Firm and has over 31 years of civil litigation and appellate experience. She focuses her practice areas of tort and employment defense, including premises liability, professional negligence, products liability, wrongful termination and Title VII discrimination claims. Regina is a certified mediator and regularly mediates employment and tort matters to resolution. She also conducts internal investigations for companies related to alleged discrimination, sexual harassment and whistleblower matters.

Regina received her Bachelor of Science degree from the University of South Carolina in 1984 and her Juris Doctor degree from the University of Maryland in Baltimore in 1987. After practicing as an associate in the litigation department of a large Maryland corporate defense law firm and directing a non-profit legal clinic for abuse victims, Regina was appointed an Assistant Attorney General in 1994.

Regina subsequently relocated back to her home state of South Carolina and was admitted to the South Carolina Bar in 2000. She was then employed as Special Counsel of a large corporate defense firm and thereafter was elected to membership at the firm. She practiced in the Employment and Labor and Business Litigation practice groups until she started her own firm along with two partners in 2007. Gaffney Lewis is a certified Women's Business Enterprise and is a member of the National Association of Minority and Women Owned Law Firms as well as the Claims and Litigation Management Alliance.

Regina's extensive experience has enabled her to consistently obtain positive results for clients both pre-trial, through negotiation and settlement and dismissal by motion, and at trial. She is "AV-rated" by Martindale-Hubbell, the highest such rating available to any individual lawyer and representing a legal ability of "very high to preeminent." She has been active in the South Carolina Bar, previously serving in various positions on the Employment Law Section, a member of the Judicial Qualifications Committee, the Lawyer Image Taskforce. Regina has presented at several CLE sessions sponsored by the Bar. She has been named in the 2014 and 2017 Legal Elite of the Midlands and 2017 South Carolina Super Lawyers. Regina served on the South Carolina Ethics Commission from 2014 – 2017 is a 2007 Fellow of the Liberty Fellowship, a statewide leadership initiative.

Leigh M. Nanson

Ogletree Deakins Nash Smoak & Stewart, PC
Columbia, SC

Leigh Nason is a shareholder in the Columbia, South Carolina office of Ogletree Deakins and co-chairs the firm's Affirmative Action/OFCCP Compliance Practice Group, whose experienced attorneys counsel and defend federal contractors and subcontractors throughout the United States on jurisdictional, compliance, and enforcement issues involving the United States Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

Leigh has been included in The Best Lawyers in America for many years. She received the 2018 Distinguished Lawyer Award from the South Carolina Bar's Employment and Labor Law Section and was selected as the 2017 Employment Law-Management Lawyer of the Year for Columbia, SC. She is listed in Chambers USA as one of the country's leading attorneys in the affirmative action compliance arena, has been designated as a South Carolina "Super Lawyer," is AV Rated by Martindale-Hubbell, and has been recommended in the United States edition of The Legal 500 in the category of Workplace and Employment Counseling. Leigh has authored and edited numerous

publications on affirmative action compliance issues and is an editor of and contributing author to all five editions of Labor and Employment Law for South Carolina Lawyers, published by the South Carolina Bar.

Leigh is a graduate of Wake Forest University and the University of South Carolina School of Law and is certified by the South Carolina Supreme Court as a specialist in employment and labor law. She served as Chair of the South Carolina Bar's Labor and Employment Law Committee and its Employment and Labor Law Specialization Advisory Board. She is on the faculty of The Institute for Workplace Equality and serves on the Board of Directors of the South Carolina Industry Liaison Group.

James "Jimmy" A. Byars

Nexsen Pruet, LLC
Columbia, SC

James A. "Jimmy" Byars is an employment litigator with a focus on information security and restrictive covenant issues, including trade secret litigation, non-compete drafting and enforcement advice, and development of related employment policies. He also advises clients on a broad range of employment matters, including employment discrimination claims, wage payment issues, workplace investigations, and federal and state employment law compliance.

Specifically, Jimmy has experience assisting clients in matters involving:

- Employee theft of trade secrets
- Enforcement of restrictive covenants, such as covenants not to compete, non-solicitation agreements, and confidentiality agreements
- Employment discrimination pursuant to Title VII, the ADA, and the ADEA
- Wage claims pursuant to the FLSA and the SC Payment of Wages Act
- ERISA litigation
- Administrative investigations and enforcement pursuant to OSHA and the NLRA
- State unemployment insurance tax appeals
- Development and implementation of employment policies and employee handbooks

In 2007, Jimmy earned his B.A. degree, summa cum laude, in Criminal Justice from The Citadel, where he was a Summerall Guard and a member of the Honor Committee. In 2010, he earned his Juris Doctor degree from Wake Forest University School of Law, where he was a member of the National Moot Court team and served as Counsel for the Respondent on the Honor Council.

A native of Columbia, Jimmy worked for Nexsen Pruet as a courier and as a law clerk before joining the firm as an attorney.

Elizabeth "Beth" B. Partlow

Law Offices of Elizabeth B. Partlow, LLC
Columbia, SC

Beth represents businesses and industries in environmental and workplace health and safety matters. She assists clients in negotiating environmental permits, responding to environmental and OSHA enforcement actions by state and federal agencies, and defending permit challenges and citizen suits. She also counsels clients on regulatory compliance, environmental issues in business transactions, and auditing programs.

Before starting her own firm in January 2015, she worked for a large international law firm, for two South Carolina governors, and for the South Carolina Department of Health and Environmental Control. She is chair of the Atlantic Compact Commission for Low-Level Radioactive Waste Management and editor of South Carolina Lawyer.

McKinley H. Hyman

Wyche, P.A.
Greenville, SC

McKinley focuses her practice on business litigation, with an emphasis on employment law.

McKinley graduated summa cum laude from the University of South Carolina where she majored in both English and Philosophy. Afterward, she attended the University of Virginia School of Law, where she served as an Editorial Board member on the Virginia Tax Review and as a Peer Advisor.

Prior to joining Wyche, McKinley was an Associate in the Greenville office of an international labor and employment law firm.

Education

- 2016, J.D. – University of Virginia School of Law, Virginia Tax Review, Peer Advisor; Virginia Law Ambassador
- 2013 – University of South Carolina, Phi Beta Kappa; Josiah Morse Award (awarded annually to one outstanding philosophy student); Polston Scholarship Award (awarded annually to two outstanding English students)

Amy Y. Jenkins

McAngus Goudelock & Courie, LLC
Mount Pleasant, SC

Amy Jenkins has practiced employment law since 1993 and chairs the firm's employment law practice group. She is a South Carolina Supreme Court Certified Specialist in Labor & Employment

Law, as well as a certified mediator. Amy handles all aspects of employment law, including litigation pending in federal and state courts and claims pending with state and federal agencies, including the EEOC, SHAC and DOL. Amy has extensive experience in drafting and evaluating policies, handbooks and contracts, and she regularly conducts training for clients, including anti-harassment training. She helps employers conduct internal compliance audits and routinely counsels clients in matters relating to hiring, terminations, wage and hour issues, harassment, discrimination, and retaliation, wrongful discharge, ERISA, non-compete agreements, trade secrets and other issues. Amy is also the co-author of the chapter "Fair Labor Standards Act" included in *Labor and Employment Law for South Carolina Lawyers*, a book published by the South Carolina Bar.

Amy is married and has two children. She enjoys traveling and cheering on her daughters at their soccer matches.

D. Michael Henthorne

Ogletree Deakins Nash Smoak & Stewart, PC
Columbia, SC

D. Michael Henthorne focuses his practice on representing management in employment litigation. A specialist in employment and labor law as certified by the South Carolina Supreme Court, Michael has litigated matters involving:

- Title VII
- The Americans with Disabilities Act
- The Family and Medical Leave Act
- The Fair Labor Standards Act
- The Age Discrimination in Employment Act
- Wage and hour disputes
- Employment contracts
- Employment torts

Covenants not to compete, trade secrets and unfair competition matters
Michael has significant trial experience and has successfully appeared before both the South Carolina Court of Appeals and the South Carolina Supreme Court. He also appears regularly in federal and state courts in South Carolina and before various regulatory and administrative tribunals, such as:

- The Equal Employment Opportunity Commission
- The Department of Labor
- The National Labor Relations Board
- The South Carolina Human Affairs Commission
- The South Carolina Department of Labor, Licensing and Regulation
- The South Carolina Department of Employment and Workforce

Michael routinely works with in-house corporate counsel and insurers to resolve employment

litigation and appellate matters. He was previously admitted pro hac vice in Clark County Nevada where he settled an employment dispute on behalf of a national sporting goods distributor, and in the Western District of Tennessee where he resolved a whistleblower action for a leading aluminum rolled products company. In addition to his work in the employment law arena, he served as lead trial counsel in an intellectual property dispute involving a Fortune 50 retailer; in the defense of a $500,000 predatory lending claim that resulted in a jury verdict for a national mortgage lender; and in the settlement of a seven-figure negligence claim for a South Carolina healthcare provider prior to trial.

Certified as both a civil mediator and an arbitrator by the South Carolina Supreme Court, Michael also has previously held the Professional in Human Resources designation from the Human Resources Certification Institute in conjunction with the Society for Human Resources Management. He has been a featured speaker at seminars and corporate training events and makes presentations for numerous professional organizations. He has also taught employment and labor law as an adjunct faculty member at Anderson University in Anderson, South Carolina.

Michael works with employers that span the following industries:

- Business
- Healthcare
- Manufacturing
- Hospitality
- Retail
- Government
- Charitable Organizations

David T. Duff

Duff & Childs, LLC
Columbia, SC

Dave is a partner in the Columbia firm of Duff & Childs, LLC. His and the firm's practice includes representation of various public sector entities, including school districts, state agencies, and municipal bodies.

Dave is a graduate of Kenyon College and Temple and New York University Law Schools, holding a Master of Laws Degree in Labor Law from NYU. He is certified by our Supreme Court as a Specialist in Employment and Labor Law. Dave also is a certified Mediator and Arbitrator.

Tucker S. Player

Player Law Firm, LLC
Charleston, SC

Tucker Player is a solo practitioner in Columbia, South Carolina. He is licensed in South Carolina and Georgia. His practice focuses on construction and business litigation.

C. Frederick W. Manning II

Fisher & Phillips LLP
Columbia, SC

Fred Manning is a partner in the firm's Columbia office. He has extensive experience litigating employment law matters involving civil rights, contracts, and wrongful termination claims.

He regularly provides advice and assistance to employers regarding the drafting and enforcement of restrictive covenants, employment contracts and corrective action. Fred has assisted employers throughout the United States in union related matters.

He also has extensive experience in representing private colleges and universities in matters relating to employment and faculty and student issues.

Fred is the author of "Public Policy Exception Open to Possible Expansion in Employment At-Will Situations" 48 S.C.L. Rev. 133 (1996). He is certified by the South Carolina Supreme Court as a Specialist in Employment and Labor Law.

While in law school, he served as the Associate Editor-in-Chief for the South Carolina Law Review. Fred is "AV" Peer Review Rated by Martindale-Hubbell and he has been listed in Chambers USA, America's Leading Business Lawyers since 2013.

Fred has been listed in The Best Lawyers in America since 2012 and he was recognized as a Litigation - ERISA Lawyer of the Year by Best Lawyers in America for 2014. In 2015, he was named to Columbia Business Monthly's Legal Elites of the Midlands. He is a member and former president of the John Belton O'Neall Inn of Court and former chair of the South Carolina Bar's Labor and Employment Law Section.

Stephanie N. Ramia

Young Clement Rivers
Charleston, SC

Stephanie N. Ramia practices primarily with the firm's Employment and Labor Law practice group. Stephanie assists both public and private employers in employment matters, including day-to-day employment issues, federal and state litigation, as well as proceedings before

administrative agencies such as the EEOC and SC Human Affairs Commission. Stephanie also has experience in representing clients in personal injury and premises liability matters. Prior to joining Young Clement Rivers, she served as a Staff Attorney for the South Carolina Supreme Court. In law school, Stephanie was the Research Editor of the Southeastern Environmental Law Journal and served as a representative for the Student Bar Association. She also worked for the South Carolina Senate Judiciary Committee and a Columbia law firm. Before law school, she worked for an international business and litigation law firm in Washington, DC.

Admitted to practice

- South Carolina, 2011
- U.S. District Court for the District of South Carolina, 2014
- U.S. Fourth Circuit Court of Appeals, 2016

Education

- University of South Carolina School of Law, J.D., 2011
- Dickinson College, with a B.A. in Political Science, 2006

Memberships

- South Carolina Bar Association
- Federal Bar Association, South Carolina Chapter
- Charleston County Bar Association
- American Bar Association
- Junior League of Charleston
- League Editor, 2017–2018
- Chair, Internal/External Communications, 2018–2019
- Charleston Young Professionals of the Charleston Metro Chamber of Commerce

Publications

- "Smart Growth: The Toolbox for Addressing Sprawling Development in Coastal South Carolina," 19 Southeastern Envtl. L.J. 173 (2010)

Joseph D. Dickey, Jr.

Dickey Law Group, LLC
Columbia, SC

As a legal advocate for businesses, governmental entities and individuals, Joseph understands his clients' need for high-quality, cost-effective service.

Conversant in Japanese and knowledgeable of Japanese business practices, Joseph also brings an international capacity to DLG. Prior to attending law school, Joseph worked in Fukuoka, Japan at an economic development firm where he conducted market research to assist in recruiting foreign investment. Joseph assisted in making presentations to local government officials about ongoing development and targeted industries in Japanese.

A native of Wellford, SC, Joseph attended college at Clemson University where he earned a B.S. in Management with an International Management Concentration and a B.A. in Japanese and International Trade. Joseph earned his Juris Doctorate from the University of South Carolina School of Law where he served as associate student works editor for the South Carolina Journal of International Law and Business and was president of the International Law Society and manager of the Black Law Students' Association's Moot Court Bar. During law school, Joseph was a member of the in-house legal department of SCANA Corporation where he gained substantial experience assisting attorneys in drafting legal documents, conducting legal research, and attending legal proceedings.

Admissions

- South Carolina
- United States District Court for South Carolina
- Fourth Circuit, U.S. Court of Appeals

Education

- J.D., University of South Carolina School of Law
- B.S. Management, International Management Concentration, Clemson University
- B.A., Japanese and International Trade, Clemson University

Associations

- Japan America Association of South Carolina (JAASC)- Board Member
- Midlands Education and Business Alliance (MEBA)- Board Member
- Goodwill Industries of Upstate/Midlands South Carolina- Board Member
- Columbia Clemson Club- Board Member
- South Carolina Bar
- Richland County Bar
- American Bar Association

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ADR

Regina H. Lewis

South Carolina Bar
Continuing Legal Education Division

2019 Recent Developments in Employment Law

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Obligations of Government Contractors

Leigh M. Nason

Affirmative Action Obligations of Federal Government Contractors

Presented by

Leigh M. Nason

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Ogletree Deakins

ogletreedeakins.com

Sources of Employment Law Relating to Affirmative Action

- **Executive Order 11246**
  - Applies to employers who do business with the federal government
  - As a condition of contracting with the government, employers are required to agree to assume anti-discrimination obligations that go beyond other statutes

- **The Americans With Disabilities Act**
- **Section 503 of the Rehabilitation Act**
  - Protects qualified individuals with a disability
  - Federal contractors must take affirmative action to employ and advance in employment qualified individuals with disabilities
  - Section 503 obligations apply to federal contracts exceeding $10,000

Sources of Employment Law Relating to Affirmative Action

- **Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)**
- **Jobs for Veterans Act**
  - Require federal contractors and subcontractors to take affirmative action to employ and advance in employment qualified covered veterans
  - VEVRAA applies to federal contracts of at least $150,000
- **Regulations**
- **Office of Federal Contract Compliance Programs (OFCCP) Directives**

Trump-Era OFCCP Directives (as of March 2019)

- 2018-03: Faith-Based Organizations
- 2018-04: Focused Reviews
- 2018-05: Analysis of Contractor Compensation Practices
- 2018-06: Contractor Recognition Program
- 2018-07: AAP Verification Initiative
- 2018-08: Transparency in Compliance Activities
- 2018-09: OFCCP Ombud Service
- 2019-01: Compliance Review Procedures
- 2019-02: Early Resolution Procedures
- 2019-03: Opinion Letters and Help Desk
- 2019-04: Voluntary Enterprise-Wide Review Program (VERP)

Laws and Regulations Affecting Government Contractors

- Nondiscrimination and affirmative action
- Preparation of Affirmative Action Programs (AAPs)
- Retention, documentation, and analysis of applicant, hire, promotion, termination, and compensation data
- Preservation of all personnel or employment records for 2 or 3 years, depending on type of record
- Inclusion of equal employment opportunity statement in job advertisements
- Posting of anti-discrimination notices
- Allowing OFCCP to audit establishments

Laws and Regulations Affecting Government Contractors – Disabled and Veterans

- Who is “an individual with a disability”?

- Who is a “protected veteran”?
  - Disabled veterans
  - Recently separated veterans
  - Active duty wartime or campaign badge veterans (f/k/a “other protected veterans”)
  - Armed Forces service medal veterans

Laws and Regulations Affecting Government Contractors - Self-Identification Obligations

- Applicants: option to disclose disability and general veteran status
- Employees
  - Post-Offer: option to disclose disability and specific veteran status
  - First year of employment: disability
  - Every five years: disability
  - Periodically: disability

Laws and Regulations Affecting Government Contractors – Mandatory Job Listing Provisions

- Applicable only to contractors covered by veterans regulations.
- Contractors must post job openings (excluding executive and senior management positions) for which it is considering external candidates with the state employment agency.
- Under the regulations, contractors must provide job listings "in any manner and format" required by the state employment agency.

Pay Equity

- Title VII of the Civil Rights Act ("discrete acts")
- Ledbetter Fair Pay Act ("pay decisions")
- Equal Pay Act ("equal work")
- Paycheck Fairness Act (not yet passed)
- Pay Transparency (for federal contractors only)
- OFCCP Directive 2018-05 (for federal contractors only)
- EEO-1 Pay Data Collection (in play?)
- State laws

Pay Transparency – OFCCP Rule

- Effective January 11, 2016
- Prohibits discrimination against those “who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants”
- Defenses – legitimate workplace rules & essential function of employee’s job
- Contractors must update EEO clauses & employee manuals and handbooks
- Applicants and employees can file OFCCP complaints to address violations
- Best practice tip – add to HR and manager training

Pay Equity- Risk Factors for Claims

- Lack of meaningful standards, guidelines, or guidance
- Lack of management training
- Exercise of discretion
- Subjective decision-making
- Failure to document pay decisions and bonuses
- Failure to communicate criteria and basis for pay decisions and bonuses
- Favoritism – others are better paid, get more overtime, preferential shifts, etc.
- Conducting non-privileged analyses

EEO-1s and Pay Data

- May 31, 2019 Filing Deadline
- Pay Data Component
  - Stayed, then stay vacated in March 2019
  - Appeal filed May 3, 2019
- Why Are EEO-1s Important?
  - OFCCP uses information as part of audit selection methodology
  - EEOC uses information to aggregate private industry demographics/job patterns

In Other News . . .

- OFCCP has published audit methodology
  - Contractors can still push back if exempt
- Corporate Scheduling Announcement Letters
  - Part of transparency initiative
  - A round of audits (3,500) started on May 9 and includes 500 Section 503 Focused Reviews
  - List available at https://www.dol.gov/ofccp/foia/FOIALibrary/
- Compliance guide for colleges/universities
- Construction regulatory update: none yet, although promised

So What Does All This Mean for Contractors?

- More audits, quicker closures, faster response time required

- OFCCP's "bread and butter" is discrimination!
  - Hiring: low skilled, high turnover jobs
  - Compensation: discretionary and variable pay practices are prime targets, as are highly-paid managers and professionals

So What Does All This Mean for Contractors?

- Compensation
  - Know what your data shows
  - Review your AAP job groups to reflect compensation architecture
  - Understand that white males can be victims of discrimination as well
  - “Fixing” pay equity problems for one protected group could lead to problems for other groups
  - Conduct all analyses under privilege

So What Does All This Mean for Contractors?

- Friendlier, more “transparent” OFCCP interactions
- More consistency between regions and offices (at least in theory)
- More emphasis on disabled and veteran issues
  - Audit and documentation requirement; list of efforts is not enough – OFCCP wants narrative explanation of efforts
  - Focused reviews will enhance efforts and compliance (but likely lead to conciliation agreements)

So What Does All This Mean for Contractors?

- Resolving problem audits: transparency in process but vigorous prosecution of noncompliance/discrimination

- Stay tuned . . . It might be a wild(er) ride!

Questions?

South Carolina Bar
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2019 Recent Developments in Employment Law

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Covenants Not to Compete

Jimmy A. Byars

Restrictive Covenants

Recent Developments in Employment Law

May 17, 2019

Jimmy Byars

Nexsen Pruet, LLC

Member, Columbia, SC

OVERVIEW

- **5th Edition of Labor and Employment Law for South Carolina Lawyers (aka "the Green Book")- section authored by Cherie Blackburn**
- **Restrictive covenant agreements**
  - Non-compete covenants: employment and sale-of-business
  - Non-solicitation covenants: customers and employees
  - Confidentiality/non-disclosure covenants
  - Blue pencil rules and step-down approach
  - Forfeiture clauses
  - Remedies

CONFIDENTIALITY/NON-DISCLOSURE COVENANTS

- **Three important functions**:
  1. Identify expectations→ limits on use/disclosure during & after employment
  2. Evidence of "reasonable" safeguards
  3. Contract remedy if info isn't trade secret
- Highest likelihood of enforceability, but courts won't enforce them if they are not carefully drafted and tailored to employee
- Overstating what info is "confidential" risks non-enforcement and other problems

CONFIDENTIALITY/NON-DISCLSOURE COVENANTS

RISK OF OVERBROAD DEFINITION OF CONFIDENTIAL INFORMATION

- ***Carolina Chemical v. Muckenfuss*** (SC 1996)
- Confidentiality provision prohibited disclosure of any knowledge/info concerning any aspect of the business which could adversely affect the company if disclosed
- Court held it amounted to *de facto* non-compete and thus subject to the same strict scrutiny (consideration, reasonable time/territory, etc.); unenforceable without time/territory
- **The point:** If a confidentiality provision is so broad that it would effectively preclude an employee from working elsewhere in the industry, it may be treated like a non-compete→ much more difficult to enforce.

CONFIDENTIALITY/NON-DISCLSOURE COVENANTS

RISK OF OVERBROAD DEFINITION OF CONFIDENTIAL INFORMATION

- ***Milliken Co. v. Morin*** (SC 2012)
- Confidentiality provision defined protected info with 5 elements: (1) competitively sensitive information; (2) of importance to; and (3) kept in confidence by Milliken; (4) which becomes known to the employee through his employment with Milliken; and (5) which is not a trade secret. Included 3-year time limitation.
- Court held this was reasonable restriction that struck appropriate balance b/w protecting valuable info and permitting employee to find gainful employment in the field
- **What to do:** (a) define confidential info narrowly; (b) consider time/territory restrictions and consideration

CONFIDENTIALITY/NON-DISCLOSURE COVENANTS

DRAFTING CONSIDERATIONS

- **DO:** (a) clearly & narrowly define what is confidential and trade secret, preferably based on employee job duties; (b) prohibit disclosure/use for non-business purposes; (c) identify procedures for use and access; (d) consider consideration
- **DON'T**: (a) say all business info is confidential; (b) prohibit use/disclosure indefinitely

RESTRICTIVE COVENANT AGREEMENTS

CONFIDENTIALITY AGREEMENTS: EXAMPLES

- **Good**:

"Confidential Information includes customer lists, customer preferences, customer pricing data, customer payment history, marketing strategies, profit/loss data, information related to margins and vendor pricing, sales forecasts, product development data, and any other information marked or treated by Dunder Mifflin management to be confidential."

- **Not as good**:

"Confidential Information includes any and all information related to Dunder Mifflin's business, customers, employees, sales, and any other information related to Scott's work for the Company."

RESTRICTIVE COVENANTS

IMPORTANCE OF CONSIDERATION

- "Consideration" is generally required to prove that a restrictive covenant is enforceable
- Requires that the employee get something in exchange for post-employment restrictions
- Agreements signed at hire are enforceable because the new job is consideration, but…
- **Continued employment is not enough**… after employment begins, new consideration must be given to bind employee to terms
- Examples: raise, bonus, access to new information, promotion, etc.

CONSIDERATION FOR CONFIDENTIALITY AGREEMENTS

CASES HIGHLIGHT THE IMPORTANCE OF TIMING

- Courts historically relaxed consideration rules for confidentiality agreements→ continued employment or access to info was typically sufficient
- Recent cases have begun to suggest the need for "new consideration" just like non-competes
- *Roundpoint Mortgage* (NC) : "continued employment" doesn't support **any** employment contract
  - Employee signed new confidentiality agreement following transfer to NC office, 4 years after hire
  - Agreement said consideration was access to info
  - Court said no evidence of access to NEW information meant no consideration→ agreement unenforceable

CONSIDERATION FOR CONFIDENTIALITY AGREEMENTS

CASES HIGHLIGHT THE IMPORTANCE OF TIMING

- Since *Roundpoint Mortgage*, several NC courts have ruled that confidentiality agreements signed after employment began could not be enforced:
  - *Addison Whitney* (2017): court denied injunction because agreements signed 90 days after hire, and no evidence employees agreed to terms at hire and simply memorialized them thru later agreement
  - *Computer Design* (2017): denied injunction because new confidentiality agreement signed 4 years post-hire
  - *American Air Filter* (2017): court dismissed breach of contract claim when agreement auto-renewed each year, but no new consideration given for renewals

CONSIDERATION FOR CONFIDENTIALITY AGREEMENTS

CASES HIGHLIGHT THE IMPORTANCE OF TIMING

- **Takeaway**: confidentiality agreements (and other restrictive covenants) MUST be signed at the time of hire, OR "new consideration" should be provided
- Once work begins, ANY delay in signing risks non-enforcement (i.e. 90 days in *Addison Whitney*)
- If alleged consideration is "access to confidential info," employee must be given access to NEW info in order for consideration to be present
- Agreements with auto-renewing terms may require new consideration for each renewal term
- These rules arguably apply to any "amended" or "restated" agreements with different terms/language

RESTRICTIVE COVENANT AGREEMENTS

NON-SOLICITATION AGREEMENTS

- Subject to strict scrutiny, but more likely to be enforced than non-compete
- Must be supported by consideration
- ***Wolf*** (Ct App 1992): must have time limitation, but customer limitation can substitute for geographic limitation
- Must be narrowly tailored to protect "legitimate business interest" in customer relationships and/or confidential customer info

NON-SOLICIATION COVENANTS

BEST PRACTICES ARISING FROM CASE LAW

- **DO:** (a) limit to EEs with customer contact, and provide to all w/similar contact
  - (b) limit to customers the EE personally contacted on company's behalf
  - (c) provide consideration
- **NOT:** (a) excessive time limitation (2yr max)
  - (b) prohibit "accepting" work
  - (c) define "customer" too broadly or vaguely (consider express list)

NON-SOLICITATION COVENANTS

EXAMPLES

- **Good:**

"For a period of twelve (12) months after separation of employment for any reason, Scott shall not, directly or indirectly, on behalf of himself or any third-party or entity, solicit, call on, or otherwise attempt to divert any Customer of Dunder Mifflin with whom Scott had material contact at any time in the final twelve (12) months of Scott's employment with the Company for purposes of offering for sale to such Customer paper or office products the same as or substantially similar to the products Scott sold for the Company."

- **Not as good:**

"For 2 years after termination of employment, Scott shall not solicit or accept business from any customer of Dunder Mifflin."

NON-COMPETE COVENANTS

NON-COMPETE AGREEMENTS

- Best protection but most difficult to enforce
- Must be supported by consideration (new job, raise, promotion, cash)
- Must have reasonable time limitation **AND** reasonable geographic limitation (tandem)
- Must be narrowly tailored to protect "legitimate business interest" in customer relationships and/or confidential info
- *Palmetto Mortuary* (SC 2018): sale-of-business non-competes subject to same requirements, but scrutiny is relaxed

NON-COMPETE COVENANTS

BEST PRACTICES ARISING FROM CASE LAW

- **DO:** (a) limit to EEs with customer contact or access to confidential info

  (b) limit to territory with legit business justification for restricting competition, and include "step down" geography

  (c) carefully define "competition" to similar role with competing company in part of industry EE involved in

- **NOT:** (a) excessive time limitation (2yr max)

  (b) excessive territory

  (c) prohibit broader role than necessary

RESTRICTIVE COVENANT AGREEMENTS

NON-COMPETE AGREEMENTS: EXAMPLES

- **Good:**

"For a period of twelve (12) months following separation of employment for any reason, Scott shall not, directly or indirectly, on behalf of himself or any third party or entity, whether as an owner, employee, consultant, contractor, officer, agent, or in any other capacity, compete with Dunder Mifflin in the commercial sale of paper products the same as or similar to the products Scott sold on behalf of the Company in the geographic territory encompassing: (1) the Northeast Region; (2) Pennsylvania; (3) Connecticut; and (4) any area within five miles of any Dunder Mifflin branch location.

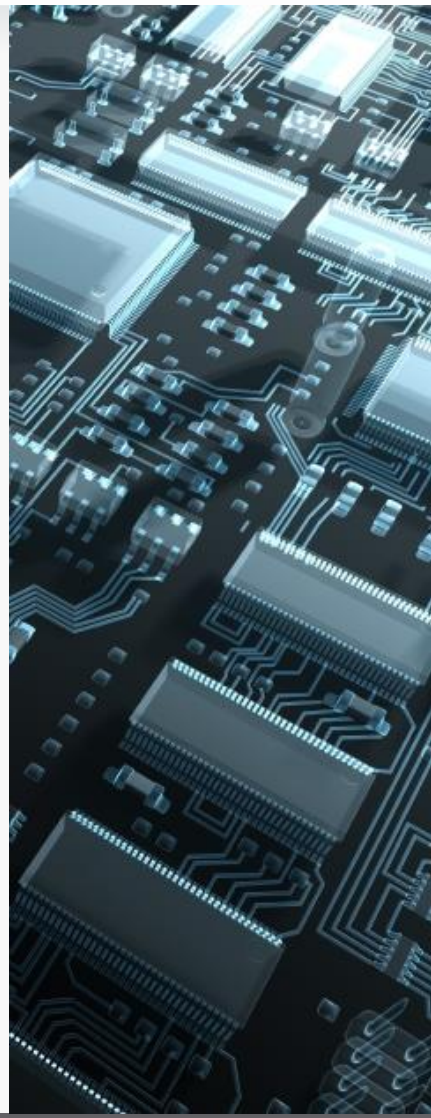
- **Not as Good:**

"For 2 years after termination, Scott shall not compete with Dunder Mifflin in the sale of paper products or printers in any state where Dunder Mifflin operates a branch."

RESTRICTIVE COVENANT AGREEMENTS

BLUE PENCILING IN SOUTH CAROLINA

- SC has narrow "blue pencil" rules
- *Poynter* (SC 2010): Courts permitted to sever unenforceable provisions and enforce the rest (if possible), but can't modify w/new language to make the agreement enforceable; court erred by adding radius restriction not found in agreement
- *Stonhard* (SC 2005): Courts will honor foreign choice-of-law provisions, but won't enforce if covenant violates SC public policy; thus NJ choice-of-law can't save absence of geographic restriction even though NJ permits broad blue pencil



RESTRICTIVE COVENANT AGREEMENTS

THE "STEP DOWN" OR "TIERED" APPROACH

- To maximize likelihood of enforceability, consider "step down" or "tiered" provisions in easily-severable subsections
- *Team 1A v. Lucas* (Ct. App. 2011)
- "…the Parties to this agreement hereby agree that for the purposes of this Agreement, the "RESTRICTED TERRITORY" shall consist of the entire continental United States. In the alternative, and only if such territory is deemed by a court or other proceeding to be unreasonable or otherwise invalid or unenforceable, then such territory shall be defined as the states of South Carolina, North Carolina, Georgia, and Alabama."
- Court holds that continental US restriction is unenforceable, but "alternative" territorial restriction may be enforceable if evidence supports that employee worked in all 4 states

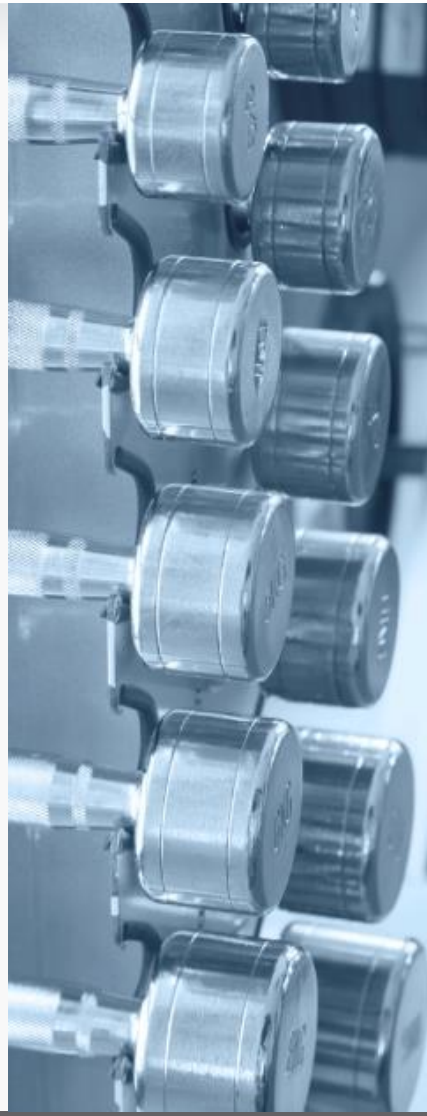
RESTRICTIVE COVENANT AGREEMENTS

THE "STEP DOWN" OR "TIERED" APPROACH

- **Examples:**

- "For purposes of this non-compete covenant, 'Restricted Territory' is defined to include: (a) the United States; (b) South Carolina; (c) North Carolina; (d) any state where Employee performs Services in the twelve (12) month period preceding his termination; and (e) the geographic area within a five (5) mile radius of any company location."

- "For purposes of this non-solicitation covenant, 'Customer' is defined to include: (a) any customer of the Company; (b) any customer of the Company about which Employee was provided access to Confidential Information; (c) any customer who with which Employee had contact at any time in the twelve (12) month period preceding the separation of his employment with the Company."



RESTRICTIVE COVENANT AGREEMENTS

FORFEITURE CLAUSES AND LIQUIDATED DAMAGES PROVISIONS

- Cases support that RCs with monetary forfeiture or payment instead of blanket prohibition can enhance likelihood of enforceability
- *Wolf* (Ct. App. 1992): enforced non-compete providing that otherwise-earned commissions forfeited for violation→ no restriction on competition, just a monetary consequence
- *Baugh v. Columbia Heart* (Ct. App. 2013): enforced non-compete with liquidated damages equal to 1-year's pay if violated; doesn't preclude competition or patient access and not a penalty b/c it was a reasonable estimate of damages incurred

RESTRICTIVE COVENANT AGREEMENTS

REMEDIES

- **Injunctive relief**: irreparable harm + inadequacy of monetary remedy→ must act quickly
- **Actual damages**: contract damages, often lost profits; courts will often enforce atty's fees provisions

QUESTIONS/COMMENTS?

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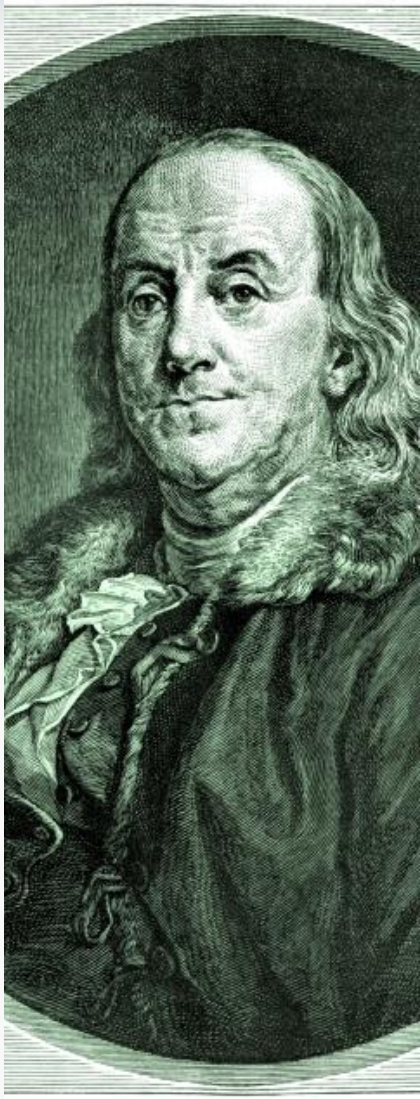

South Carolina Bar
Continuing Legal Education Division

2019 Recent Developments in Employment Law

Friday, May 17, 2019

Occupational Safety and Health

Elizabeth B. Partlow

Occupational Safety and Health

2019 Recent Developments in Employment Law

May 17, 2019

Beth Partlow
Law Offices of Elizabeth B. Partlow, LLC
Columbia, South Carolina
(803) 814-0868
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Are you covered?

- South Carolina Department of Labor, Licensing and Regulation
- Federal Department of Labor
- Preemptive statutes

Standards and Regulations

- General Industry, 29 C.F.R. § 1910
- Construction, 29 C.F.R. § 1926
- Agriculture, 29 C.F.R. § 1928
- Maritime, 29 C.F.R. §§ 1915 and 1916

General Duty Clause

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

29 U.S.C. §654(a)(1).

OSHA Recordkeeping and Reporting: Immediate Reporting

- Within 8 hours: any work-related fatality
- Within 24 hours: any work-related amputation, loss of an eye, or hospitalization

OSHA Recordkeeping and Reporting: OSHA Forms

Form 300: All job-related injuries and illnesses that result in death, one or more lost workdays, restrictions of work, loss of consciousness, transfer to another job, or medical treatment (other than first aid).

Form 301: Injury and Illness Report.

Form 300A: Annual summaries posted for three months beginning on February 1 of the following year.

Inspections

- ❑ Program or complaint
- ❑ Consent or warrant
- ❑ Citations
  - Serious
  - Other than serious
  - Willful
  - Repeat
  - Failure to abate

Contesting Citations and Penalties

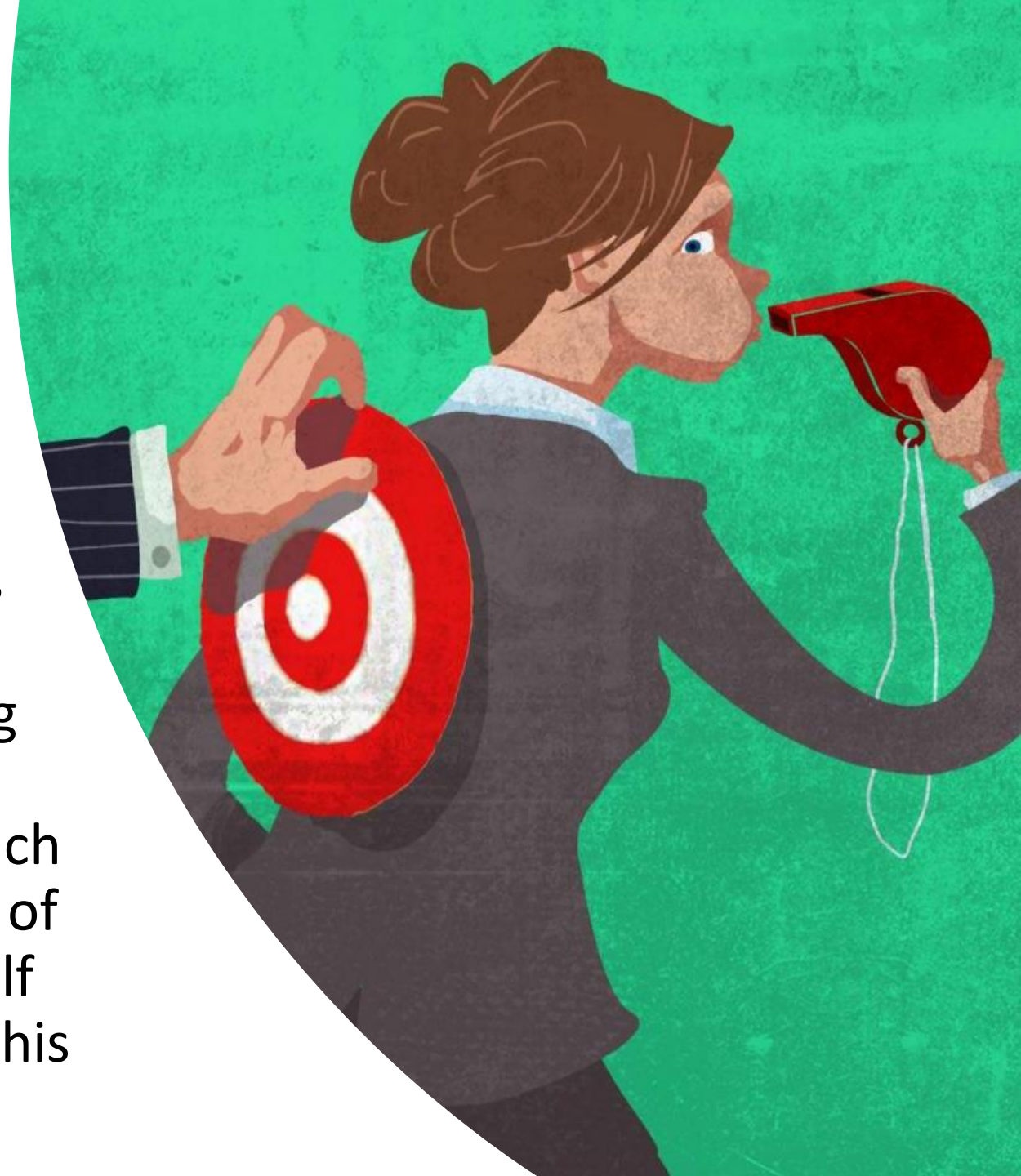
- Informal Review
- Administrative Law Court
- Judicial Review

Contesting Citations and Penalties: Defenses

- ❑ Timeliness of citation
- ❑ No violation/Standard does not apply
- ❑ Affirmative defenses
  - Impossibility
  - Greater hazard
  - Unpreventable employee misconduct

Whistleblower Protection

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise of such employee on the behalf of himself or others of any right afforded under this Act.



Whistleblower Protection—Time frames are important!

- OSH Act
- Environmental and Nuclear Safety Laws
- Transportation Industry Laws
- Consumer and Investor Protection Laws

Resources

- www.osha.gov
- www.whistleblowers.gov
- www.scosha.llronline.com

South Carolina Bar
Continuing Legal Education Division

2019 Recent Developments in Employment Law

Friday, May 17, 2019

Special Problems Relating to Sex Discrimination

McKinley H. Hyman

South Carolina Bar
Continuing Legal Education Division

2019 Recent Developments in Employment Law

Friday, May 17, 2019

Fair Labor Standards Act

Amy Y. Jenkins

MCANGUS GOUDELOCK & COURIE

MGCLAW.COM

FAIR LABOR STANDARDS ACT UPDATE

Amy Jenkins

The Biggest FLSA News That Did Not Happen

- Context:
  - I wrote the updated book chapter during Summer 2016
  - New FLSA regulations were to take effect December 1, 2016
- The regulations would have altered the white collar exemptions to increase the salary level at which someone could be considered exempt
  - From $455/week ($23,660 per year)
  - To $913/week ($47,476 per year)

The Biggest FLSA News That Did Not Happen

- "Highly compensated" exemption threshold was also changing from $100,000 to $134,000 annually

- 4 million workers would suddenly be entitled to overtime pay if their salaries were not increased

The Biggest FLSA News That Did Not Happen

- As I was turning in my chapter, which discussed these changes:
  - Lawyers were busy counseling their clients about the changes
  - Employers were: (1) increasing salaries (to keep someone exempt); (2) reclassifying previously exempt individuals to non-exempt (because increases in salary were not feasible); and (3) shedding jobs (to make payroll)
  - Many employers had notified employees of their new wages well before the December 1, 2016 effective date

But then….

- September 2016: 21 states sued the DOL to block implementation of the overtime rule. Separately, business groups brought a similar action against the DOL. Those two cases were eventually consolidated.
- November 22, 2016: U.S. District Judge Amos Mazzant (E.D. Tex.) signed a preliminary, nationwide injunction halting the regulations from taking effect on December 1, 2016
- Judge Mazzant determined that all of the plaintiffs would likely succeed on the merits of their arguments; namely, that the DOL had overreached by raising the minimum salary level

Judge Mazzant's Ruling

- Congress defined the white collar exemptions with regard to duties, which does not include a minimum salary level.
- Nothing in the exemptions indicate that Congress intended that DOL define and delimit with respect to a minimum salary level.
- With the Final Rule, DOL exceeded its delegated authority and ignored Congress's intent by raising the minimum salary level such that it supplanted the duties test.

Judge Mazzant's Final Ruling

- On August 31, 2017: Judge Mazzant issued his final ruling in *State of Nevada et al. v. United States Department of Labor, et al.*
- Judge Mazzant granted the Plaintiffs' motion for summary judgment, holding that the DOL exceeded the authority delegated to it by Congress by increasing the minimum salary for the white collar exemptions under the FLSA to $913 per week.

Now what?

- Following Judge Mazzant's final ruling, business interest groups and employers declared victory
- But many knew the issue was not dead.
- Employers and employees watched and waited for DOL to propose a more modest increase to the salary thresholds

Now what?

- March 7, 2019: DOL announced a new proposed rule:
  - Increase white collar salary threshold from $455 to $679 per week (equivalent to $35,308 per year). [$12,000 less than in 2016 Rule]
  - Increase the "highly compensated employees" threshold from the currently-enforced level of $100,000 to $147,414 per year. [$13,000 more than in 2016 rule]
  - Allow employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the salary level
  - DOL taking feedback on proposed rule – stay tuned

But That's Not All…

- On March 28, 2019, DOL proposed the first changes to the "regular rate" regulations in over 50 years
- Non-exempt employees receive overtime pay based on their "regular rate" which is not simply their hourly rate
- "Regular rate" currently encompasses all remuneration that non-exempt employees receive subject to 8 listed exclusions

Regular Rate Proposed Changes

- New definition is intended to clarify what perks, benefits, etc. must be included in the regular rate

- Under current rules, employers are discouraged from offering perks for fear of inclusion in overtime pay calculation

Regular Rate Proposed Changes

- DOL proposes to expressly exclude from regular rate various perks including:
  - Reimbursed expenses
  - Payments for unused paid leave, including paid sick leave
  - Discretionary bonuses
  - Tuition reimbursement
- DOL accepting comments….stay tuned

DOL: Joint Employer Update

- On April 1, 2019: DOL announced a proposed rule to narrow the definition of “joint employer” under the FLSA.
- Joint employers are jointly and severally liable for wage and hour claims under the FLSA.
- DOL has not meaningfully changed its joint employer regulation since 1958

DOL: Joint Employer Update

DOL proposes a 4 factor test that would consider whether the potential joint employer actually exercises power to:

1. Hire or fire the employee;
2. Supervise and control the employee's work schedules or conditions of employment;
3. Determine the employee's rate and method of payment; and
4. Maintain the employee's employment records

DOL: Joint Employer Update

- If the rule becomes law, it could offer franchisors and businesses that hire workers through staffing firms a shield from liability for alleged FLSA violations

- DOL is currently taking feedback on proposed rule – stay tuned

Opinion Letters – They Are Back

- DOL has begun issuing opinion letters again after a hiatus during the Obama administration
- Employers can now ask the DOL's views on FLSA-related matters
- The letters [names redacted] are on DOL's website and can provide answers to compliance questions

Key FLSA Cases Since Chapter Submitted in Summer 2016

- Anything exciting prior to Summer 2016 is included in the book chapter

- Will highlight a few key cases that have come out since then

Class Action Waivers

Epic Systems Corp. v. Lewis: 2018 – SCOTUS

- FLSA case
- Arbitration agreements with class and collective action waivers are enforceable

- No post-*Epic* ruling yet by 4th Circuit as of this writing
- D.S.C. -- *Dimery v. Convergys Corp.*, 2018 U.S. Dist. LEXIS 50555 [Judge Harwell] – such waivers are enforceable [pre-*Epic* ruling]
- D.S.C – *Gordon v. TBC Retail Grp., Inc.,* 2018 U.S. Dist. LEXIS 120433 [Judge Norton] – post-*Epic* ruling upholding collective/class action waivers in an FLSA matter

Rejection of "Narrow Construction" as to Overtime Exemptions

Encino Motorcars, LLC v. Navarro: 2018 –SCOTUS

- Case was about whether service advisors at automobile dealerships were exempt from overtime.
- Key case because the Court rejected 70+ years of precedent where FLSA exemptions were construed narrowly. Now they must just be given a "fair reading."
- It should be easier for employers to now convince courts that employees fall within overtime exemptions.

Questions?

- Amy Jenkins
- 843-576-2917
- Amy.Jenkins@mgclaw.com

United States Department of Labor

Wage and Hour Division

Wage and Hour Division (WHD)

Notice of Proposed Rulemaking: Overtime Update

On March 7, 2019 the Department of Labor announced a proposed rule that would make more than a million more American workers eligible for overtime.

Under currently enforced law, employees with a salary below $455 per week ($23,660 annually) must be paid overtime if they work more than 40 hours per week. Workers making at least this salary level may be eligible for overtime based on their job duties. This salary level was set in 2004.

This proposal would boost the proposed standard salary level to $679 per week (equivalent to $35,308 per year). Above this salary level, eligibility for overtime varies based on job duties.

In developing the proposal, the Department received extensive public input from six in-person listening sessions held around the nation and more than 200,000 comments that were received as part of a 2017 Request for Information (RFI). Commenters who participated in response to the RFI or who participated at a listening session overwhelmingly agreed that the currently enforced salary and compensation levels need to be updated.

The NPRM includes:

- The proposal increases the minimum salary required for an employee to qualify for exemption from the currently-enforced level of $455 to $679 per week (equivalent to $35,308 per year).
- The proposal increases the total annual compensation requirement for "highly compensated employees" (HCE) from the currently-enforced level of $100,000 to $147,414 per year.
- A commitment to periodic review to update the salary threshold. An update would continue to require notice-and-comment rulemaking.
- Allowing employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10 percent of the standard salary level.
- No changes in overtime protections for:
  - Police Officers

- Fire Fighters
- Paramedics
- Nurses
- Laborers including: non-management production-line employees
- Non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, and other construction workers

- No changes to the job duties test.
- No automatic adjustments to the salary threshold.

The Department will consider all timely comments in developing a final rule.

Additional Information

- Notice of Proposed Rulemaking: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees
- Press Release [03/22/19]: U.S. Department Of Labor's Overtime Proposal Open For Public Comment
- Press Release [03/07/19]: U.S. Department of Labor Releases Overtime Update Proposal
- Fact Sheet: Notice of Proposed Rulemaking to Update the Regulations Defining and Delimiting the Exemptions for Executive, Administrative, and Professional Employees
- Frequently Asked Questions About the Proposed Rule
- Overtime Pay Website

U.S. Department of Labor

U.S. Wage and Hour Division

Wage and Hour Division

(March 2019)

Fact Sheet: Notice of Proposed Rulemaking to Update the Regulations Governing the Regular Rate under the FLSA

The U.S. Department of Labor (Department) is proposing to clarify and update the regulations governing the regular rate requirements under the Fair Labor Standards Act (FLSA). The FLSA generally requires overtime pay of at least one and one-half times the regular rate for hours worked in excess of 40 hours per workweek. Regular rate requirements define what forms of payment employers include and exclude in the "time and one-half" calculation when determining workers' overtime rates.

Part 778 constitutes the Department's official interpretation with respect to the meaning and application of the "regular rate" for purposes of calculating overtime compensation due under section 7 of the FLSA, 29 U.S.C. 207, including calculation of the regular rate. Part 548 of Title 29 implements section 7(g)(3) of the FLSA, which permits employers, under specific circumstances, to use a basic rate to compute overtime compensation rather than a regular rate. Parts 778 and 548 have not been significantly revised in over 50 years.

In this rulemaking, the Department proposes updates to a number of regulations, both to provide clarity and better reflect the 21st-century workplace. In doing so, these proposed changes would promote compliance with the FLSA; provide appropriate and updated guidance in an area of evolving law and practice; and encourage employers to provide additional and innovative benefits to workers without fear of costly litigation. The Department expects that the proposed rule will encourage some employers to start providing certain benefits that they may presently refrain from providing due to apprehension about potential overtime consequences, which in turn might have a positive impact on workplace morale, employee compensation, and employee retention. The Department was unable to quantify such potential benefits and invites comment from the public regarding the possible effects of the proposed rule.

* Key Provisions of the Proposed Rule *

The NPRM focuses primarily on clarifying whether certain kinds of perks, benefits or other miscellaneous payments must be included in the "regular rate" used to determine an employee's overtime pay. In relevant part, the Department proposes clarifications to the current regulations to confirm the following:

- that the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services may be excluded from an employee's regular rate of pay;
- that payments for unused paid leave, including paid sick leave, may be excluded from an employee's regular rate of pay;
- that reimbursed expenses need not be incurred "solely" for the employer's benefit for the reimbursements to be excludable from an employee's regular rate;

- that reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and meets other regulatory requirements may be excluded from an employee's regular rate of pay;
- that employers do not need a prior formal contract or agreement with the employee(s) to exclude certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA; and
- that pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, may be excluded from an employee's regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked.

The Department also proposes to provide examples of discretionary bonuses that may be excluded from an employee's regular rate of pay under section 7(e)(3) of the FLSA and to clarify that the label given a bonus does not determine whether it is discretionary. The Department also proposes to provide additional examples of benefit plans, including accident, unemployment, and legal services, that may be excluded from an employee's regular rate of pay under section 7(e)(4) of the FLSA.

Additionally, the Department proposes to clarify that tuition programs, such as reimbursement programs or repayment of educational debt, could be excluded under several different provisions of section 7(e), and welcomes comments about how employers currently administer such programs.

Finally, the Department proposes two substantive changes to the existing regulations. First, the Department proposes to eliminate the restriction in §§ 778.221 and 778.222 that "call-back" pay and other payments similar to call-back pay must be "infrequent and sporadic" to be excludable from an employee's regular rate, while maintaining that such payments must not be so regular that they are essentially prearranged. Second, the Department proposes an update to its "basic rate" regulations. Under the current regulations, employers using an authorized basic rate may exclude from the overtime computation any additional payment that would not increase total overtime compensation by more than $0.50 a week on average for overtime workweeks in the period for which the employer makes the payment. The Department's proposal would update this regulation to change the $0.50 limit to 40 percent of the federal minimum wage—currently $2.90.. The Department welcomes comments on whether 40 percent is an appropriate threshold.

For additional information, visit our Wage and Hour Division Website: www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

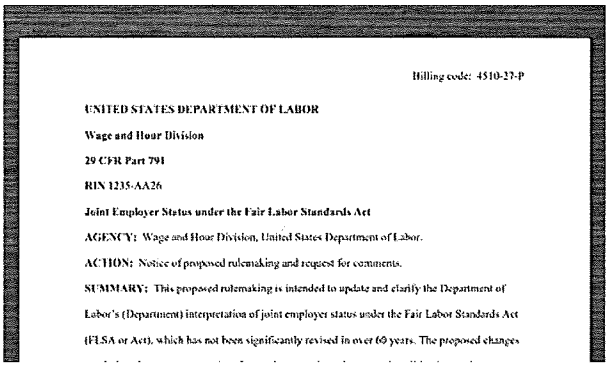
United States Department of Labor

Wage and Hour Division

Wage and Hour Division (WHD)

Notice of Proposed Rulemaking: Joint Employer Status

On April 1, 2019, the U.S. Department of Labor announced a proposed rule to revise and clarify the responsibilities of employers and joint employers to employees in joint employer arrangements. The Department has not meaningfully revised its joint employer regulation since 1958.



Billing code: 4510-27-P

UNITED STATES DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 791

RIN 1235-AA26

Joint Employer Status under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, United States Department of Labor.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: This proposed rulemaking is intended to update and clarify the Department of Labor's (Department) interpretation of joint employer status under the Fair Labor Standards Act (FLSA or Act), which has not been significantly revised in over 60 years. The proposed changes

The Fair Labor Standards Act (FLSA) allows joint employer situations where an employer and a joint employer are jointly responsible for the employee's wages. This proposal would ensure employers and joint employers clearly understand their responsibilities to pay at least the federal minimum wage for all hours worked and overtime for all hours worked over 40 in a workweek.

In 2017, the Department withdrew the previous administration's sub-regulatory guidance regarding joint employer status. That guidance did not go through the rulemaking process that includes public notice and comment.

The Department proposes a clear, four-factor test—based on well-established precedent—that would consider whether the potential joint employer actually exercises the power to:

- hire or fire the employee;
- supervise and control the employee's work schedules or conditions of employment;
- determine the employee's rate and method of payment; and
- maintain the employee's employment records.

The proposal also includes a set of examples for comment that would further help to clarify joint employer status.

The Notice of Proposed Rulemaking (NPRM) will publish on April 9, 2019 in the Federal Register, at which time interested parties may submit comments on the proposal at www.regulations.gov in the rulemaking docket RIN 1235-AA26 by June 10, 2019. Only comments received during the comment period will be considered part of the rulemaking record.

The Department will consider all timely comments in developing any final rule.

Additional Information

- Notice of Proposed Rulemaking: Joint Employer Status under the FLSA
- Fact Sheet: Notice of Proposed Rulemaking to Update the Regulations Governing Joint Employer Status under the FLSA
- Frequently Asked Questions About the Proposed Rule
- Examples Clarifying Joint Employment Status
- Press Release [04/01/19]: Department of Labor Issues Proposal to Update the FLSA's Joint Employer Regulations
- Press Release [04/08/10]: Comment Period for U.S. Department of Labor's Joint Employer Proposal Opens

User Name: AMY JENKINS
Date and Time: Tuesday, April 30, 2019 5:44:00 PM EDT
Job Number: 88018274

Document (1)

1. *Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612*
   Client/Matter: 00206.08008
   Search Terms: "Epic Systems"
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	Sources: U.S. Supreme Court Cases, Lawyers' Edition

Epic Sys. Corp. v. Lewis

Supreme Court of the United States

October 2, 2017, Argued[*]; May 21, 2018, Decided

Nos. 16-285, 16-300, 16-307.

[*] Together with No. 16-300, *Ernst & Young LLP et al.* v. *Morris et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit, and No. 16-307, *National Labor Relations Board* v. *Murphy Oil USA, Inc., et al.*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

Reporter
138 S. Ct. 1612 *; 200 L. Ed. 2d 889 **; 2018 U.S. LEXIS 3086 ***; 86 U.S.L.W. 4297; 168 Lab. Cas. (CCH) P11,091; 211 L.R.R.M. 3061; 27 Wage & Hour Cas. 2d (BNA) 1197; 27 Fla. L. Weekly Fed. S 255; 2018 WL 2292444

EPIC SYSTEMS CORPORATION, Petitioner (No. 16-285) v. JACOB LEWIS

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 2015 U.S. App. LEXIS 18673 (5th Cir., Oct. 26, 2015)
Morris v. Ernst & Young, LLP, 834 F.3d 975, 2016 U.S. App. LEXIS 15638 (9th Cir. Cal., Aug. 22, 2016)
Lewis v. Epic Sys. Corp., 823 F.3d 1147, 2016 U.S. App. LEXIS 9638 (7th Cir. Wis., May 26, 2016)

Disposition: *No. 16-285, 823 F. 3d 1147*, and *No. 16-300, 834 F. 3d 975*, reversed and remanded; *No. 16-307, 808 F. 3d 1013*, affirmed.

Core Terms

arbitration, employees, arbitration agreement, procedures, law law law, cases, collection action, courts, rights, concerted activity, terms, statutes, contracts, class action, join, parties, waivers, saving clause, proceedings, individualized, enforceable, provisions, disputes, mutual aid, decisions, workplace, collective bargaining, rule rule rule, collective-litigation, federal court

Case Summary

Overview

HOLDINGS: [1]-The arbitration agreements between employers and employees that called for individualized proceedings were to be enforced as written where *9 U.S.C.S. § 2* did not save the employees' defense that the contracts were unenforceable just because they required bilateral arbitration, and nothing in *29 U.S.C.S. § 157* expressed approval or disapproval of arbitration or mentioned class or collective action procedures; [2]-The NLRB's opinion suggesting that the *NLRA* displaced the Arbitration Act was not due Chevron deference as it had interpreted a statute that it did not administer, i.e., the FAA, the Executive Branch had offered competing interpretations of the *NLRA*, and the statutory construction canon against reading conflicts into statutes resolved the issue.

Outcome

Judgments in two cases reversed, judgment in third case affirmed; 5-4 decision, 1 concurrence, 1 dissent.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN1[] **Arbitration Agreements**

In the *Federal Arbitration Act*, Congress has instructed federal courts to enforce arbitration agreements according to their terms, including terms providing for individualized proceedings.

Governments > Legislation > Interpretation

HN2[] **Interpretation**

It is the court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN3[] **Arbitration Agreements**

By its terms, the saving clause of the *Federal Arbitration Act* allows courts to refuse to enforce arbitration agreements upon such grounds as exist at law or in equity for the revocation of any contract. *9 U.S.C.S. § 2*.

Business & Corporate
Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN4 **Arbitration Agreements**

The saving clause of the *Federal Arbitration Act*, *9 U.S.C.S. § 2*, recognizes only defenses that apply to any contract. In this way the clause establishes a sort of equal-treatment rule for arbitration contracts. The clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. At the same time, the clause offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. Under judicial precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration.

Business & Corporate
Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Contracts Law > Defenses > General Overview

HN5 **Arbitration Agreements**

Courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. Just as judicial antagonism toward arbitration before the *Federal Arbitration Act's* enactment manifested itself in a great variety of devices and formulas declaring arbitration against public policy, the Concepcion analysis teaches that courts must be alert to new devices and formulas that would achieve much the same result today. And a rule seeking to declare individualized arbitration proceedings off limits is just such a device.

Business & Corporate
Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Contracts Law > Defenses > Illegal Bargains

HN6 **Arbitration Agreements**

Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, judicial precedent says, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability.

Governments > Courts > Judicial Precedent

HN7 **Judicial Precedent**

The law of precedent teaches that like cases should generally be treated alike.

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Interpretation

HN8 **Allocation**

When confronted with two Acts of Congress allegedly touching on the same topic, a court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both. A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be clear and manifest. And in approaching a claimed conflict, courts come armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.

Business & Corporate
Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Arbitration Awards

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN9 **Arbitration Agreements**

Section 7, *29 U.S.C.S. § 157*, focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. But it does not express

approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the *Federal Arbitration Act*, let alone accomplish that much clearly and manifestly, as judicial precedents demand.

Governments > Legislation > Interpretation

HN10 **Interpretation**

Where a more general term follows more specific terms in a statutory list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words.

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN11 **Protected Activities**

As used in *29 U.S.C.S. § 157*, the term "other concerted activities" should, like the terms that precede it, serve to protect things employees just do for themselves in the course of exercising their right to free association in the workplace, rather than the highly regulated, courtroom-bound activities of class and joint litigation. None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

Governments > Legislation > Interpretation

HN12 **Interpretation**

The usual rule is that Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions; it does not, one might say, hide elephants in mouseholes.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN13 **Arbitration Agreements**

Even a statute's express provision for collective legal actions does not necessarily mean that it precludes individual attempts at conciliation through arbitration. And judicial precedent stresses that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the *Federal Arbitration Act*.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > General Overview

HN14 **Arbitration Agreements**

Nothing in judicial precedent indicates that the *National Labor Relations Act* guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the *Federal Arbitration Act*.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN15 **Deference to Agency Statutory Interpretation**

On no account might the United States Supreme Court agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN16 **Deference to Agency Statutory Interpretation**

Chevron deference is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity.

Governments > Legislation > Interpretation

HN17 **Interpretation**

The canon against reading conflicts into statutes is a traditional tool of statutory construction.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN18 **Deference to Agency Statutory Interpretation**

Where the canons of statutory construction supply an answer, Chevron deference leaves the stage.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN19 **Arbitration Agreements**

Judicial precedent clearly teaches that a contract defense conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures is inconsistent with the *Federal Arbitration Act* and its saving clause.

Lawyers' Edition Display

Decision

[889]** Employees who entered with employers into contract providing for individualized arbitration proceedings to resolve employment disputes between parties were not entitled to litigate Fair Labor Standards Act (*29 U.S.C.S. § 201 et seq.*) or related state-law claims through class or collective actions in federal court.

Summary

Overview: HOLDINGS: [1]-The arbitration agreements between employers and employees that called for individualized proceedings were to be enforced as written where *9 U.S.C.S. § 2* did not save the employees' defense that the contracts were unenforceable just because they required bilateral arbitration, and nothing in *29 U.S.C.S. § 157* expressed approval or disapproval of arbitration or mentioned class or collective action procedures; [2]-The NLRB's opinion suggesting that the NLRA displaced the Arbitration Act was not due Chevron deference as it had interpreted a statute that it did not administer, **[**890]** i.e., the FAA, the Executive Branch had offered competing interpretations of the NLRA, and the statutory construction canon against reading conflicts into statutes resolved the issue.

Outcome: Judgments in two cases reversed, judgment in third case affirmed; 5-4 decision, 1 concurrence, 1 dissent.

Headnotes

Arbitration 11 > INDIVIDUALIZED PROCEEDINGS > Headnote:
LEdHN1. 1.

In the Federal Arbitration Act (*9 U.S.C.S. § 1 et seq.*), Congress has instructed federal courts to enforce arbitration agreements according to their terms, including terms providing for individualized proceedings. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Statutes 135 > HARMONIZING STATUTES > Headnote:
LEdHN2. 2.

It is the court's duty to interpret Congress' statutes as a harmonious whole rather than at war with one another. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 13 > AGREEMENT -- REFUSAL TO ENFORCE > Headnote:
LEdHN3. 3.

By its terms, the saving clause of the Federal Arbitration Act allows courts to refuse to enforce arbitration agreements upon such grounds as exist at law or in equity for the revocation of any contract. *9 U.S.C.S. § 2*. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 2.3Arbitration 5 > CONTRACT LAW -- VALIDITY OF AGREEMENT > Headnote:
LEdHN4. 4.

The saving clause of the Federal Arbitration Act (*9 U.S.C.S. § 2*) recognizes only defenses that apply to any contract. In this way the clause establishes a sort of equal-treatment rule for arbitration contracts. The clause permits agreements to arbitrate to be invalidated by generally applicable contract

defenses, such as fraud, duress, or unconscionability. At the same time, the clause offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. Under judicial precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[891]**

Arbitration 11 > NONCONSENSUAL CLASSWIDE PROCEDURES > Headnote:
LEdHN5.[] 5.

Courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. Just as judicial antagonism toward arbitration before the Federal Arbitration Act's (*9 U.S.C.S. § 1 et seq.*) enactment manifested itself in a great variety of devices and formulas declaring arbitration against public policy, the Concepcion analysis teaches that courts must be alert to new devices and formulas that would achieve much the same result today. And a rule seeking to declare individualized arbitration proceedings off limits is just such a device. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 5 > VALIDITY OF CONTRACT > Headnote:
LEdHN6.[] 6.

Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, judicial precedent says, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Courts 766 > PRECEDENT > Headnote:
LEdHN7.[] 7.

The law of precedent teaches that like cases should generally be treated alike. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Statutes 229 > DISPLACEMENT OF OTHER STATUTE -- CONGRESSIONAL INTENTION > Headnote:
LEdHN8.[] 8.

When confronted with two Acts of Congress allegedly touching on the same topic, a court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both. A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be clear and manifest. And in approaching a claimed conflict, courts come armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address pre-existing law when it wishes to suspend its normal operations in a later statute. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Labor 125 > COLLECTIVE BARGAINING -- ARBITRATION > Headnote:
LEdHN9.[] 9.

Section 7 (*29 U.S.C.S. § 157*) focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Federal Arbitration Act (*9 U.S.C.S. § 1 et seq.*), let alone accomplish that much clearly and manifestly, as judicial precedents demand. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Statutes 173 > GENERAL AND SPECIFIC TERMS > Headnote:
LEdHN10.[] 10.

Where a more general term follows more specific terms in a statutory list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[892]**

Labor 9 > CONCERTED ACTIVITIES -- EMPLOYEE RIGHTS > Headnote:
LEdHN11. 11.

As used in *29 U.S.C.S. § 157*, the term "other concerted activities" should, like the terms that precede it, serve to protect things employees just do for themselves in the course of exercising their right to free association in the workplace, rather than the highly regulated, courtroom-bound activities of class and joint litigation. None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Statutes 123.5 > ALTERATION OF REGULATORY SCHEME > Headnote:
LEdHN12. 12.

The usual rule is that Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions; it does not, one might say, hide elephants in mouseholes. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 2.1 > COLLECTIVE ACTIONS -- DISPLACEMENT OF ARBITRATION > Headnote:
LEdHN13. 13.

Even a statute's express provision for collective legal actions does not necessarily mean that it precludes individual attempts at conciliation through arbitration. And judicial precedent stresses that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Federal Arbitration Act (*9 U.S.C.S. § 1 et seq.*). (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 2.1Labor 20 > CLASS AND COLLECTIVE ACTION > Headnote:
LEdHN14. 14.

Nothing in judicial precedent indicates that the National Labor Relations Act (*29 U.S.C.S. § 151 et seq.*) guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Federal Arbitration Act (*9 U.S.C.S. § 1 et seq.*). (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Constitutional Law 55 > DELEGATION OF AUTHORITY TO ADMINISTRATIVE AGENCY > Headnote:
LEdHN15. 15.

On no account might the United States Supreme Court agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Administrative Law 276 > STATUTORY CONSTRUCTION -- JUDICIAL DEFERENCE > Headnote:
LEdHN16. 16.

Chevron deference is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Statutes 135 > AVOIDING CONFLICTS > Headnote:
LEdHN17. 17.

The canon against reading conflicts into statutes is a traditional tool of statutory construction. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

[893]**

Administrative Law 276 > STATUTORY CONSTRUCTION -- JUDICIAL DEFERENCE > Headnote:
LEdHN18. 18.

Where the canons of statutory construction supply an answer, Chevron deference leaves the stage. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Arbitration 5 > CLASSWIDE PROCEDURES -- ENFORCEABILITY > Headnote: ***LEdHN19.***[] 19.

Judicial precedent clearly teaches that a contract defense conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures is inconsistent with the Federal Arbitration Act (*9 U.S.C.S. § 1 et seq.*) and its saving clause. (Gorsuch, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Syllabus

[*1616] [894]** In each of these cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate *Fair Labor Standards Act* and related state law claims through class or collective actions in federal court. Although the *Federal Arbitration Act* generally requires courts to enforce arbitration agreements as written, the employees argued that its "saving clause" removes this obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements here violated the *National Labor Relations Act*. The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the *NLRA* demands a different conclusion. Until recently, courts as well as the National Labor Relations Board's general counsel agreed that such arbitration agreements are enforceable. In 2012, however, the Board ruled that the *NLRA* effectively **[***2]** nullifies the Arbitration Act in cases like these, and since then other courts have either agreed with or deferred to the Board's position.

Held:

Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the *NLRA* suggests otherwise. *Pp. ___ - ___, 200 L. Ed. 2d, at 898-911*.

(a) The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. See *9 U. S. C. §§2*, *3*, *4*. These emphatic directions would seem to resolve any argument here. The Act's saving clause--which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," *§2*-recognizes only " 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' " *AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742*, not defenses targeting arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration," *id., at 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742*. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes. **[***3]** *Pp. ___ - ___, 200 L. Ed. 2d, at 898-901*.

(b) The employees also mistakenly claim that, even if the Arbitration Act normally requires enforcement of arbitration agreements like theirs, the *NLRA* overrides that guidance and renders their agreements unlawful yet. When confronted with two Acts allegedly touching on the same topic, this Court must strive "to give effect to both." **[*1617]** *Morton v. Mancari, 417 U. S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290*. To prevail, the employees must show a " 'clear and manifest' " congressional intention to displace one Act with another. *Ibid.* There is a "stron[g] presum[ption]" that disfavors repeals by implication and that "Congress will specifically address" **[**895]** preexisting law before suspending the law's normal operations in a later statute. *United States v. Fausto, 484 U. S. 439, 452, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830*.

The employees ask the Court to infer that class and collective actions are "concerted activities" protected by *§7 of the NLRA*, which guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . ., and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," *29 U. S. C. §157*. But *§7* focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to **[***4]** displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in *§7*, since those procedures were hardly known when the *NLRA* was adopted in 1935. Because the catchall term "other concerted activities for the purpose of . . . other mutual aid or protection" appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, *i.e.*, things employees do for themselves in the course of exercising their right to free association in the workplace.

The *NLRA's* structure points to the same conclusion. After speaking of various "concerted activities" in *§7*, the statute establishes a detailed regulatory regime applicable to each item on the list, but gives no hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Nor is it at all obvious what rules should govern on such essential issues as opt-out and opt-in procedures, notice to class members, and class certification standards. Telling too is the fact that Congress has shown that it knows exactly how to specify certain dispute resolution procedures, cf., *e.g., 29 U. S. C. §§216(b), 626*, or to override the Arbitration Act, **[***5]** see, *e.g., 15 U. S. C. §1226(a)(2)*, but Congress has done nothing like that in the *NLRA*.

The employees suggest that the *NLRA* does not discuss class and collective action procedures because it means to confer a right to use *existing* procedures provided by statute or rule, but the *NLRA* does not say even that much. And if employees do take existing rules as they find them, they must take them subject to those rules' inherent limitations, including the principle that parties may depart from them in favor of individualized arbitration.

In another contextual clue, the employees' underlying causes of action arise not under the *NLRA* but under the *Fair Labor Standards Act*, which permits the sort of collective action the employees wish to pursue here. Yet they do not suggest that the *FLSA* displaces the Arbitration Act, presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings, see *Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26*. The employees' theory also runs afoul of the rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. American Trucking Assns., Inc., 531 U. S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1*, as it would allow a catchall term in the *NLRA* to dictate **[**896]** the particulars of dispute resolution **[***6]** procedures in Article III courts or arbitration proceedings--matters that are usually left to, *e.g.*, the Federal Rules of Civil Procedure, the **[*1618]** Arbitration Act, and the *FLSA*. Nor does the employees' invocation of the *Norris-LaGuardia Act*, a predecessor of the *NLRA*, help their argument. That statute declares unenforceable contracts in conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection," *29 U. S. C. §102*, and just as under the *NLRA*, that policy does not conflict with Congress's directions favoring arbitration.

Precedent confirms the Court's reading. The Court has rejected many efforts to manufacture conflicts between the Arbitration Act and other federal statutes, see, *e.g. American Express Co. v. Italian Colors Restaurant, 570 U. S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417*; and its *§7* cases have generally involved efforts related to organizing and collective bargaining in the workplace, not the treatment of class or collective action procedures in court or arbitration, see, *e.g., NLRB v. Washington Aluminum Co., 370 U. S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298*.

Finally, the employees cannot expect deference under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694*, because *Chevron*'s essential premises are missing. The Board sought not to interpret just the *NLRA*, "which it administers," *id., at 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694*, but to interpret that statute in a way that limits the **[***7]** work of the Arbitration Act, which the agency does not administer. The Board and the Solicitor General also dispute the *NLRA's* meaning, articulating no single position on which the Executive Branch might be held "accountable to the people." *Id., at 865, 104 S. Ct. 2778, 81 L. Ed. 2d 694*. And after "employing traditional tools of statutory construction," *id., at 843, n. 9, 104 S. Ct. 2778, 81 L. Ed. 2d 694*, including the canon against reading conflicts into statutes, there is no unresolved ambiguity for the Board to address. *Pp. ___ - ___, 200 L. Ed. 2d, at 901-909*.

No. 16-285, 823 F. 3d 1147, and *No. 16-300, 834 F. 3d 975*, reversed and remanded; *No. 16-307, 808 F. 3d 1013*, affirmed.

Counsel: Paul D. Clement argued the cause for petitioners in Nos. 16-285 & 16-300.

Jeffrey B. Wall argued the cause for the United States, as amicus curiae, by special leave of court, supporting the petitioners in Nos. 16-285 and 16-300 and respondents in No. 16-307.

Richard F. Griffin, Jr. argued the cause for petitioner, acting as respondent, in No. 16-307.

Daniel R. Ortiz argued the cause for respondents in Nos. 16-285 & 16-300.

Judges: Gorsuch, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Alito, JJ., joined. Thomas, J., filed a concurring opinion. Ginsburg, J., filed a dissenting opinion, in which Breyer, Sotomayor, and Kagan, JJ., joined.

Opinion by: GORSUCH

Opinion

Justice **Gorsuch** delivered the opinion of the Court.

[*1619] Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. ***HN1***[] ***LEdHN[1]***[] [1] **[**897]** In the *Federal Arbitration Act*, **[***8]** Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the *National Labor Relations Act (NLRA)* offers a conflicting command. ***HN2***[] ***LEdHN[2]***[] [2] It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The *NLRA* secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the *NLRA*—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the *NLRA* have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP* v. *Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an **[***9]** agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by . . . a court" in the relevant jurisdiction. App. in **[*1620]** No. 16-300, p. 43. The agreement also specified individualized arbitration, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings." *Id.*, at 44.

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal *Fair Labor Standards Act (FLSA)* and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the *FLSA's* collective action provision, *29 U. S. C. §216(b)*. He sought to pursue the state law claim as a class action under *Federal Rule of Civil Procedure 23*.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed **[***10]** this judgment. *834 F. 3d 975 (2016)*. The Ninth Circuit recognized that the Arbitration Act generally requires courts to enforce arbitration agreements as written. But the court reasoned that the statute's "saving clause," see *9 U. S. C. §2*, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the *NLRA* by barring employees from engaging in the "concerted activit[y]," *29 U. S. C. §157*, of pursuing claims as a class or collective action.

Judge Ikuta dissented. In her view, the Arbitration Act protected the arbitration **[**898]** agreement from judicial interference and nothing in the Act's saving clause suggested otherwise. Neither, she concluded, did the *NLRA* demand a different result. Rather, that statute focuses on protecting unionization and collective bargaining in the workplace, not on guaranteeing class or collective action procedures in disputes before judges or arbitrators.

Although the Arbitration Act and the *NLRA* have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements **[***11]** like those before us must be enforced according to their terms. See, *e.g.*, *Owen v. Bristol Care, Inc., 702 F. 3d 1050 (CA8 2013)*; *Sutherland v. Ernst & Young LLP, 726 F. 3d 290 (CA2 2013)*;*D. R. Horton, Inc. v. NLRB, 737 F. 3d 344 (CA5 2013)*; *Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal. 4th 348, 173 Cal. Rptr. 3d 289, 327 P. 3d 129 (2014)*; *Tallman v. Eighth Jud. Dist. Court, 359 P. 3d 113 (2015)*; *808 F. 3d 1013 (CA5 2015)* (case below in No. 16-307).

The National Labor Relations Board's general counsel expressed much the same view in 2010. Remarking that employees and employers "can benefit from the relative simplicity and informality of resolving claims before arbitrators," the general counsel opined that the validity of such agreements "does not involve consideration of the policies of the *National Labor Relations Act*." Memorandum GC 10-06, pp. 2, 5 (June 16, 2010).

But recently things have shifted. In 2012, the Board—for the

first time in the 77 years since the *NLRA's* adoption—asserted that the *NLRA* effectively nullifies the Arbitration Act in cases like ours. *D. R. Horton, Inc., 357 N. L. R. B. 2277*. Initially, this agency decision received a cool reception in court. See *D. R. Horton, 737 F. 3d, at 355-362*. In the last two years, though, some circuits have either agreed with the Board's conclusion or **[*1621]** thought themselves obliged to defer to it under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. See *823 F. 3d 1147 (CA7 2016)* (case below in No. 16-285); *834 F. 3d 975* (case below in No. 16-300); *NLRB v. Alt. Entm't, Inc., 858 F.3d 393 (CA6 2017)*. More recently still, the disagreement has grown as the Executive has disavowed the Board's (most recent) position, and the Solicitor General and the Board have offered us battling **[***12]** briefs about the law's meaning. We granted certiorari to clear the confusion. *580 U. S. ___, 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017)*.

II

We begin with the Arbitration Act and the question of its saving clause.

Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. *Scherk v. Alberto-Culver Co., 417 U. S. 506, 510, n. 4, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974)*. But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, **[**899]** and often cheaper resolutions for everyone involved. *Id., at 511, 94 S. Ct. 2449, 41 L. Ed. 2d 270*. So Congress directed courts to abandon their hostility and instead treat arbitration agreements as "valid, irrevocable, and enforceable." *9 U. S. C. §2*. The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U. S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U. S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)*); see *id., at 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270* (discussing "the plain meaning of the statute" and "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

Not only did Congress require courts to respect and enforce agreements to arbitrate; **[***13]** it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. See *§3* (providing for a stay of litigation pending arbitration "in accordance with the terms of the agreement"); *§4* (providing for "an order directing that . . . arbitration proceed in the manner provided for in such agreement"). Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *American Express Co. v. Italian Colors Restaurant, 570 U. S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)* (some emphasis added; citations, internal quotation marks, and brackets omitted).

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. See *AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*; *Italian Colors, supra*; *DIRECTV, Inc. v. Imburgia, 577 U. S. ___, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015)*. You might wonder if the balance Congress struck in 1925 between arbitration **[*1622]** and litigation **[***14]** should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. ***HN3***[↑] ***LEdHN[3]***[↑] [3] By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." *§2*. That provision applies here, the employees tell us, because the *NLRA* renders their particular class and collective action waivers illegal. In their view, illegality under the *NLRA* is a "ground" that "exists at law . . . for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.

[900]** The problem with this line of argument is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. See *834 F. 3d, at 991-992, 997* (Ikuta, J., dissenting). Put to the side the question of what it takes to qualify as a ground for "revocation" of a **[***15]** contract. See *Concepcion, supra, at 352-355, 131 S. Ct. 1740, 179 L. Ed. 2d 742* (Thomas, J., concurring); *post, at 1-2, 200 L. Ed. 2d, at 911-912* (Thomas, J., concurring). Put to the side for the moment, too, even the

question whether the NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

It can't because HN4[↑] LEdHN[4][↑] [4] the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. Kindred Nursing Centers L. P. v. Clark, 581 U. S. ___, ___, 137 S. Ct. 1421, 197 L. Ed. 2d 806, 812 (2017). The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" Concepcion, 563 U. S., at 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742. At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." Id., at 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742; see Kindred Nursing, supra, at ___, 137 S. Ct. 1421, 197 L. Ed. 2d 806, 814.

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, **[***16]** say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of Concepcion. There this Court faced a state law defense that prohibited as unconscionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. 563 U. S., at 338, 341, 131 S. Ct. 1740, 179 L. Ed. 2d 742. But, the Court held, the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same. It **[*1623]** did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This "fundamental" change to the traditional arbitration process, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and **[***17]** mak[e] the process slower, more costly, and more likely to generate procedural **[**901]** morass than final judgment." Id., at 347, 348, 131 S. Ct. 1740, 179 L. Ed. 2d 742. Not least, *Concepcion* noted, arbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. *Ibid.* All of which would take much time and effort, and introduce new risks and costs for both sides. *Ibid.* In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. Id., at 351, 131 S. Ct. 1740, 179 L. Ed. 2d 742. But *Concepcion*'s essential insight remains: HN5[↑] LEdHN[5][↑] [5] courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without **[***18]** the parties' consent. Id., at 344-351, 131 S. Ct. 1740, 179 L. Ed. 2d 742; see also Stolt-Nielsen S. A. v. AnimalFeeds Int'l , 559 U.S. 662, 684-687, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy," *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. 563 U. S., at 342, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (internal quotation marks omitted). And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.

The employees' efforts to distinguish *Concepcion* fall short. They note that their putative NLRA defense would render an agreement "illegal" as a matter of federal statutory law rather than "unconscionable" as a matter of state common law. But we don't see how that distinction makes any difference in light of *Concepion*'s rationale and rule. HN6[↑] LEdHN[6][↑] [6] Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of that kind, *Concepcion* tells us, is one that **[***19]** impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. HN7[↑] LEdHN[7][↑] [7] The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us

to enforce, not override, the terms of the arbitration agreements before us.

III

But that's not the end of it. Even if the Arbitration Act normally requires **[**902]** us to **[*1624]** enforce arbitration agreements like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. HN8[↑] LEdHN[8][↑] [8] When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" Morton v. Mancari, 417 U. S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy **[***20]** burden of showing "'a clearly expressed congressional intention'" that such a result should follow. Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U. S. 528, 533, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995). The intention must be "'clear and manifest.'" Morton, supra, at 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. United States v. Fausto, 484 U. S. 439, 452, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988).

These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

> "the right to self-organization, to form, join, or assist labor **[***21]** organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. HN9[↑] LEdHN[9][↑] [9] Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. Cf. 14 Penn Plaza LLC v. Pyett, 556 U. S. 247, 256-260, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009). But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective **[**903]** actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective **[***22]** action provision postdated Section 7 by years. See Rule 23-Class **[*1625]** Actions, 28 U. S. C. App., p. 1258 (1964 ed., Supp. II); 52 Stat. 1069; Concepcion, 563 U. S., at 349, 131 S. Ct. 1740, 179 L. Ed. 2d 742; see also Califano v. Yamasaki, 442 U. S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979) (noting that the "usual rule" then was litigation "conducted by and on behalf of individual named parties only"). And while some forms of group litigation existed even in 1935, see 823 F. 3d, at 1154, Section 7's failure to mention them only reinforces that the statute doesn't speak to such procedures.

A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term "other concerted activities for the purpose of . . . other mutual aid or protection." This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively." 29 U. S. C. §157. And HN10[↑] LEdHN[10][↑] [10] where, as here, a more general term follows more specific terms in a list, the general term is usually understood to "'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 115, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001) (discussing *ejusdem generis* canon); National Assn. of Mfrs. v. Department of Defense, 583 U. S. ___, ___, 138 S. Ct. 617, 199 L. Ed. 2d 501 (2018). All of which suggests that HN11[↑] LEdHN[11][↑] [11] the term "other concerted

activities" **[***23]** should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." *Alternative Entertainment, 858 F. 3d, at 414-415* (Sutton, J., concurring in part and dissenting in part) (emphasis deleted). None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The *NLRA's* broader structure underscores the point. After speaking of various "concerted activities" in *Section 7*, Congress proceeded to establish a regulatory regime applicable to each of them. The *NLRA* provides rules for the recognition of exclusive bargaining representatives, *29 U. S. C. §159*, explains employees' and employers' obligation to bargain collectively, *§158(d)*, and conscribes certain labor organization practices, *§§158(a)(3), (b)*. The *NLRA* also touches on other concerted activities closely related to organization and collective bargaining, such as **[***24]** picketing, *§158(b)(7)*, and strikes, *§163*. It even sets rules for adjudicatory proceedings **[**904]** under the *NLRA* itself. *§§160*, *161*. Many of these provisions were part of the original *NLRA* in 1935, see *49 Stat. 449*, while others were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures *Section 7* might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the *NLRA* even whispers to us on any of these essential questions. And it is hard to fathom **[*1626]** why Congress would take such care to regulate all the other matters mentioned in *Section 7* yet remain mute about this matter alone—unless, of course, *Section 7* doesn't speak to class and collective action procedures in the first place.

Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress **[***25]** has spoken often and clearly to the procedures for resolving "actions," "claims," "charges," and "cases" in statute after statute. *E.g., 29 U. S. C. §§216(b), 626*; *42 U. S. C. §§2000e-5(b), (f)(3)-(5)*. Congress has likewise shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, "[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if" certain conditions are met, *15 U. S. C. §1226(a)(2)*; or that "[n]o predispute arbitration agreement shall be valid or enforceable" in other circumstances, *7 U. S. C. §26(n)(2)*; *12 U. S. C. §5567(d)(2)*; or that requiring a party to arbitrate is "unlawful" in other circumstances yet, *10 U. S. C. §987(e)(3)*. The fact that we have nothing like that here is further evidence that *Section 7* does nothing to address the question of class and collective actions.

In response, the employees offer this slight reply. They suggest that the *NLRA* doesn't discuss any particular class and collective action procedures because it merely confers a right to use *existing* procedures provided by statute or rule, "on the same terms as [they are] made available to everyone else." Brief for Respondent in No. 16-285, p. 53, n. 10. But of course the *NLRA* doesn't say even that much. And, besides, if the parties really take existing class and collective action rules as they **[***26]** find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures of their own design.

Still another contextual clue yields the same message. The employees' underlying causes of action involve their wages and arise not under the *NLRA* but under an entirely different statute, the *Fair Labor Standards Act*. The *FLSA* allows employees to sue on behalf of "themselves and other employees similarly situated," *29 U. S. C. §216(b)*, and it's precisely this sort of collective action the employees before us wish to pursue. Yet they do not offer the seemingly more natural suggestion that the *FLSA* **[**905]** overcomes the Arbitration Act to permit their class and collective actions. Why not? Presumably because this Court held decades ago that an identical collective action scheme (in fact, one borrowed from the *FLSA*) does *not* displace the Arbitration Act or prohibit individualized arbitration proceedings. *Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)* (discussing *Age Discrimination in Employment Act*). In fact, it turns out that "[e]very circuit to consider the question" has held that the *FLSA* allows agreements for individualized arbitration. **[***27]** *Alternative Entertainment, 858 F. 3d, at 413* (opinion of Sutton, J.) (collecting cases). Faced with that obstacle, the employees are left to cast about elsewhere for help. And so they have cast in this direction, suggesting that one statute (the *NLRA*) steps in to dictate the procedures for claims under a different statute (the *FLSA*), and thereby overrides the commands of yet a third statute (the Arbitration Act). It's a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.

Perhaps worse still, the employees' theory runs afoul of ***HN12***[↑] ***LEdHN[12]***[↑] [12] the usual rule that Congress "does not alter the fundamental **[*1627]** details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc., 531 U. S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)*. Union organization and collective bargaining in the workplace are the bread and butter of the *NLRA*, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least the Federal Rules of Civil Procedure, the Arbitration Act, and the *FLSA*. It's more than a little doubtful that Congress would have tucked into the mousehole of *Section 7*'s catchall term an elephant that tramples the **[***28]** work done by these other laws; flattens the parties' contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.

Nor does it help to fold yet another statute into the mix. At points, the employees suggest that the *Norris-LaGuardia Act*, a precursor of the *NLRA*, also renders their arbitration agreements unenforceable. But the *Norris-LaGuardia Act* adds nothing here. It declares "[un]enforceable" contracts that conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection." *29 U. S. C. §§102*, *103*. That is the same policy the *NLRA* advances and, as we've seen, it does not conflict with Congress's statutory directions favoring arbitration. See also *Boys Markets, Inc. v. Retail Clerks, 398 U. S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970)* (holding that the *Norris-LaGuardia Act's* anti-injunction provisions do not bar enforcement of arbitration agreements).

What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save **[***29]** one temporary exception since **[**906]** overruled), with statutes ranging from the *Sherman* and *Clayton Acts* to the *Age Discrimination in Employment Act*, the *Credit Repair Organizations Act*, the *Securities Act of 1933*, the *Securities Exchange Act of 1934*, and the *Racketeer Influenced and Corrupt Organizations Act*. *Italian Colors, 570 U. S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417*; *Gilmer, 500 U. S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26*; *CompuCredit Corp. v. Greenwood, 565 U. S. 95, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012)*; *Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U. S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)* (overruling *Wilko v. Swan, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953)*); *Shearson/American Express Inc. v. McMahon, 482 U. S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)*. Throughout, we have made clear that ***HN13***[↑] ***LEdHN[13]***[↑] [13] even a statute's express provision for collective legal actions does not necessarily mean that it precludes "'individual attempts at conciliation'" through arbitration. *Gilmer, supra, at 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26*. And we've stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act. *CompuCredit, supra, at 103-104, 132 S. Ct. 665, 181 L. Ed. 2d 586*; *McMahon, supra, at 227, 107 S. Ct. 2332, 96 L. Ed. 2d 185*; *Italian Colors, supra, at 234, 133 S. Ct. 2304, 186 L. Ed. 2d 417*. Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

Consider a few examples. In *Italian Colors*, this Court refused to find a conflict between the Arbitration Act and the *Sherman Act* because the *Sherman Act* **[*1628]** (just like the *NLRA*) made "no mention of class actions" and was adopted before *Rule 23* introduced its exception to the "usual rule" of "individual" dispute resolution. *570 U. S., at 234, 133 S. Ct. 2304, 186 L. Ed. 2d 417* (internal quotation marks omitted). **[***30]** In *Gilmer*, this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though" the *Age Discrimination in Employment Act* "expressly permitted collective legal actions." *Italian Colors, supra, at 237, 133 S. Ct. 2304, 186 L. Ed. 2d 417* (citing *Gilmer, supra, at 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26*). And in *CompuCredit*, this Court refused to find a conflict even though the *Credit Repair Organizations Act* expressly provided a "right to sue," "repeated[ly]" used the words "action " and "court" and "class action," and even declared "[a]ny waiver" of the rights it provided to be "void." *565 U. S., at 99-100, 132 S. Ct. 665, 181 L. Ed. 2d 586* (internal quotation marks omitted). If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the *NLRA* alone and for the first time does so today.

The employees rejoin that our precedential story is complicated by some of this Court's cases interpreting *Section 7* itself. But, as it turns out, this Court's *Section 7* cases have usually involved just what you would expect from the statute's plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings. See, *e.g.*, *NLRB **[**907]** v. Washington Aluminum Co., 370 U. S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962)* (walkout to protest workplace conditions); **[***31]** *NLRB v. Granite State Joint Board, 409 U.S. 213, 93 S. Ct. 385, 34 L. Ed. 2d 422 (1972)* (resignation from union and

refusal to strike); *NLRB v. J. Weingarten, Inc., 420 U. S. 251, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975)* (request for union representation at disciplinary interview). Neither do the two cases the employees cite prove otherwise. In *Eastex, Inc. v. NLRB, 437 U. S. 556, 558, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978)*, we simply addressed the question whether a union's distribution of a newsletter in the workplace qualified as a protected concerted activity. We held it did, noting that it was "undisputed that the union undertook the distribution in order to boost its support and improve its bargaining position in upcoming contract negotiations," all part of the union's "'continuing organizational efforts.'" *Id., at 575, and n. 24, 98 S. Ct. 2505, 57 L. Ed. 2d 428*. In *NLRB v. City Disposal Systems, Inc., 465 U. S. 822, 831-832, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984)*, we held only that an employee's assertion of a right under a collective bargaining agreement was protected, reasoning that the collective bargaining "process—beginning with the organization of the union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity." ***HN14***[↑] ***LEdHN[14]***[↑] [14] Nothing in our cases indicates that the *NLRA* guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

That leaves **[***32]** the employees to try to make something of our dicta. The employees point to a line in *Eastex* observing that "it has been held" by other courts and the Board "that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." *437 U. S., at 565-566, 98 S. Ct. 2505, 57 L. Ed. 2d 428*; see also Brief for National Labor Relations Board in No. 16-307, p. 15 (citing similar Board decisions). But even on its own **[*1629]** terms, this dicta about the holdings of other bodies does not purport to discuss what *procedures* an employee might be entitled to in litigation or arbitration. Instead this passage at most suggests only that "resort to administrative and judicial forums" isn't "entirely unprotected." *Id., at 566, 98 S. Ct. 2505, 57 L. Ed. 2d 428*. Indeed, the Court proceeded to explain that it did not intend to "address . . . the question of what may constitute 'concerted' activities in this [litigation] context." *Ibid., n. 15, 98 S. Ct. 2505, 57 L. Ed. 2d 428*. So even the employees' dicta, when viewed fairly and fully, doesn't suggest that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. Neither should this come as a surprise given that not **[***33]** a single one of the lower court or Board decisions *Eastex* discussed went so far as to hold that *Section 7* guarantees a right to class or collective action procedures. As we've seen, the Board did not purport to discover that right until 2012, and no federal appellate court accepted it until 2016. See *D. R. Horton, 357 N. L. R. B. 2277*; *823 F. 3d 1147* (case below in No. 16-285).

[908]** With so much against them in the statute and our precedent, the employees end by seeking shelter in *Chevron*. Even if this Court doesn't see what they see in *Section 7*, the employees say we must rule for them anyway because of the deference this Court owes to an administrative agency's interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel's judgment in 2010 that the *NLRA* and the Arbitration Act coexist peaceably; they wish us to defer instead to the Board's 2012 opinion suggesting the *NLRA* displaces the Arbitration Act. No party to these cases has asked us to reconsider *Chevron* deference. Cf. *SAS Institute Inc. v. Iancu, 138 S. Ct. 1348, 200 L. Ed. 2d 695*. But even under *Chevron*'s terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an "implicit" delegation **[***34]** to an agency to interpret a "statute which it administers." *467 U. S., at 841, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694*. Here, though, the Board hasn't just sought to interpret its statute, the *NLRA*, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And ***HN15***[↑] ***LEdHN[15]***[↑] [15] on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*'s essential premises is simply missing here.

It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies. *Gordon v. New York Stock Exchange, Inc., 422 U. S. 659, 685-686, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975)*. An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "'bootstrap[ping] itself into an area in which it has no jurisdiction.'" *Adams Fruit Co. v. Barrett, 494 U. S. 638, 650, 110 S. Ct. 1384, 108 L. Ed. 2d 585 (1990)*. All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment. See *Hoffman Plastic Compounds, Inc. v. NLRB, 535 U. S. 137, 144, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002)* (noting that this Court has "never deferred to the Board's remedial preferences where such **[***35]** preferences potentially trench upon federal statutes and policies unrelated to the *NLRA*").

[*1630] Another justification the *Chevron* Court offered for deference is that "policy choices" should be left to Executive Branch officials "directly accountable to the people." *467 U. S., at 865, 104 S. Ct. 2778, 81 L. Ed. 2d 694*. But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the *NLRA*. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it **[**909]** might be held accountable. See Hemel & Nielson, *Chevron* Step One-and-a-Half, *84 U. Chi. L. Rev. 757, 808 (2017)* ("If the theory undergirding *Chevron* is that voters should be the judges of the executive branch's policy choices, then presumably the executive branch should have to take ownership of those policy choices so that voters know whom to blame (and to credit)"). In these circumstances, we will not defer.

Finally, the *Chevron* Court explained that ***HN16***[↑] ***LEdHN[16]***[↑] [16] deference is not due unless a "court, employing traditional tools of statutory construction," **[***36]** is left with an unresolved ambiguity. *467 U. S., at 843, n. 9,104 S. Ct. 2778, 81 L. Ed. 2d 694*. And that too is missing: ***HN17***[↑] ***LEdHN[17]***[↑] [17] the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. ***HN18***[↑] ***LEdHN[18]***[↑] [18] Where, as here, the canons supply an answer, "*Chevron* leaves the stage." *Alternative Entertainment, 858 F. 3d, at 417* (opinion of Sutton, J.).

IV

The dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead "yellow dog" contract. *Post, at 3-17, 30, 200 L. Ed. 2d, at 913-921, 930* (opinion of Ginsburg, J.). But like most apocalyptic warnings, this one proves a false alarm. Cf. L. Tribe, American Constitutional Law 435 (1978) ("'*Lochnerizing*' has become so much an epithet that the very use of the label may obscure attempts at understanding").

Our decision does nothing to override Congress's policy judgments. As the dissent recognizes, the legislative policy embodied in the *NLRA* is aimed at "safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining." *Post, at 8, 200 L. Ed. 2d, at 916*. Those rights stand every bit **[***37]** as strong today as they did yesterday. And rather than revive "yellow dog" contracts against union organizing that the *NLRA* outlawed back in 1935, today's decision merely declines to read into the *NLRA* a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010.

Instead of overriding Congress's policy judgments, today's decision seeks to honor them. This much the dissent surely knows. Shortly after invoking the specter of *Lochner*, it turns around and criticizes the Court for trying *too hard* to abide the Arbitration Act's "'liberal federal policy favoring arbitration agreements,'" *Howsam v. Dean Witter Reynolds, Inc., 537 U. S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)*, saying we "'ski'" too far down the "'slippery slope'" of this Court's arbitration precedent, *post, at 23, 200 L. Ed. 2d, at 925*. But the dissent's real complaint lies with the mountain of precedent itself. The dissent spends page after page relitigating our Arbitration Act precedents, rehashing arguments this Court has heard and rejected many times in many cases that no party **[*1631]** has asked us to revisit. Compare *post, at 18-23, 26, 200 L. Ed. 2d, at 922-925, 927* (criticizing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*, *Gilmer, 500 U. S. 20, 111 S. Ct. **[**910]** 1647, 114 L. Ed. 2d 26*, *Circuit City, 532 U. S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234*, *Concepcion, 563 U. S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742*, *Italian Colors, 570 U. S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417*, and *CompuCredit, 565 U. S. 95, 132 S. Ct. 665, 181 L. Ed. 2d 586*), with *Mitsubishi, supra, at 645-650, 105 S. Ct. 3346, 87 L. Ed. 2d 444* (Stevens, J., dissenting), *Gilmer, supra, at 36, 39-43, 111 S. Ct. 1647, 114 L. Ed. 2d 26* (Stevens, J., dissenting), *Circuit City, supra, at 124-129, 121 S. Ct. 1302, 149 L. Ed. 2d 234* (Stevens, J., dissenting), *Concepcion, supra, at 357-367, 131 S. Ct. 1740, 179 L. Ed. 2d 742* (Breyer, J., dissenting), *Italian Colors, supra, at 240-253, 133 S. Ct. 2304, 186 L. Ed. 2d 417* (Kagan, **[***38]** J., dissenting), and *CompuCredit, supra, at 116-117, 132 S. Ct. 665, 181 L. Ed. 2d 586* (Ginsburg, J., dissenting).

When at last it reaches the question of applying our precedent, the dissent offers little, and understandably so. ***HN19***[↑] ***LEdHN[19]***[↑] [19] Our precedent clearly teaches that a contract defense "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with the Arbitration Act and its saving clause. *Concepcion, supra, at 336, 131 S. Ct. 1740, 179 L. Ed. 2d 742* (opinion of the Court). And that, of course, is exactly what the employees' proffered defense seeks to do.

Nor is the dissent's reading of the *NLRA* any more available to us than its reading of the Arbitration Act. The dissent

imposes a vast construction on Section 7's language. Post, at 9, 200 L. Ed. 2d, at 916. But a statute's meaning does not always "turn solely" on the broadest imaginable "definitions of its component words." Yates v. United States, 574 U. S. ___, ___, 135 S. Ct. 1074; 191 L. Ed. 2d 64, 76 (2015) (plurality opinion). Linguistic and statutory context also matter. We have offered an extensive explanation why those clues support our reading today. By contrast, the dissent rests its interpretation on legislative history. Post, at 3-5, 200 L. Ed. 2d, at 913-915; see also post, at 19-21, 200 L. Ed. 2d, at 923-924. But legislative history is not the law. "It is the business of Congress to sum up its own debates in its legislation," and once it enacts a statute **[***39]** "'[w]e do not inquire what the legislature meant; we ask only what the statute means.'" Schwegmann Brothers v. Calvert Distillers Corp., 341 U. S. 384, 396, 397, 71 S. Ct. 745, 95 L. Ed. 1035, 60 Ohio Law Abs. 81 (1951) (Jackson, J., concurring) (quoting Justice Holmes). Besides, when it comes to the legislative history here, it seems Congress "did not discuss the right to file class or consolidated claims against employers." D. R. Horton, 737 F. 3d, at 361. So the dissent seeks instead to divine messages from congressional commentary directed to different questions altogether—a project that threatens to "substitute [the Court] for the Congress." Schwegmann, supra, at 396, 71 S. Ct. 745, 95 L. Ed. 1035, 60 Ohio Law Abs. 81.

Nor do the problems end there. The dissent proceeds to argue that its expansive reading of the NLRA conflicts with and should prevail over the Arbitration Act. The NLRA leaves the Arbitration Act without force, the dissent says, because it provides the more "pinpointed" direction. Post, at 25, 200 L. Ed. 2d, at 927. Even taken on its own terms, though, this argument quickly faces trouble. The dissent says the NLRA is the more specific provision because it supposedly **[**911]** "speaks directly to group action by employees," while the Arbitration Act doesn't speak to such actions. *Ibid.* But the question before us is whether courts must enforce particular arbitration agreements according to their terms. And it's the Arbitration Act that speaks directly **[***40]** to the enforceability of arbitration agreements, **[*1632]** while the NLRA doesn't mention arbitration at all. So if forced to choose between the two, we might well say the Arbitration Act offers the more on-point instruction. Of course, there is no need to make that call because, as our precedents demand, we have sought and found a persuasive interpretation that gives effect to all of Congress's work, not just the parts we might prefer.

Ultimately, the dissent retreats to policy arguments. It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. Post, at 26-30, 200 L. Ed. 2d, at 927-929. But it's altogether unclear why the dissent expects to find such a right in the NLRA rather than in statutes like the FLSA that actually regulate wages and hours. Or why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead. *29 U. S. C. §216(b)*; Gilmer, supra, at 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26. While the dissent is no doubt right that class actions can enhance enforcement by "spread[ing] the costs of litigation," post, at 9, 200 L. Ed. 2d, at 917, it's also well known that they can unfairly "plac[e] pressure on the defendant to settle even unmeritorious **[***41]** claims," Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co., 559 U. S. 393, 445, n. 3, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) (Ginsburg, J., dissenting). The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. Just recently, for example, one federal agency banned individualized arbitration agreements it blamed for underenforcement of certain laws, only to see Congress respond by immediately repealing that rule. See 82 Fed. Reg. 33210 (2017) (cited post, at 28, n. 15, 200 L. Ed. 2d, at 928); *Pub. L. 115-74, 131 Stat. 1243*. This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That*, we had always understood, was *Lochner*'s sin.

*

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies. The judgments in *Epic*, No. 16-285, and *Ernst & Young*, **[***42]** No. 16-300, are reversed, and the cases are remanded for further proceedings consistent with this opinion. The judgment in *Murphy Oil*, No. 16-307, is affirmed.

So ordered.

Concur by: THOMAS

Concur

[912]** Justice **Thomas**, concurring.

I join the Court's opinion in full. I write separately to add that

the employees also cannot prevail under the plain meaning of the *Federal Arbitration Act*. The Act declares arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U. S. C. §2*. As I have previously explained, grounds for revocation of a contract are those that concern "'the formation of the arbitration agreement.'" *American Express Co. v. Italian Colors Restaurant, 570 U. S. 228, 239, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)* (concurring opinion) (quoting **[*1633]** *AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 353, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)* (Thomas, J., concurring)). The employees argue, among other things, that the class waivers in their arbitration agreements are unenforceable because the *National Labor Relations Act* makes those waivers illegal. But illegality is a public-policy defense. See *Restatement (Second) of Contracts §§178-179* (1979); *McMullen v. Hoffman, 174 U. S. 639, 669-670, 19 S. Ct. 839, 43 L. Ed. 1117 (1899)*. Because "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made," the saving clause does not apply here. *Concepcion, supra, at 357, 131 S. Ct. 1740, 179 L. Ed. 2d 742*. For this reason, and the reasons in the Court's opinion, the employees' arbitration **[***43]** agreements must be enforced according to their terms.

Dissent by: GINSBURG

Dissent

Justice **Ginsburg**, with whom Justice **Breyer**, Justice **Sotomayor**, and Justice **Kagan** join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the *Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 et seq.*, and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. See Ruan, What's Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers, *2012 Mich. St. L. Rev. 1103, 1118-1119* (Ruan). But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. See *id., at 1108-1111*. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the *Federal Arbitration Act* (Arbitration Act or FAA), *9 U. S. C. §1 et seq.*, permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the *National Labor Relations Act (NLRA)* **[***44]**, *29 U. S. C. §151 et seq.*, "to engage in . . . concerted activities" for their "mutual aid or protection"? *§157*. The answer should be a resounding "No."

In the *NLRA* and its forerunner, the *Norris-LaGuardia Act* (NLGA), *29 U. S. C. §101 et seq.*, Congress acted on an acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. **[**913]** A single employee, Congress understood, is disarmed in dealing with an employer. See *NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 33-34, 57 S. Ct. 615, 81 L. Ed. 893 (1937)*. The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the *NLRA*, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer." *NLRB v. City Disposal Systems, Inc., 465 U. S. 822, 835, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984)*. Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.

To explain why the Court's decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation's workplaces, and Congress' aim in the NLGA and the *NLRA* to place employers and employees on a more equal footing. I then explain why the Arbitration Act, sensibly read, does **[***45]** not shrink the *NLRA's* protective sphere.

I

It was once the dominant view of this Court that "[t]he right of a person to sell **[*1634]** his labor upon such terms as he deems proper is . . . the same as the right of the purchaser of labor to prescribe [working] conditions." *Adair v. United States, 208 U. S. 161, 174, 28 S. Ct. 277, 52 L. Ed. 436, 5 Ohio L. Rep. 605 (1908)* (invalidating federal law prohibiting interstate railroad employers from discharging or discriminating against employees based on their membership in labor organizations); accord *Coppage v. Kansas, 236 U. S. 1, 26, 35 S. Ct. 240, 59 L. Ed. 441 (1915)* (invalidating state law prohibiting employers from requiring employees, as a condition of employment, to refrain or withdraw from union membership).

The NLGA and the *NLRA* operate on a different premise, that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment. For decades, the Court's decisions have reflected that understanding. See *Jones & Laughlin*

Steel, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (upholding the *NLRA* against employer assault); cf. *United States v. Darby, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941)* (upholding the *FLSA*).

A

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. See 75 Cong. Rec. 4502 **[***46]** (1932). Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. See *ibid.*; H. Millis & E. Brown, From the *Wagner Act* to Taft-Hartley: A Study of National Labor Policy and Labor Relations 7-8 (1950).

Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. See J. Seidman, The Yellow Dog Contract 11 (1932). Notable among such devices was the "yellow-dog contract." Such agreements, **[**914]** which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. See *id.*, at 11, 56. Many of the employer-designed agreements cast an even wider net, "proscrib[ing] all manner of concerted activities." Finkin, The Meaning and Contemporary Vitality of the *Norris-LaGuardia Act*, *93 Neb. L. Rev. 6, 16 (2014)*; see Seidman, *supra*, at 59-60, 65-66. As a prominent United States Senator observed, contracts of the yellow-dog genre rendered the "laboring man . . . absolutely helpless" by "waiv[ing] his right . . . to free association" and by requiring that he "singly present any grievance he has." 75 Cong. Rec. 4504 (remarks of Sen. Norris).

Early legislative efforts to protect workers' **[***47]** rights to band together were unavailing. See, *e.g.*, *Coppage, 236 U. S., at 26, 35 S. Ct. 240, 59 L. Ed. 441*; Frankfurter & Greene, Legislation Affecting Labor Injunctions, 38 Yale L. J. 879, 889-890 (1929). Courts, including this one, invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to "liberty of contract." See *Coppage, 236 U. S., at 26, 35 S. Ct. 240, 59 L. Ed. 441*; Frankfurter & Greene, *supra*, at 890-891. While stating that legislatures could curtail contractual "liberty" in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced. See *Coppage, 236 U. S., at 16-19, 35 S. Ct. 240, 59 L. Ed. 441*.

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting **[*1635]** employees' associational rights. First, in 1932, Congress passed the NLGA, which regulates the employer-employee relationship indirectly. *Section 2* of the Act declares:

> "Whereas . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives **[***48]** of his own choosing, . . . and that he shall be free from the interference, restraint, or coercion of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *29 U. S. C. §102*.

Section 3 provides that federal courts shall not enforce "any . . . undertaking or promise in conflict with the public policy declared in *[§2]*." *§103*. [1] In adopting these provisions, Congress sought to render ineffective employer-imposed contracts proscribing employees' **[**915]** concerted activity of any and every kind. See 75 Cong. Rec. 4504-4505 (remarks of Sen. Norris) ("[o]ne of the objects" of the NLGA was to "outlaw" yellow-dog contracts); *Finkin, supra, at 16* (contracts prohibiting "all manner of concerted activities apart from union membership or support . . . were understood to be 'yellow dog' contracts"). While banning court enforcement of contracts proscribing concerted action by employees, the NLGA did not directly prohibit coercive employer practices.

But Congress did so three years later, in 1935, when it enacted the *NLRA*. Relevant here, *§7 of the NLRA* guarantees employees "the right to self-organization, to form, join, or assist labor **[***49]** organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*." *29 U. S. C. §157* (emphasis added). *Section 8(a)(1)* safeguards those rights by making it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in *[§7]*." *§158(a)(1)*. To oversee the Act's guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent

[1] Other provisions of the NLGA further rein in federal-court authority to disturb employees' concerted activities. See, *e.g.*, *29 U. S. C. §104(d)* (federal courts lack jurisdiction to enjoin a person from "aiding any person participating or interested in any labor dispute who is being proceeded against in, or [who] is prosecuting, any action or suit in any court of the United States or of any State").

regulatory agency empowered to administer "labor policy for the Nation." *San Diego Building Trades Council v. Garmon, 359 U. S. 236, 242, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)*; see *29 U. S. C. §160*.

Unlike earlier legislative efforts, the NLGA and the *NLRA* had staying power. When a case challenging the *NLRA's* constitutionality made its way here, the Court, in retreat from its *Lochner*-era contractual-"liberty" decisions, upheld the Act as a permissible exercise of legislative authority. See *Jones & Laughlin Steel, 301 U. S., at 33-34, 57 S. Ct. 615, 81 L. Ed. 893*. The Court recognized that employees have a "fundamental right" to join together to advance their common interests and that Congress, in lieu of "ignor[ing]" that right, had elected to "safeguard" it. *Ibid.*

B

Despite the *NLRA's* prohibitions, the employers in the cases now before the Court required their employees **[***50]** to sign **[*1636]** contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-one. [2] When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the *FLSA* and Federal **[**916]** Rules of Civil Procedure, [3] the employers moved to compel individual arbitration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge that they must have access to a judicial forum. [4] They argue only that the *NLRA* prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

C

Although the *NLRA* safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks **[***51]** more embracively. In addition to protecting employees' rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing," the Act protects employees' rights "to engage in *other* concerted activities for the purpose of . . . mutual aid or protection." *29 U. S. C. §157* (emphasis added); see, *e.g.*, *NLRB v. Washington Aluminum Co., 370 U. S. 9, 14-15, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962)* (*§7* protected unorganized employees when they walked off the job to protest cold working conditions). See also 1 J. Higgins, The Developing *Labor Law 209 (6th ed. 2012)* ("*Section 7* protects not only union-related activity but also 'other concerted **[*1637]** activities . . . for mutual aid or protection.'"); 1 N. Lareau, Labor and Employment Law §1.01[1], p. 1-2 (2017) ("*Section 7* extended to employees three federally protected rights: (1) the right to form and join unions; (2) the right to bargain collectively (negotiate) with employers about terms and conditions of employment; *and* (3) the right to work in concert with another employee or employees to achieve employment-related goals." (emphasis added)).

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of . . . mutual aid or protection." *29 U. S. C. §157*. "Concerted" means "[p]lanned or **[***52]** accomplished together;

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[2] The Court's opinion opens with the question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" *Ante, at 1, 200 L. Ed. 2d, at 896*. Were the "agreements" genuinely bilateral? Petitioner ***Epic Systems*** Corporation e-mailed its employees an arbitration agreement requiring resolution of wage and hours claims by individual arbitration. The agreement provided that if the employees "continue[d] to work at Epic," they would "be deemed to have accepted th[e] Agreement." App. to Pet. for Cert. in No. 16-285, p. 30a. Ernst & Young similarly e-mailed its employees an arbitration agreement, which stated that the employees' continued employment would indicate their assent to the agreement's terms. See App. in No. 16-300, p. 37. Epic's and Ernst & Young's employees thus faced a Hobson's choice: accept arbitration on their employer's terms or give up their jobs.

[3] The *FLSA* establishes an opt-in collective-litigation procedure for employees seeking to recover unpaid wages and overtime pay. See ***29 U. S. C. §216(b)***. In particular, it authorizes "one or more employees" to maintain an action "in behalf of himself or themselves and other employees similarly situated." *Ibid.* "Similarly situated" employees may become parties to an *FLSA* collective action (and may share in the recovery) only if they file written notices of consent to be joined as parties. *Ibid.* The Federal Rules of Civil Procedure provide two collective-litigation procedures relevant here. First, *Rule 20(a)* permits individuals to join as plaintiffs in a single action if they assert claims arising out of the same transaction or occurrence and their claims involve common questions of law or fact. Second, *Rule 23* establishes an opt-out class-action procedure, pursuant to which "[o]ne or more members of a class" may bring an action on behalf of the entire class if specified prerequisites are met.

[4] Notably, one employer specified that if the provisions confining employees to individual proceedings are "unenforceable," "any claim brought on a class, collective, or representative action basis must be filed in . . . court." App. to Pet. for Cert. in No. 16-285, at 35a.

combined." American Heritage Dictionary 381 (5th ed. 2011). **[**917]** "Mutual" means "reciprocal." *Id.*, at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. See *infra, at 27-28, 200 L. Ed. 2d, at 928*.

Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the *NLRA's* design. Congress expressed its intent, when it enacted the *NLRA*, to "protec[t] the exercise by workers of full freedom of association," thereby remedying "[t]he inequality of bargaining power" workers faced. *29 U. S. C. §151*; see, *e.g.*, *Eastex, Inc. v. NLRB, 437 U. S. 556, 567, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978)* (the Act's policy is "to protect the right of workers to act together to better their working conditions" (internal quotation marks omitted)); *City Disposal, 465 U. S., at 835, 104 S. Ct. 1505, 79 L. Ed. 2d 839* ("[I]n enacting *§7 of the NLRA*, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). See also *supra, at 5-6, 200 L. Ed. 2d, at 914-915*. There can be no serious **[***53]** doubt that collective litigation is one way workers may associate with one another to improve their lot.

Since the Act's earliest days, the Board and federal courts have understood *§7*'s "concerted activities" clause to protect myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they participate in concerted appeals to the media, *e.g.*, *NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F. 2d 503, 505-506 (CA2 1942)*, legislative bodies, *e.g.*, *Bethlehem Shipbuilding Corp. v. NLRB, 114 F. 2d 930, 937 (CA1 1940)*, and government agencies, *e.g.*, *Moss Planing Mill Co., 103 N. L. R. B. 414, 418-419*, enf'd, *206 F. 2d 557 (CA4 1953)*. "The 74th Congress," this Court has noted, "knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Eastex, 437 U. S., at 565, 98 S. Ct. 2505, 57 L. Ed. 2d 428*.

Crucially important here, for over 75 years, the Board has held that the *NLRA* safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. See, *e.g.*, *Spandsco Oil and Royalty Co., 42 N. L. R. B. 942, 948-949 (1942)* (three employees' joint filing of *FLSA* suit ranked as concerted activity protected by the *NLRA*); *Poultrymen's Service Corp., 41 N. L. R. B. 444, 460-463, and n. 28 (1942)* (same with respect to employee's filing of **[*1638]** *FLSA* suit on behalf of himself and **[***54]** others similarly situated), enf'd, *138 F. 2d 204 (CA3 1943)*; *Sarkes Tarzian, Inc., 149 N. L. R. B. 147, 149, 153 (1964)* (same with respect to employees' filing class libel suit); *United Parcel Service, Inc., 252 N. L. R. B. 1015, 1018 (1980)* (same with respect to employee's filing class action regarding break times), enf'd, **[**918]** *677 F. 2d 421 (CA6 1982)*; *Harco Trucking, LLC, 344 N. L. R. B. 478, 478-479 (2005)* (same with respect to employee's maintaining class action regarding wages). For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by *§7*." *Leviton Mfg. Co. v. NLRB, 486 F. 2d 686, 689 (CA1 1973)*; see, *e.g.*, *Brady v. NFL, 644 F.3d 661, 673 (CA8 2011)* (similar). [5] The Court pays scant heed to this longstanding line of decisions. [6]

D

In face of the *NLRA's* text, history, purposes, and longstanding construction, the Court nevertheless concludes

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[5] The Court cites, as purported evidence of contrary agency precedent, a 2010 "Guideline Memorandum" that the NLRB's then-General Counsel issued to his staff. See *ante, at 4, 19, 22, 200 L. Ed. 2d, at 898, 907, 909*. The General Counsel appeared to conclude that employees have a *§7* right to file collective suits, but that employers can nonetheless require employees to sign arbitration agreements waiving the right to maintain such suits. See Memorandum GC 10-06, p. 7 (June 16, 2010). The memorandum sought to address what the General Counsel viewed as tension between longstanding precedent recognizing a *§7* right to pursue collective employment litigation and more recent court decisions broadly construing the FAA. The memorandum did not bind the Board, and the Board never adopted the memorandum's position as its own. See *D. R. Horton, 357 N. L. R. B. 2277, 2282 (2012)*, enf. denied in relevant part, *737 F. 3d 344 (CA5 2013)*; Tr. of Oral Arg. 41. Indeed, shortly after the General Counsel issued the memorandum, the Board rejected its analysis, finding that it conflicted with Board precedent, rested on erroneous factual premises, "defie[d] logic," and was internally incoherent. *D. R. Horton, 357 N. L. R. B., at 2282-2283*.

[6] In 2012, the Board held that employer-imposed contracts barring group litigation in any forum—arbitral or judicial—are unlawful. *D. R. Horton, 357 N. L. R. B. 2277*. In so ruling, the Board simply applied its precedents recognizing that (1) employees have a *§7* right to engage in collective employment litigation and (2) employers cannot lawfully require employees to sign away their *§7* rights. See *id., at 2278, 2280*. It broke no new ground. But cf. *ante, at 2, 19, 200 L. Ed. 2d, at 896, 907*.

that collective proceedings do not fall within the scope of §7. None of the Court's reasons for diminishing §7 should carry the day.

1

The Court relies principally on the *ejusdem generis* canon. See *ante, at 12, 200 L. Ed. 2d, at 903*. Observing that §7's "other concerted activities" clause "appears at the end of a detailed list of activities," the Court says the clause should be read to "embrace" only activities "similar in nature" to those set forth first in the list, *ibid.* (internal quotation marks omitted), *i.e.*, "'self-organization,' 'form[ing], join[ing], or assist[ing] labor **[***55]** organizations,' and 'bargain[ing] collectively,'" *ibid.* The Court concludes that §7 should, therefore, be read to protect "things employees 'just do' for themselves." *Ibid.* (quoting *NLRB v. Alternative Entertainment, Inc., 858 F. 3d 393, 415 (CA6 2017)* (Sutton, J., concurring in part and dissenting in part); emphasis deleted). It is far from apparent why joining hands in litigation would not qualify as "things employees just do for themselves." In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow §7's protections in the manner the Court suggests.

[*1639] The *ejusdem generis* canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. **[**919]** See *Russell Motor Car Co. v. United States, 261 U. S. 514, 519, 43 S. Ct. 428, 67 L. Ed. 778, 58 Ct. Cl. 708 (1923)*. Courts must take care, however, not to deploy the canon to undermine Congress' efforts to draft encompassing legislation. See *United States v. Powell, 423 U. S. 87, 90, 96 S. Ct. 316, 46 L. Ed. 2d 228 (1975)* ("[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute."). Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embracive purpose in enacting the legislation, *i.e.*, to "protec[t] the exercise by workers of full freedom of **[***56]** association." *29 U. S. C. §151*; see *supra, at 9, 200 L. Ed. 2d, at 916*.

2

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA's "structure." *Ante, at 12, 200 L. Ed. 2d, at 903*. Citing a handful of provisions that touch upon unionization, collective bargaining, picketing, and strikes, the Court asserts that the NLRA "establish[es] a regulatory regime" governing each of the activities protected by §7. *Ante, at 12-13, 200 L. Ed. 2d, at 903-904*. That regime, the Court says, offers "specific guidance" and "rules" regulating each protected activity. *Ante, at 13, 200 L. Ed. 2d, at 903*. Observing that none of the NLRA's provisions explicitly regulates employees' resort to collective litigation, the Court insists that "it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in *[§7]* yet remain mute about this matter alone—unless, of course, *[§7]* doesn't speak to class and collective action procedures in the first place." *Ibid.*

This argument is conspicuously flawed. When Congress enacted the NLRA in 1935, the only §7 activity Congress addressed with any specificity was employees' selection of collective-bargaining representatives. See 49 Stat. 453. The Act did not offer "specific guidance" about employees' rights to "form, join, or assist labor organizations." **[***57]** Nor did it set forth "specific guidance" for any activity falling within §7's "other concerted activities" clause. The only provision that touched upon an activity falling within that clause stated: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." *Id.*, at 457. That provision hardly offered "specific guidance" regarding employees' right to strike.

Without much in the original Act to support its "structure" argument, the Court cites several provisions that Congress added later, in response to particular concerns. Compare *49 Stat. 449-457* with 61 Stat. 142-143 (1947) (adding *§8(d)* to provide guidance regarding employees' and employers' collective-bargaining obligations); 61 Stat. 141-142 (amending *§8(a)* and adding *§8(b)* to proscribe specified labor organization practices); 73 Stat. 544 (1959) (adding *§8(b)(7)* to place restrictions on labor organizations' right to picket employers). It is difficult to comprehend why Congress' later inclusion of specific guidance regarding some of the activities protected by §7 sheds any light on Congress' initial conception of §7's scope.

But even if each of the provisions the Court cites had been included in the original Act, they still would provide **[**920]** little support for the Court's conclusion. For **[***58]** going on 80 years now, the Board and federal courts—including this one—have understood §7 to protect numerous activities **[*1640]** for which the Act provides no "specific" regulatory guidance. See *supra, at 9-10, 200 L. Ed. 2d, at 916-918*.

3

In a related argument, the Court maintains that the NLRA does not "even whispe[r]" about the "rules [that] should govern the adjudication of class or collective actions in court or arbitration." *Ante, at 13, 200 L. Ed. 2d, at 903*. The employees here involved, of course, do not look to the NLRA for the procedures enabling them to vindicate their employment rights in arbitral or judicial forums. They assert that the Act

establishes their right to act in concert using existing, generally available procedures, see *supra, at 7, n. 3, 200 L. Ed. 2d, at 916*, and to do so free from employer interference. The *FLSA* and the Federal Rules on joinder and class actions provide the procedures pursuant to which the employees may ally to pursue shared legal claims. Their employers cannot lawfully cut off their access to those procedures, they urge, without according them access to similar procedures in arbitral forums. See, *e.g.*, American Arbitration Assn., Supplementary Rules for Class Arbitrations (2011).

To the employees' argument, the Court replies: If the employees "really take existing **[***59]** class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures." *Ante, at 14, 200 L. Ed. 2d, at 904*. The freedom to depart asserted by the Court, as already underscored, is entirely one sided. See *supra, at 2-5, 200 L. Ed. 2d, at 913-915*. Once again, the Court ignores the reality that sparked the *NLRA's* passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the *NLRA* secures against employer interference employees' right to act in concert for their "mutual aid or protection." *29 U. S. C. §§151, 157, 158*.

4

Further attempting to sow doubt about *§7*'s scope, the Court asserts that class and collective procedures were "hardly known when the *NLRA* was adopted in 1935." *Ante, at 11, 200 L. Ed. 2d, at 903*. In particular, the Court notes, the *FLSA's* collective-litigation procedure postdated *§7* "by years" and *Rule 23* "didn't create the modern class action until 1966." *Ibid.*

First, one may ask, is there any reason to suppose that Congress intended **[***60]** to protect employees' right to act in concert using only those procedures and forums available in 1935? Congress framed *§7* in broad terms, "entrust[ing]" the Board with "responsibility to adapt the Act to changing patterns of industrial life." *NLRB v. J. Weingarten, Inc., 420 U. S. 251, 266, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975)*; see *Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998)* ("[T]he fact that a statute can be applied in situations not expressly anticipated **[**921]** by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted)). With fidelity to Congress' aim, the Board and federal courts have recognized that the *NLRA* shields employees from employer interference when they, *e.g.*, join together to file complaints with administrative agencies, even if those agencies did not exist in 1935. See, *e.g.*, *Wray Electric Contracting, Inc., 210 N. L. R. B. 757, 762 (1974)* (the *NLRA* protects concerted filing of complaint with the Occupational Safety and Health Administration).

Moreover, the Court paints an ahistorical picture. As Judge Wood, writing for the Seventh Circuit, cogently explained, **[*1641]** the *FLSA's* collective-litigation procedure and the modern class action were "not written on a clean slate." *823 F. 3d 1147, 1154 (2016)*. By 1935, permissive joinder was scarcely uncommon in courts of equity. See 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1651 (3d ed. 2001). Nor were representative **[***61]** and class suits novelties. Indeed, their origins trace back to medieval times. See S. Yeazell, From Medieval Group Litigation to the Modern Class Action 38 (1987). And beyond question, "[c]lass suits long have been a part of American jurisprudence." 7A Wright, *supra*, §1751, at 12 (3d ed. 2005); see *Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356, 363, 41 S. Ct. 338, 65 L. Ed. 673 (1921)*. See also Brief for Constitutional Accountability Center as *Amicus Curiae* 5-16 (describing group litigation's "rich history"). Early instances of joint proceedings include cases in which employees allied to sue an employer. *E.g.*, *Gorley v. Louisville, 65 S.W. 844, 23 Ky. L. Rptr. 1782 (1901)* (suit to recover wages brought by ten members of city police force on behalf of themselves and other officers); *Guiliano v. Daniel O'Connell's Sons, 105 Conn. 695, 136 A. 677 (1927)* (suit by two employees to recover for injuries sustained while residing in housing provided by their employer). It takes no imagination, then, to comprehend that Congress, when it enacted the *NLRA*, likely meant to protect employees' joining together to engage in collective litigation. [7]

E

Because I would hold that employees' *§7* rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, *i.e.*, "waivers," are unlawful. As earlier recounted, **[***62]** see *supra, at 6, 200 L. Ed. 2d, at 915*, *§8(a)(1)* makes it an "unfair labor practice" for an

[7] The Court additionally suggests that something must be amiss because the employees turn to the *NLRA*, rather than the *FLSA*, to resist enforcement of the collective-litigation waivers. See *ante, at 14-15, 200 L. Ed. 2d, at 904-905*. But the employees' reliance on the *NLRA* is hardly a reason to "raise a judicial eyebrow." *Ante, at 15, 200 L. Ed. 2d, at 905*. The *NLRA's* guiding purpose is to protect employees' rights to work together when addressing shared workplace grievances of whatever kind.

employer to "interfere with, restrain, or coerce" employees in the exercise of their §7 rights. *29 U. S. C. §158(a)(1)*. Beyond genuine dispute, an employer "interfere[s] with" and "restrain[s]" employees in the exercise of their §7 rights by mandating that they prospectively renounce those rights in **[**922]** individual employment agreements. [8] The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. See *National Licorice Co. v. NLRB, 309 U. S. 350, 364, 60 S. Ct. 569, 84 L. Ed. 799 (1940)*. Properly assessed, then, the "waivers" rank as unfair labor practices outlawed by the *NLRA*, and therefore unenforceable in court. See *Kaiser Steel Corp. v. Mullins, 455 U. S. 72, 77, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982)* ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by **[*1642]** the federal law."). [9]

[8] See, *e.g.*, *Bethany Medical Center, 328 N. L. R. B. 1094, 1105-1106 (1999)* (holding employer violated ***§8(a)(1)*** by conditioning employees' rehiring on the surrender of their right to engage in future walkouts); *Mandel Security Bureau Inc., 202 N. L. R. B. 117, 119, 122 (1973)* (holding employer violated ***§8(a)(1)*** by conditioning employee's reinstatement to former position on agreement that employee would refrain from filing charges with the Board and from circulating work-related petitions, and, instead, would "mind his own business").

[9] I would similarly hold that the NLGA renders the collective-litigation waivers unenforceable. That Act declares it the public policy of the United States that workers "shall be free from the interference, restraint, or coercion of employers" when they engage in "concerted activities" for their "mutual aid or protection." *29 U. S. C. §102*; see *supra, at 5, 200 L. Ed. 2d, at 914*. *Section 3* provides that federal courts shall not enforce any "promise in conflict with the [Act's] policy." *§103*. Because employer-extracted collective-litigation waivers interfere with employees' ability to engage in "concerted activities" for their "mutual aid or protection," see *supra, at 8-11, 200 L. Ed. 2d, at 916-918*, the arm-twisted waivers collide with the NLGA's stated policy; thus, no federal court should enforce them. See Finkin, The Meaning and Contemporary Vitality of the *Norris-LaGuardia Act*, *93 Neb. L. Rev. 6 (2014)*.

Boys Markets, Inc. v. Retail Clerks, 398 U. S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970), provides no support for the Court's contrary conclusion. See *ante, at 16, 200 L. Ed. 2d, at 905*. In *Boys Markets*, an employer and a union had entered into a collective-bargaining agreement, which provided that labor disputes would be resolved through arbitration and that the union would not engage in strikes, pickets, or boycotts during the life of the agreement. *398 U. S., at 238-239, 90 S. Ct. 1583, 26 L. Ed. 2d 199*. When a dispute later arose, the union bypassed arbitration and called a strike. *Id., at 239, 90 S. Ct. 1583, 26 L. Ed. 2d 199*. The question presented: Whether a federal district court could enjoin the strike and order the parties to arbitrate their dispute. The case required the Court to reconcile the NLGA's limitations on federal courts' authority to enjoin employees' concerted activities, see *29 U. S. C. §104*, with *§301(a) of the Labor Management Relations Act, 1947*, which grants federal courts the power to enforce collective-bargaining agreements, see *29 U. S. C. §185(a)*. The Court concluded that permitting district courts to enforce no-strike and arbitration provisions in collective-bargaining agreements would encourage employers to enter into such agreements, thereby furthering federal labor policy. *398 U. S., at 252-253, 90 S. Ct. 1583, 26 L. Ed. 2d 199*. That case has little relevance here. It did not consider the enforceability of arbitration provisions that require employees to arbitrate disputes only one-by-one. Nor did it consider the enforceability of arbitration provisions that an employer has unilaterally imposed on employees, as opposed to provisions negotiated through collective-bargaining processes in which employees can leverage their collective strength.

II

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. *Ante, at 6, 200 L. Ed. 2d, at 899*. Nothing in the FAA or this Court's case law, however, requires subordination of the *NLRA's* protections. Before addressing the interaction between the **[***63]** two laws, I briefly recall the FAA's history and the domain for which that Act was designed.

[923]** A

1

Prior to 1925, American courts routinely declined to order specific performance of arbitration agreements. See Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 270 (1926). Growing backlogs in the courts, which delayed the resolution of commercial disputes, prompted the business community to seek legislation enabling merchants to enter into binding arbitration agreements. See *id.*, at 265. The business community's aim was to secure to merchants an expeditious, economical means of resolving their disputes. See *ibid.* The American Bar Association's Committee on Commerce, Trade and Commercial Law took up the reins in 1921, drafting the legislation Congress enacted, with relatively few changes, four years later. See Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A. B. A. J. 153 (1925).

The legislative hearings and debate leading up to the FAA's passage evidence **[*1643]** Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes. See,

e.g., 65 Cong. Rec. 11080 (1924) (remarks of Rep. Mills) ("This bill provides that where **[***64]** there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract."); Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924) (Joint Hearings) (consistently focusing on the need for binding arbitration of commercial disputes). [10]

The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts. In brief, when the legislation was introduced, organized labor voiced concern. See Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923) (Hearing). Herbert Hoover, then Secretary of Commerce, suggested that if there were "objection[s]" to including "workers' contracts in the law's scheme," Congress could amend the legislation to say: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Id.*, at 14. Congress adopted Secretary Hoover's suggestion virtually verbatim in §1 of the **[***65]** Act, see Joint Hearings 2; 9 U. S. C. §1, and labor expressed **[**924]** no further opposition, see H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). [11]

Congress, it bears repetition, envisioned application of the Arbitration Act to voluntary, negotiated agreements. See, *e.g.*, 65 Cong. Rec. 1931 (remarks of Rep. Graham) (the FAA provides an "opportunity to enforce . . . an agreement to arbitrate, when voluntarily placed in the document by the parties to it"). Congress never endorsed a policy favoring arbitration where one party sets the terms of an agreement while the other is left to "take it or leave it." Hearing 9 (remarks of Sen. Walsh) (internal quotation marks omitted); see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, *388 U. S. 395, 403, n. 9, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)* ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1.").

2

In recent decades, this Court has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes. See Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, **[*1644]** 74 Wash. U. L. Q. 637, 644-674 (1996) (tracing the Court's evolving interpretation of the **[***66]** FAA's scope). In 1983, the Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a "liberal federal policy favoring arbitration." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U. S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (involving an arbitration agreement between a hospital and a construction contractor). Soon thereafter, the Court ruled, in a series of cases, that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well. *E.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985); Shearson/American Express Inc. v. McMahon, 482 U. S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987). Further, in 1991, the Court concluded in Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 23, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), that the FAA requires enforcement of agreements to arbitrate claims arising under the Age Discrimination in Employment Act of 1967, a workplace antidiscrimination statute. Then, in 2001, the Court ruled in Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 109, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001), that the Arbitration Act's exemption for employment contracts should be construed narrowly, to exclude from the Act's scope only transportation workers' contracts.

Employers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act. Few employers imposed arbitration agreements on their employees in the early 1990's. After *Gilmer* and *Circuit City*, however, employers' exaction of arbitration clauses in employment contracts grew steadily. See, *e.g.*, Economic **[***67]** Policy Institute (EPI), A. Colvin, The **[**925]** Growing Use of Mandatory Arbitration 1-2, 4 (Sept. 27, 2017), available at https://www.epi.org/files/pdf/135056.pdf (All Internet

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[10] American Bar Association member Julius H. Cohen, credited with drafting the legislation, wrote shortly after the FAA's passage that the law was designed to provide a means of dispute resolution "particularly adapted to the settlement of commercial disputes." Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 279 (1926). Arbitration, he and a colleague explained, is "peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like." *Id.*, at 281. "It has a place also," they noted, "in the determination of the simpler questions of law" that "arise out of th[e] daily relations between merchants, [for example,] the passage of title, [and] the existence of warranties." *Ibid.*

[11] For fuller discussion of Congress' intent to exclude employment contracts from the FAA's scope, see Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 124-129, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001) (Stevens, J., dissenting).

materials as visited May 18, 2018) (data indicate only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today). Moreover, in response to subsequent decisions addressing class arbitration, [12] employers have increasingly included in their arbitration agreements express group-action waivers. See Ruan 1129; Colvin, *supra, at 6, 200 L. Ed. 2d, at 915* (estimating that 23.1% of nonunionized employees are now subject to express class-action waivers in mandatory arbitration agreements). It is, therefore, this Court's exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants—that led the NLRB to confront, for the first time in 2012, the precise question **[*1645]** whether employers can use arbitration agreements to insulate themselves from collective employment litigation. See *D. R. Horton, 357 N. L. R. B. 2277 (2012)*, enf. denied in relevant part, *737 F. 3d 344 (CA5 2013)*. Compare *ante, at 3-4, 200 L. Ed. 2d, at 897-898* (suggesting the Board broke new ground in 2012 when it concluded that the *NLRA* prohibits employer-imposed arbitration agreements that mandate individual arbitration) with *supra, at 10-11, 200 L. Ed. 2d, at 917-918* (NLRB decisions recognizing **[***68]** a *§7* right to engage in collective employment litigation), and *supra, at 17, n. 8, 200 L. Ed. 2d, at 922* (NLRB decisions finding employer-dictated waivers of *§7* rights unlawful).

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today. Cf. R. Bork, The Tempting of America 169 (1990) ("Judges . . . live on the slippery slope of analogies; they are not supposed to ski it to the bottom.").

B

Through the Arbitration Act, Congress sought "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint, 388 U. S., at 404, n. 12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270*. Congress thus provided in *§2 of the FAA* that the terms of a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." **[**926]** *9 U. S. C. §2* (emphasis added). Pursuant to this "saving clause," arbitration agreements and terms may be invalidated based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)*; see *ante, at 7, 200 L. Ed. 2d, at 900*.

Illegality is a traditional, generally applicable contract defense. See 5 R. Lord, Williston on Contracts §12.1 (4th ed. 2009) **[***69]** . "[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *Kaiser Steel, 455 U. S., at 77, 102 S. Ct. 851, 70 L. Ed. 2d 833* (quoting *McMullen v. Hoffman, 174 U. S. 639, 654, 19 S. Ct. 839, 43 L. Ed. 1117 (1899)*). For the reasons stated *supra, at 8-17, 200 L. Ed. 2d, at 916-921*, I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's saving clause can thus achieve harmonization of the FAA and the *NLRA* without undermining federal labor policy.

The Court urges that our case law—most forcibly, *AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*—rules out reconciliation of the *NLRA* and the FAA through the latter's saving clause. See *ante, at 6-9, 200 L. Ed. 2d, at 899-901*. I disagree. True, the Court's Arbitration Act decisions establish that the saving clause "offers no refuge" for defenses that discriminate against arbitration, "either by name or by more subtle methods." *Ante, at 7, 200 L. Ed. 2d, at 900*. The Court, therefore, has rejected saving clause salvage where state courts have invoked generally applicable contract defenses to discriminate "covertly" against arbitration. *Kindred Nursing Centers L.P. v. Clark, 581 U. S. ___, ___, 137 S. Ct. 1421, 197 L. Ed. 2d 806, 809 (2017)*. In *Concepcion*, the Court held that the saving clause **[***70]** did not spare the California Supreme Court's invocation of unconscionability doctrine to establish a rule blocking enforcement of class-action waivers

[12] In *Green Tree Financial Corp. v. Bazzle, 539 U. S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)*, a plurality suggested arbitration might proceed on a class basis where not expressly precluded by an agreement. After *Bazzle*, companies increasingly placed explicit collective-litigation waivers in consumer and employee arbitration agreements. See Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, *104 Mich. L. Rev. 373, 409-410 (2005)*. In *AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*, and *American Express Co. v. Italian Colors Restaurant, 570 U. S. 228, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)*, the Court held enforceable class-action waivers in the arbitration agreements at issue in those cases. No surprise, the number of companies incorporating express class-action waivers in consumer and employee arbitration agreements spiked. See 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 29 (2017), available at *https://www.classactionsurvey.com/pdf/2017-class-action-survey.pdf* (reporting that 16.1% of surveyed companies' arbitration agreements expressly precluded class actions in 2012, but 30.2% did so in 2016).

in adhesive consumer **[*1646]** contracts. *563 U. S., at 341-344, 346-352, 131 S. Ct. 1740, 179 L. Ed. 2d 742*. Class proceedings, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id., at 348, 131 S. Ct. 1740, 179 L. Ed. 2d 742*. Accordingly, the Court concluded, the California Supreme Court's rule, though derived from unconscionability doctrine, impermissibly disfavored arbitration, and therefore could not stand. *Id., at 346-352, 131 S. Ct. 1740, 179 L. Ed. 2d 742*.

Here, however, the Court is not asked to apply a generally applicable contract defense to generate a rule discriminating against arbitration. At issue is application of the ordinarily superseding rule that "illegal promises will not be enforced," *Kaiser Steel, 455 U. S., at 77, 102 S. Ct. 851, 70 L. Ed. 2d 833*, to invalidate arbitration provisions at odds with the *NLRA*, a pathmarking federal statute. That statute neither discriminates against arbitration on its face, **[**927]** nor by covert operation. It requires invalidation of *all* employer-imposed contractual provisions prospectively waiving employees' *§7* rights. See *supra, at 17, and n. 8, 200 L. Ed. 2d, at 922*; cf. *Kindred Nursing Centers, 581 U. S., at ___, n. 2, 137 S. Ct. 1421, 197 L. Ed. 2d 806, 813, n. 2*) (States may enforce generally applicable rules so long **[***71]** as they do not "single out arbitration" for disfavored treatment).

C

Even assuming that the FAA and the *NLRA* were inharmonious, the *NLRA* should control. Enacted later in time, the *NLRA* should qualify as "an implied repeal" of the FAA, to the extent of any genuine conflict. See *Posadas v. National City Bank, 296 U. S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936)*. Moreover, the *NLRA* should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment. See *Radzanower v. Touche Ross & Co., 426 U. S. 148, 153, 96 S. Ct. 1989, 48 L. Ed. 2d 540 (1976)* ("a specific statute" generally "will not be controlled or nullified by a general one" (internal quotation marks omitted)). [13]

[13] Enacted, as was the *NLRA*, after passage of the FAA, the NLGA also qualifies as a statute more specific than the FAA. Indeed, the NLGA expressly addresses the enforceability of contract provisions that interfere with employees' ability to engage in concerted activities. See *supra, at 17, n. 9, 200 L. Ed. 2d, at 922*. Moreover, the NLGA contains an express repeal provision, which provides that "[a]ll acts and parts of acts in conflict with [the Act's] provisions . . . are repealed." *29 U. S. C. §115*.

Citing statutory examples, the Court asserts that when Congress wants to override the FAA, it does so expressly. See *ante, at 13-14, 200 L. Ed. 2d, at 903-905*. The statutes the Court cites, however, are of recent vintage. [14] Each was enacted during the time this Court's decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum or to provide a green light for group litigation before an arbitrator or court. See *CompuCredit Corp. v. Greenwood, 565 U. S. 95, 116, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012)* (Ginsburg, J., dissenting). The Congress that drafted the *NLRA* in 1935 was scarcely on similar alert.

[*72]** III

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. See generally Sternlight, Disarming Employees: **[*1647]** How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections, *80 Brooklyn L. Rev. 1309 (2015)*.

The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread. See Ruan 1109-1111; A. Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 11-16, 21-22 (2009). One study estimated that in Chicago, Los Angeles, and New York City alone, low-wage workers lose nearly $3 billion in legally owed wages each **[**928]** year. *Id.*, at 6. The U. S. Department of Labor, state labor departments, and state attorneys general can uncover and obtain recoveries for some violations. See EPI, B. Meixell & R. Eisenbrey, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year 2 (2014), available at *https://www.epi.org/files/2014/wage-theft.pdf*. Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing **[***73]** wage and hours laws. See Brief for State of Maryland et al. as *Amici Curiae* 29-33; Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, *53 Wm. & Mary L. Rev. 1137, 1150-1151 (2012)* (Department of Labor investigates fewer than 1% of *FLSA*-covered employers each year).

If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the

[14] See 116 Stat. 1836 (2002); 120 Stat. 2267 (2006); 124 Stat. 1746 (2010); 124 Stat. 2035 (2010).

enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries. See *id., at 1184-1185* (because "the *FLSA* systematically tends to generate low-value claims," "mechanisms that facilitate the economics of claiming are required"); *Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 552 (SDNY 2011)* (finding that an employee utilizing Ernst & Young's arbitration program would likely have to spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent amount in liquidated damages); cf. Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, *124 Yale L. J. 2804, 2904 (2015)* (analyzing available data from the consumer context to conclude that "private enforcement of small-value claims depends on collective, rather than individual, action"); *Amchem Products, Inc. v. Windsor, 521 U. S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (class actions help "overcome the problem that small **[***74]** recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" (internal quotation marks omitted)). [15]

Fear of retaliation may also deter potential claimants from seeking redress alone. See, *e.g.*, Ruan 1119-1121; Bernhardt, *supra*, at 3, 24-25. Further inhibiting single-file claims is the slim relief obtainable, even of the injunctive kind. See *Califano v. Yamasaki, 442 U. S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)* ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit **[*1648]** balance of underpaying workers tips heavily in favor of skirting legal obligations.

In stark contrast to today's decision, [16] the Court has repeatedly recognized the centrality of group action **[**929]** to the effective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played a critical role in enforcing prohibitions against workplace discrimination based on race, sex, and other protected characteristics. See, *e.g.*, *Griggs v. Duke Power Co., 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)*; *Automobile Workers v. Johnson Controls, Inc., 499 U. S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991)*. In this context, the Court has comprehended that government entities charged with enforcing antidiscrimination **[***75]** statutes are unlikely to be funded at levels that could even begin to compensate for a significant dropoff in private enforcement efforts. See *Newman v. Piggie Park Enterprises, Inc., 390 U. S. 400, 401, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968)* (*per curiam*) ("When the *Civil Rights Act of 1964* was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."). That reality, as just noted, holds true for enforcement of wage and hours laws. See *supra, at 27, 200 L. Ed. 2d, at 927*.

I do not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a groupwide basis, see Brief for NAACP Legal Defense & Educational Fund, Inc., et al. as *Amici Curiae* 19-25, which some courts have concluded cannot be maintained by solo complainants, see, *e.g.*, *Chin v. Port Auth. of N. Y. & N. J., 685 F. 3d 135, 147 (CA2 2012)* (pattern-or-practice method of proving race discrimination is unavailable in non-class actions). It would be grossly exorbitant to read the FAA to devastate *Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq.*, and other laws enacted to eliminate, root and branch, class-based employment discrimination, see *Albemarle Paper Co. v. Moody, 422 U. S. 405, 417, 421, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975)*. With fidelity to the Legislature's will, the Court could hardly **[***76]** hold otherwise.

I note, finally, that individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect. See, *e.g.*, App. to Pet. for Cert. in No. 16-285, p. 34a (Epic's agreement); App. in No. 16-300, p. 46 (Ernst & Young's agreement). As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws. Cf. *Encino Motorcars, LLC v. Navarro, ante, p. ___, 138 S. Ct. 1134, 200 L. Ed. 2d 433* (Court divides on whether "service advisors" are exempt from overtime-pay requirements). With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

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If these untoward consequences stemmed from legislative

[15] Based on a 2015 study, the Bureau of Consumer Financial Protection found that "pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief." *82 Fed. Reg. 33210 (2017)*.

[16] The Court observes that class actions can be abused, see *ante, at 24, 200 L. Ed. 2d, at 911*, but under its interpretation, even two employees would be stopped from proceeding together.

choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come **[**930]** from Congress. It is the **[*1649]** result of take-it-or-leave-it labor contracts **[***77]** harking back to the type called "yellow dog," and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16-307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16-285 and 16-300.

References

9 U.S.C.S. § 2; *29 U.S.C.S. §§157*, *201 et seq.*

31 Moore's Federal Practice § 903.10 (Matthew Bender 3d ed.)

L Ed Digest, Arbitration § 11; Labor § 125

L Ed Index, Arbitration and Award

Supreme Court's construction and application of *Rule 23 of Federal Rules of Civil Procedure*, concerning class actions. *144 L. Ed. 2d 889*.

What kinds of contracts containing arbitration agreements are subject to stay and enforcement provisions of *§§1-4* and *8* of Federal Arbitration Act (FAA) (*9 U.S.C.S. §§1-4* and *8*, and similar predecessor provisions)--Supreme Court cases. *130 L. Ed. 2d 1189*.

Validity, under Federal Constitution, of arbitration statutes--Supreme Court cases. *87 L. Ed. 2d 787*.

Supreme Court's application of the rules of ejusdem generis and noscitur a sociis. *46 L. Ed. 2d 879*.

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1. *Dimery v. Convergys Corp., 2018 U.S. Dist. LEXIS 50555*

Client/Matter: 00206.08008
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Cases	Sources: U.S. Federal; Cases

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Dimery v. Convergys Corp.

United States District Court for the District of South Carolina, Florence Division

March 26, 2018, Decided; March 26, 2018, Filed

Civil Action No.: 4:17-CV-00701-RBH

Reporter
2018 U.S. Dist. LEXIS 50555 *; 210 L.R.R.M. 3600; 2018 WL 1471892

TERRY DIMERY, individually, and on behalf of other similarly-situated individuals, Plaintiffs, v. CONVERGYS CORPORATION, and CONVERGYS CUSTOMER MANAGEMENT GROUP, INC., jointly and severally as, Defendants.

Core Terms

collection action, employees, class action, waived, lawsuit, waivers, similarly situated, Plaintiffs', declaration, electronic, join, Relations, provides, certify, parties, substantial rights, Notice, courts, summary judgment, individualized, arbitration, cases, employment application, certification, Conditional, Opt-In, summary judgment motion, arbitration agreement, employment agreement, class member

Case Summary

Overview

HOLDINGS: [1]-Employees, who worked as at-home customer service representatives, were not entitled to certification of their action against the employer as a collective action under *29 U.S.C.S. § 216(b)* of the *Fair Labor Standards Act* because they had signed an agreement expressly stating they would pursue any lawsuit relating to their employment as an individual, and would not lead, join, or serve as a member of a class or group of persons bringing such a lawsuit; [2]-The right to bring a collective action was a procedural right and could be waived; [3]-The right to bring a collective action was not protected by the *National Labor Relations Act*; [4]-Alternatively, the court found an insufficient showing of similarly situated employees: the employees' claim that they had uncompensated start-up and wind-up times presented predominantly individualized inquiry.

Outcome
Employees' motion for conditional class certification and notice denied.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes the showing, however, the opposing party must respond to the motion with specific facts showing there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. When no genuine issue of any material fact exists, summary judgment is appropriate. The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. However, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Opposing Materials

HN2 **Entitlement as Matter of Law, Genuine Disputes**

Once the party moving for summary judgment has met its burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial. The nonmoving party may not rely on beliefs, conjecture, speculation, of conclusory allegations to defeat a motion for summary judgment. Rather, the nonmoving party is required to submit evidence of specific facts by way of affidavits, depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. *Fed. R. Civ. P. 56(c)*, *(e)*. The nonmovant's proof must meet the substantive evidentiary standard of proof that would apply at a trial on the merits.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Labor & Employment Law > Employment Relationships > Employment Contracts > Formation & Letter Agreements

Computer & Internet Law > ... > Contracts > Electronic Contracts > Digital Signatures

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Execution & Delivery

HN3 **Contract Conditions & Provisions, Arbitration Clauses**

An electronic signature of acknowledgment of the receipt of an employee handbook containing an arbitration provision constitutes valid acceptance of an arbitration agreement.

Business & Corporate Compliance > ... > Contract Formation > Contracts Law > Contract Formation

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN4 **Contracts, Formation of Contracts**

In determining the existence of a contract, federal courts look to state law for guidance. In South Carolina, the elements of a contract include offer, acceptance, and valuable consideration. South Carolina law has enacted the Uniform Electronic Transactions Act, which provides that a contract must not be denied legal effect or enforceability because it is an electronic record. *S.C. Code Ann. § 26-6-70*.

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Execution & Delivery

Contracts Law > Statute of Frauds > Requirements > Signatures

Computer & Internet Law > ... > Contracts > Electronic Contracts > Digital Signatures

Contracts Law > Statute of Frauds > Requirements > Writings

Computer & Internet Law > ... > Contracts > Electronic Contracts > Formation

HN5 **Formation of Contracts, Execution**

In South Carolina, an electronic signature satisfies a law requiring a contract or record be in writing. *S.C. Code Ann. § 26-6-70*.

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN6 **Remedies, Class Actions**

The *Fair Labor Standards Act (**FLSA**)* provides that an action to recover damages may be maintained against any employer by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. *29 U.S.C.S. § 216(b)*. An employee must consent in writing to becoming a party plaintiff in any such action under the ***FLSA***. *29 U.S.C.S. § 216(b)*.

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN7 **Remedies, Class Actions**

There is no suggestion in the text, legislative history, or purpose of the *Fair Labor Standards Act (**FLSA**)* that Congress intended to confer a nonwaivable right to a class action under that statute. Further analysis of case law reveals

that the ***FLSA*** *29 U.S.C.S. § 216(b)* collective action is a procedural right, rather than a substantive one, and can be waived.

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > Arbitration Provisions

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

Labor & Employment Law > Employment Relationships > Employment Contracts > Contract Interpretation

HN8[] **Conditions & Terms, Arbitration Provisions**

The right to a collective action under the *Fair Labor Standards Act (**FLSA**)*, *29 U.S.C.S. § 216(b)* is waivable, even when an employment agreement does not contain an arbitration clause.

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

Labor & Employment Law > Employment Relationships > Employment Contracts > Contract Interpretation

HN9[] **Remedies, Class Actions**

*Section 16(b) of the Fair Labor Standards Act (**FLSA**)*, *29 U.S.C.S. § 16(b)*, provides that an employee may bring ***FLSA*** violations for and in behalf of himself and other employees similarly situated. The ***FLSA*** contains no explicit provision precluding arbitration or a waiver of the right to a collective action under *§ 16(b)*. The circuits that have addressed this issue at that time concluded that the ***FLSA*** does not provide for a non-waivable substantive right to bring a collective action. Even if Congress intended to create a right under the ***FLSA*** to bring a class action, if an employee has to affirmatively opt-in to a class action, surely that employee has the ability to waive participation, as well. Congress's decision to specifically allow for the procedural right to collective action in the ***FLSA*** does not thereby transform this right into a substantive one.

Civil Procedure > Special Proceedings > Class Actions

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN10[] **Special Proceedings, Class Actions**

The decision to enact the collective action provision within the *Fair Labor Standards Act (**FLSA**)*, *29 U.S.C.S. § 216(b)*, actually limits a litigant's procedural rights under *Fed. R. Civ. P. 23*. Were it not for that provision within the ***FLSA***, a litigant could bring a representative ***FLSA*** action without prior consent of similarly situated individuals.

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN11[] **Remedies, Class Actions**

The *Fair Labor Standards Act (**FLSA**)* does not provide a substantive right to bring a collective action based upon a certain class, despite the fact that it permits employees to bring such actions.

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

Labor & Employment Law > Employment Relationships > Employment Contracts > Contract Interpretation

HN12[] **Remedies, Class Actions**

Based upon the applicable contract language, a plaintiff may be able to waive the ability to bring their *Fair Labor Standards Act (**FLSA**)* claims as collective class actions under *29 U.S.C.S. § 216(b)*, if provided for in the agreement and not otherwise precluded by another applicable law.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN13[] **Class Actions, Prerequisites for Class Action**

Fed. R. Civ. P. 23(a) states that one or more members of a class may sue or be sued as representative parties provided certain requirements are met.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN14[] **Class Actions, Prerequisites for Class Action**

The right of a litigant to employ *Fed. R. Civ. P. 23* is a procedural right only, ancillary to the litigation of substantive claims.

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN15[] **Collective Bargaining & Labor Relations, Protected Activities**

Section 7 of the National Labor Relations Act (NLRA) protects the rights of employees to engage in concerted legal action.

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN16[] **Employer Violations, Interference With Protected Activities**

The Fifth Circuit has previously rejected the opinion that *Section 7 of the National Labor Relations Act (NLRA)* (describing concerted activities), *29 U.S.C.S. § 157*, guarantees a right to participate in class and collective actions. The Fifth Circuit has previously held that the phrase "other concerted activities" does not contemplate participation in class and collective actions. Accordingly, the Fifth Circuit determined that *Section 7 of the NLRA* does not include the right to participate in class and collective actions. Therefore, waivers of the right to participate in such actions do not constitute engaging in unfair labor practices for the purposes of the National Labor Relations Board.

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN17[] **Employer Violations, Interference With Protected Activities**

Section 7 of the National Labor Relations Act (NLRA), *29 U.S.C.S. § 157*, does not include a right to participate in collective actions, and abrogation of this right does not constitute an unfair labor practice under *Section 8(a)(1)*.

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN18[] **Remedies, Class Actions**

*Section 216(b) of the Fair Labor Standards Act (**FLSA**)*, *29 U.S.C.S. § 216(b)*, sets forth the standard for class certification and provides: an action may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. Several district courts employ a two-step process in analyzing the certification of a collective action under the ***FLSA***. At the first step, the court generally considers whether other similarly situated employees should be notified. The second step is triggered by an employer's motion for decertification and typically occurs after substantial discovery has taken place.

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN19[] **Remedies, Class Actions**

Under step one of a collective action under the *Fair Labor Standards Act (**FLSA**)*, *29 U.S.C.S. § 216(b)*, courts often require a plaintiff show a reasonable basis for his or her claim that there are other similarly situated employees. Alternatively, courts have required plaintiffs to make a modest factual showing that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law. Other courts have described this requirement as demonstrating some identifiable factual nexus which binds the named plaintiffs and the potential class members together. Under this step, the plaintiff's burden has been described as fairly lenient because the court is trying to determine whether similarly situated plaintiffs exist. Still, the plaintiff bears the burden of demonstrating that notice is appropriate. Mere allegations will not suffice to make a

proper showing; instead, some factual evidence is necessary.

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN20 **Remedies, Class Actions**

The court's discretion to facilitate notice in collective action cases under *29 U.S.C.S. § 216(b)* of the *Fair Labor Standards Act (**FLSA**)* is not without bounds. Courts should not exercise this discretion unless the plaintiff has shown that the facts and circumstances of the case present a class of similarly situated aggrieved employees. If the court determines that individualized determinations are more likely to predominate, a collective action would hinder, rather than promote, efficient case management. In such a case, notice should not be granted.

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN21 **Remedies, Class Actions**

If a court grants a motion for conditional certification in a collective action under the *Fair Labor Standards Act (**FLSA**)*, *29 U.S.C.S. § 216(b)*, the defendant may file a motion for decertification, at which time a more stringent standard under the second step must be met. The second step usually occurs near the end of discovery, and the courts have considered a number of factors, including (1) disparate factual and employment settings of individual plaintiffs; (2) the various defenses available to defendants that appear to be individual to each plaintiff; and (3) fairness and procedural considerations. The term similarly situated is not defined in the statute; however, courts have determined if potential class members are similarly situated based on the existence of issues common to the proposed class that are central to the disposition of the ***FLSA*** claims and that such common issues can be substantially adjudicated without consideration of facts unique or particularized as to each class member. Courts determine whether conditional certification of a collective action is warranted by examining the parties' pleadings and affidavits.

Civil Procedure > Pretrial Matters > Conferences > Case Management

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN22 **Conferences, Case Management**

Fed. R. Civ. P. 16(b)(4) provides that a schedule may be modified only for good cause and with the judge's consent. Good cause means that scheduling deadlines cannot be met, despite a party's diligent efforts. Circumstances within each case sometimes necessitate for leeway within scheduling order deadlines.

Counsel: **[*1]** For Terry Dimery, individually and on behalf of other similarly-situated individuals, Plaintiff: Benjamin A Baroody, LEAD ATTORNEY, Bellamy Rutenburg Copeland Epps Gravely and Bowers, Myrtle Beach, SC; Charles R Ash, IV, Jason J Thompson, Kevin J Stoops, PRO HAC VICE, Sommers Schwartz PC, Southfield, MI.

For Convergys Corporation, jointly and severally, Convergys Customer Management Group Inc, jointly and severally, Defendants: William L Duda, LEAD ATTORNEY, Ogletree Deakins Nash Smoak and Stewart PC, Columbia, SC; Lynda M Hill, Mekesha H Montgomery, PRO HAC VICE, Frost Brown Todd LLC, Nashville, TN.

Judges: R. Bryan Harwell, United States District Judge.

Opinion by: R. Bryan Harwell

Opinion

ORDER

On March 14, 2017, Plaintiffs Terry Dimery ("Plaintiff") and Cynthia Fuerte filed this Collective and Class Action Complaint, seeking recovery against former employer Convergys Corporation ("Convergys") and Convergys Customer Management Group, Inc. ("CCMG") (Collectively, "Defendants"). The Complaint asserts that Defendants engaged in willful violations of the *Fair Labor Standards Act (the "**FLSA**")* and breach of contract under common law [ECF #1, p. 1]. The Complaint requested relief in the form of damages associated with **[*2]** the breach of contract and violation of ***FLSA*** claims, as well as an order certifying this action as a collective action in accordance with *29 U.S.C. § 216(b)* and *Rule 23 of the Federal Rules of Civil Procedure*. [ECF #1, p. 23]. Currently before the Court are several motions, including Plaintiffs' Motion to Conditionally Certify Class based on a failure to pay overtime wages under *§ 216(b) of the **FLSA*** [ECF #10];[1]; Defendants' Motion for Summary

[1] This Motion for Conditional Certification does not reference a *Rule*

Judgment as to both Plaintiffs' ***FLSA*** collective action and *Rule 23* class claims [ECF #35]; and Defendants' Motion to Strike Notice of Joinder. [ECF #42]. The Court will now consider these motions before it. In so doing, this Court has considering all briefing and arguments by the parties, as well as all evidence of record.

Procedural History and Statement of Facts

Plaintiff Terry Dimery was employed by Defendants from November 16, 2015 until January 13, 2017. [ECF #35-1, p. 2]. Opt-in Plaintiff Charlotte Jones was employed from February 5, 2009 until April 21, 2017. [ECF #35-1, p. 2]. According to the facts as alleged in the Complaint, Plaintiffs were employed as hourly at-home customer service representatives by Defendants. [ECF #1, p. 2]. According to Plaintiffs, employees work from home, rather than at a central office location. [ECF **[*3]** #1, p. 6]. Plaintiffs allege that Defendants failed to pay them, and all similarly situated employees, for their pre-shift time spent booting up their computers, logging into required computer networks and software applications, and reviewing work-related e-mails and other information at the start of their shift. [ECF #1, p. 2]. Furthermore, Plaintiffs allege that Defendants failed to compensate them and other similarly situated employees for all mid-shift technical downtime incurred due to computer and other technical problems. [ECF #1, p. 2]. Plaintiffs further allege that Defendants failed to pay Plaintiffs and other similarly situated employees for post-shift time spent doing similar tasks. [ECF #1, p. 3]. Plaintiffs thus brought this action pursuant to *29 U.S.C. § 216(b)* of the ***FLSA*** on behalf of themselves and "all current and former hourly at-home customer service representatives who worked for Convergys at any time from March __, 2014 through the date of judgment." [ECF #1, p. 15]. This is the purported definition of employees who they seek to join in the ***FLSA*** collective action. Plaintiffs also brought this action pursuant to *Fed. R. Civ. P. 23(b)(2)* and *(b)(3)* on behalf of themselves, and the same suggested defined group **[*4]** of employees for the class action. [ECF #1, p. 17]. After filing the Complaint, Plaintiffs filed a Motion for Conditional Class Certification and Notice on April 3, 2017. [ECF #10]. The motion seeks an order from this Court conditionally certifying the proposed collective ***FLSA*** class. [ECF #10-1, p. 29]. On April 27, 2017, Plaintiffs filed a Consent to Join, naming Charlotte Jones as an Opt-In Plaintiff. [ECF #23-1]. On May 30, 2017, Plaintiff Fuerte was dismissed from this case with prejudice. [ECF #27]. On May 31, 2017, Opt-In Plaintiff Charlotte Jones filed a declaration stating similar allegations against Defendants as those found in the Complaint. [ECF #29-1].

23 class.

On July 14, 2017, Defendants filed a motion for summary judgment. [ECF #35]. Defendants' argument is premised on the fact that both Plaintiffs Dimery and Jones waived their ability to pursue a collective and class action against Defendants by signing their respective employment application agreements, which included language to that effect. Several days later on July 17, 2017, Defendants filed their response opposing class certification. [ECF #36]. Plaintiff filed a reply to this opposition on July 24, 2017 [ECF #37], as well **[*5]** as filing a response to Defendants' summary judgment motion on July 28, 2017. [ECF #38]. Defendants filed a reply in support of the requested summary judgment on August 4, 2017. [ECF #39]. On October 10, 2017, Plaintiff filed a Notice of Joinder seeking to include Lashea Moore as an opt-in Plaintiff. [ECF #41]. On October 13, 2017, Defendants filed a Motion to Strike requesting this notice of joinder be denied. [ECF #42]. Plaintiffs filed a response in opposition [ECF #43], and Defendants filed a reply [ECF #44]. These matters are now before the Court for review.

Discussion

I. Summary Judgment

The first issue this Court will consider is whether it is appropriate to grant summary judgment to Defendants with respect to Plaintiffs' ***FLSA*** collective and *Rule 23* class action claims. Defendants argue that Plaintiffs have waived their right to maintain either a collective or class action as a matter of law. ***HN1***[⬆] Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)* **[*6]** . The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes the showing, however, the opposing party must respond to the motion with "specific facts showing there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. When no genuine issue of any material fact exists, summary judgment is appropriate. *Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir. 1991)*. The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Id.* However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*.

In this case, Defendants "bear[s] the initial burden of pointing to the absence of a genuine issue of material fact." *Temkin v. Frederick Cnty. Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*). If Defendants carry this burden, "the burden then shifts to the non-moving party to come forward with fact sufficient to create a triable issue of fact." *Id. at 718-19* (citing *Anderson, 477 U.S. at 247-48*).

Moreover, ***HN2***[] "once the moving party has met its burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial." *Baber v. Hosp. Corp. of Am., 977 F.2d 872, 874-75 (4th Cir. 1992)*. The nonmoving party may not rely on beliefs, conjecture, speculation, of conclusory allegations to defeat a motion for summary judgment. *See id*; *Doyle v. Sentry, Inc., 877 F. Supp. 1002, 1005 (E.D. Va. 1995)*. Rather, the nonmoving party is required to submit evidence of specific facts by way of affidavits, depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. *See Fed. R. Civ. P. 56(c), (e)*; *Baber, 977 F.2d at 875* (citing *Celotex, 477 U.S. at 324*)). The nonmovant's proof must meet "the substantive evidentiary **[*7]** standard of proof that would apply at a trial on the merits." *Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993)*; *DeLeon v. St. Joseph Hosp., Inc., 871 F.2d 1229, 1233 n.7 (4th Cir. 1989)*.

A. Existence of a Valid, Binding Agreement

Defendants first argue that, as a matter of law, Plaintiffs waived their right to pursue a collective or class action against Defendants, based upon the language in the employment application between Defendants and Plaintiffs which constitutes an enforceable contract. Defendants reference the fact that, within the Complaint, Plaintiffs rely upon the existence of a binding and valid contract for their purported claims. Defendants have attached to their Motion the Declaration of Pam Castillo, the Regional Human Resources Business Partner for Convergys. [ECF #35-2, pp. 2-3]. Ms. Castillo attests to the fact that both Charlotte Jones and Terry Dimery were employed by Convergys. [ECF #35-2, pp. 2-3]. She further attests to the fact that Ms. Jones was offered a full-time position on August 30, 2016 and signed an employment application on August 31, 2016. [ECF #35-2]. This document, entitled "Reaffirmation of Application Acknowledgement," evidencing Ms. Jones's hire date, was signed on August 31, 2016 and is attached to Ms. Castillo's declaration. [ECF #35-2, Exhibit B]. Greg Preston, **[*8]** the Director of Application Development, also filed a declaration attesting to the fact that Terry Dimery electronically signed an employment application on November 7, 2015. [ECF #35, Exhibit 2]. Attached to Mr. Preston's declaration is the electronic employment agreement.[2] In response, Plaintiffs argue that this Court should deny the motion as premature because Plaintiffs have not had the opportunity to explore the timing and the validity of the purported agreements in the discovery process. [ECF #38, p. 10]. Discovery in this case ended January 3, 2018, and Plaintiffs have not supplemented the record with any additional evidence or documents.

HN4[] In determining the existence of a contract, federal courts look to state law for guidance. In South Carolina, the elements of a contract include offer, acceptance and valuable consideration. *Wilson v. Willis, 786 S.E.2d 571, 579, 416 S.C. 395 (S.C. Ct. App. 2016)*. South Carolina law has enacted the Uniform Electronic Transactions Act, which provides that a contract must not be denied legal effect or enforceability because it is an electronic record. *S.C. Code Ann. § 26-6-70*. Defendants argue that the electronic signatures of Plaintiff Jones and Plaintiff Dimery in the employment application agreement, **[*9]** which included a collective and ***class action waiver***, are enforceable. Other courts have found that a similar waiver within an employment application may become binding on the parties. *Palmer v. Convergys Corp., No. 7:10-cv-145, 2012 U.S. Dist. LEXIS 16200, 2012 WL 425256 (M.D. Ga. Feb. 9, 2012)* (finding a waiver very similar to the one at issue to be enforceable); *see generally Convergys Corp. v. NLRB, 866 F.3d 635 (5th Cir. 2017)* (discussing the agreement that Convergys job applicants must sign which includes a ***class action waiver***, and ultimately finding the waiver valid). Plaintiffs also rely upon the validity of an employment agreement in order to bring forth certain allegations in their Complaint. For example, the Complaint alleges, "Defendant had a binding and valid contract with Plaintiffs" and that Plaintiffs "accepted the terms of Defendants' contractual promises and performed under the contract." [ECF #1, pp. 21-22]. It does not appear Plaintiffs directly dispute the existence of a valid agreement. Instead, Plaintiffs argue that they need time to explore the timing and validity of the agreements Defendants have provided with

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[2] Courts have previously held that ***HN3***[] an electronic signature of acknowledgment of the receipt of an employee handbook containing an arbitration provision constitutes valid acceptance of an [arbitration] agreement. *Jackson v. University of Phoenix, Inc., No. 5:13-cv-736-BO, 2014 U.S. Dist. LEXIS 21175, 2014 WL 672852 (E.D.N.C. Feb. 20, 2014)*. Furthermore, where a defendant comes forward with evidence showing an employee electronically acknowledged receipt of an agreement, in that case an arbitration agreement, the plaintiff's denial that he signed an acknowledgment has failed to provide a valid basis to submit claims to arbitration. *See Jackson, 2014 U.S. Dist. LEXIS 21175, 2014 WL 672852, at *1*.

their motion, and therefore argue that the motion is premature because discovery has not yet ended. [ECF #38, p. 10]. Plaintiffs point out that there are not any "actual **[*10]** signatures" on the applications; however, this Court notes that it does appear that at least as to Charlotte Jones, the application was electronically signed. As to Plaintiff Dimery, Mr. Preston testifies that Plaintiff Dimery "signed" the document with an electronic number unique to him. ***HN5***[↑] In South Carolina, an electronic signature satisfies a law requiring a contract or "record" be in writing. *S.C. Code Ann. § 26-6-70*. Plaintiffs do not otherwise argue that they did not sign an employment application or agreement.

Discovery ended on January 3, 2018. Defendants have met their initial burden of establishing the existence of a contract in that they have provided the affidavits of Convergys employees who have attested that these documents relate to the respective employees. Once Defendants provided the requisite evidentiary support to establish these agreements, it was incumbent upon Plaintiff to provide something beyond mere allegations to refute this fact. Plaintiffs have not filed anything in the record to suggest these documents contain false signatures, nor have Plaintiffs supplemented their response to the motion or requested additional time to supplement the record. Plaintiffs have not otherwise come forward **[*11]** with evidence, affidavit or otherwise, suggesting that Plaintiffs did not sign the agreements in question. While Plaintiffs make mention of the fact that they need additional time to investigate these documents, Plaintiffs have not filed an affidavit or otherwise provided any evidence to refute the testimony on Ms. Castillo and Mr. Preston regarding the timing and veracity of the execution of these documents. Therefore, this Court believes it is appropriate to consider the merits of the summary judgment motion at this stage.

B. Waiver Language and Contractual Rights

Defendants argue that as a matter of law, an individual may waive his or her right to bring or join a class action lawsuit. Thus, Defendants contend that Plaintiff Dimery and Opt-In Plaintiff Jones waived their ability to pursue a collective and class action because they both signed an agreement expressly stating they would "pursue any lawsuit" relating to their employment with Defendant "as an individual, and will not lead, join, or serve as a member of a class or group of persons bringing such a lawsuit." [ECF #35-2, Ex. B]. In response, Plaintiffs first argue that generally speaking, individuals cannot waive their private **[*12]** right of action under the ***FLSA***. This argument is tethered to a related argument in which Plaintiffs argue the right to pursue a collective action is a substantive right, and that the clear intent of the ***FLSA***, as well as public policy, precludes such a waiver.

HN6[↑] The ***FLSA*** provides that an action to recover damages, "may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." *29 U.S.C. § 216(b)*. An employee must consent in writing to becoming a party plaintiff in any such action under the ***FLSA***. *29 U.S.C. § 216(b)*. Defendants have provided the affidavit of Greg Preston who avers that Plaintiff Dimery electronically signed his employment application with a unique electronic signature ID on November 7, 2015. Defendants have attached Plaintiff Dimery's application for employment, which included the following language:

> I further agree that I will pursue any claim or lawsuit relating to my employment with Convergys (or any of its subsidiaries or related entities) as an individual, and will not lead, join, or serve as a member of a class or group of person bringing such a claim or lawsuit.

[ECF #35-3, pp. 3-4,p. 17]. Likewise Opt-In Plaintiff **[*13]** Charlotte Jones electronically signed an employment agreement containing almost identical language on August 31, 2016. [ECF #35-2, pp. 13-14].

Plaintiffs assert that the right to participate in a collective action under *§ 216(b)* is a *substantive* right provided for by the ***FLSA*** that cannot normally be waived. Plaintiffs further argue that the right to bring a collective action under the ***FLSA*** may only be waived in very narrow circumstances: either through an approved settlement or within the context of binding arbitration agreements. A proposed settlement is not at issue in this case, nor is an arbitration agreement. Plaintiffs argue that the cases relied upon by Defendants only involve waivers that are in conjunction with an arbitration provision. Plaintiffs further argue that in Defendants' case authorities, the waivers were determined valid because of the FAA and federal policy favoring arbitration, and because those cases had arbitration provisions. The case at hand does not have an arbitration provision, but the Fourth Circuit in *Adkins* makes clear that regardless of an arbitration provision, ***HN7***[↑] there is "no suggestion in the text, legislative history, or purpose of the ***FLSA*** that Congress intended **[*14]** to confer a nonwaivable right to a class action under that statute." *Adkins v. Labor Ready, Inc., 303 F.3d 496, 503 (4th Cir. 2002)*. Further analysis of case law reveals that the ***FLSA*** *§ 216(b)* "collective" action is a procedural right, rather than a substantive one, and can be waived. This Court is aware of the current trio of pending cases before the Supreme Court addressing whether class action waivers in employment

arbitration agreements are valid.[3] However, this Court believes that the current case law before it provides sufficient guidance within this context to consider the following arguments by the parties. There is no arbitration provision here. There is only a waiver of collective/class action provision.

Plaintiffs principally rely on the holding in *Killion v. KeHE Distributors, LLC, 761 F.3d 574, 590 (6th Cir. 2014)*, which provides that the right to participate in a collection action within the context of the ***FLSA*** cannot normally be waived. *Killion* relied upon the Sixth Circuit's previous holding in *Boaz v. FedEx Customer Info. Servs., Inc.*, where the court held that an employment agreement cannot deprive employees of their statutory rights under the ***FLSA***, before invalidating a clause that limited the time to file a lawsuit under the ***FLSA***. *725 F.3d 603, 606 (6th Cir. 2013)*. *Killion* noted that no court of appeals appeared to have squarely addressed this **[*15]** issue regarding the validity of a collective action waiver outside of the arbitration context at that time.

A few years later, in *Feamster v. Compucom Sys., Inc., No. 7:15-CV-00564, 2016 U.S. Dist. LEXIS 20150, 2016 WL 722190 (W.D. Va. Feb. 19, 2016)*, a defendant moved to dismiss collective action claims because it argued the plaintiffs had already waived their right to bring collective action litigation within their employment agreements. *2016 U.S. Dist. LEXIS 20150, [WL] at *3*. *Feamster* considered the plaintiffs' argument that the waivers are unenforceable as a matter law based upon the ruling in *Killion*. However, *Feamster* ultimately rejected the Sixth Circuit's analysis in favor of a line of cases holding ***HN8***[⬆] the right to collective action is waivable, even when an employment agreement does not contain an arbitration clause, thereby declining to follow *Killion*. Instead, the court in *Feamster* relied heavily upon the holding in *Walthour v. Compucom Systems, Inc., 745 F.3d 1326 (11th Cir. 2014)*.

In *Walthour*, the Eleventh Circuit considered the validity of a collection action waiver in the context of an arbitration clause and found that the ***FLSA*** did not preclude the enforcement of the waiver. The Court first considered the language of ***HN9***[⬆] *Section 16(b) of the* ***FLSA*** which provides that an employee may bring ***FLSA*** violations "for and in behalf of himself . . . and other employees similarly **[*16]** situated." *Walthour* explained, "the ***FLSA*** contains no explicit provision precluding arbitration or a waiver of the right to a collective action under *§ 16(b)*." *745 F.3d at 1334*. The *Walthour* court noted that the circuits that have addressed this issue at that time concluded that the ***FLSA*** *does not provide for a non-waivable substantive right to bring a collective action.* *Id. at 1336* (emphasis added). *Walthour* reasoned that even if Congress intended to create a "right" under the ***FLSA*** to bring a class action, if an employee has to affirmatively "opt-in" to a class action, surely that employee has the ability to waive participation, as well. *Id. at 1335*.[4] *Walthour* thus agreed with the analysis of the Eighth Circuit in *Owen v. Bristol Care, Inc., 702 F.3d 1050, 1051-52 (8th Cir. 2013)*, which set forth the same reasoning in analyzing an ***FLSA*** claim. Perhaps more persuasive is the fact that the Eleventh Circuit determined that Congress's decision to specifically allow for the *procedural* right to collective action in the ***FLSA*** does not thereby transform this right into a *substantive* one. *Id. at 1336*.[5] The Fourth Circuit has also determined that there is *no* suggestion that Congress intended to confer a non-waivable right to a class action under this statute. *Adkins v. Labor Ready, Inc., 303 F.3d 496, 506 (4th Cir. 2002)*.

In reviewing **[*17]** the applicable case law, this Court finds that based on the current case law, including cases within the Fourth Circuit, ***HN11***[⬆] the ***FLSA*** does not provide a substantive right to bring a collective action based upon a certain class, despite the fact that it permits employees to bring such actions. This Court acknowledges Plaintiffs'

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[3] This Court notes that currently before the United States Supreme Court is the issue of whether an employee can be required to resolve employment disputes through individual arbitration, waiving the possibility of proceeding collectively. *Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016)*. This case has been consolidated with *NLRB v. Murphy Oil USA, Inc., 808 F.3d 1013 (5th Cir. 2015)* and *Ernst & Young LLP v. Morris, 834 F.3d 975 (9th Cir. 2016)* (consolidation referenced at ***137 S. Ct. 809, 196 L. Ed. 2d 595 (2017)***). The NLRB argues that waiver provisions of class actions in employment arbitration agreements violate employees' rights under the *National Labor Relations Act* and are unenforceable. The question is whether the FAA trumps the *NLRA*.

[4] Moreover, *Walthour* points out that the Supreme Court has previously considered this language in a case brought under the *Age Discrimination in Employment Act*, which expressly adopted the collective language action found in the ***FLSA***. In *Amer. Exp. Co. v. Italian Colors Restaurant*, the Supreme Court interpreted a previous case in reaching the result that the Supreme Court had no qualms about enforcing class action waivers in the context of arbitration agreements even though the *ADEA* expressly permitted collective actions. *570 U.S. 228, 238, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)*.

[5] In fact, the Eleventh Circuit further makes clear that ***HN10***[⬆] the decision to enact the collective action provision within the ***FLSA*** actually limits a litigant's procedural rights under *Rule 23*. Were it not for that provision within the ***FLSA***, a litigant could bring a representative ***FLSA*** action without prior consent of similarly situated individuals. *Walthour, 745 F.3d at 1336*.

reliance on the reasoning set forth in *Boaz,* however the issue in that case was whether employees can waive their claims under the ***FLSA*** by signing an employment agreement that shortens the limitations period to bring a lawsuit. The *Boaz* court found that the very right of employees to bring claims for violation of their ***FLSA*** right to minimum wages, overtime, and liquidated damages was abridged by precluding these employees from bringing claims within the specified statutory period. *Boaz, 725 F.3d 603, 606 (6th Cir. 2013)*. Plaintiffs' reliance on this case to assert that the right to bring a collective action is nonwaivable is contrary to the controlling case law in this circuit, as well as is distinguishable from this case in that Plaintiffs' ability to bring their individual FSLA claims is still left intact.

As to Plaintiffs' policy arguments regarding the waiver of class actions in suits brought under **[*18]** the ***FLSA***, the Court does not find *Brooklyn Savings Bank v. O'Neil* to be persuasive. *324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945)*. Plaintiff argues that *O'Neil* supports the idea that the clear congressional intent of Congress was to preclude waivers of collective action rights under the ***FLSA***. This Court agrees with Plaintiff that *O'Neil* undoubtedly discusses the importance of the ***FLSA***, particularly as it relates to wage earners. However *O'Neil* specifically considered whether a wage earner can waive his or her right to recover liquidated damages under the *Section 16(b)*. There, the Court explained that the statutory language, legislative reports and debates do not reveal that the issue had been specifically considered but ultimately decided to prohibit these kinds of waivers after explaining how it is similar to the prohibition on allowing a waiver of basic minimum and overtime wages. *324 U.S. 697, 707, 65 S. Ct. 895, 89 L. Ed. 1296*. In other words, a prohibition on liquidated damages was linked to the minimum wage expressly listed in the statute. By contrast, the waiver in question in this case focuses on the method by which a lawsuit may be brought, but it does not otherwise prohibit a claimant from bringing individual claims. Therefore, this Court finds that ***HN12***[⬆] based upon the applicable **[*19]** contract language, a plaintiff may be able to waive the ability to bring their ***FLSA*** claims as collective class actions, if provided for in the agreement and not otherwise precluded by another applicable law. In this case, the agreement provides for a waiver of collective and class actions; therefore, unless precluded by another law, summary judgment should be granted to Defendants as to Plaintiffs' collective action claims brought under the ***FLSA***.[6]

[6] Here, Plaintiffs argue that the *National Labor Relations Act* prevents these kinds of waivers. Accordingly, this Court considers Plaintiffs' argument with respect to the *National Labor Relations Act*.

C. *Rule 23* Class Action Waivers

Defendants also seek summary judgment as to Plaintiffs' *Rule 23* "class action" claims. [ECF #35-1, p. 1]. In response, Plaintiffs have not provided a response as to the invalidity of the waiver as it relates to class actions brought under *Rule 23*. ***HN13***[⬆] *Federal Rule of Civil Procedure 23(a)* states that, "one or more members of a class may sue or be sued as representative parties" provided certain requirements are met. Plaintiffs have not indicated any reason for this Court not to find that, much like the applicability of the waiver as to the ***FLSA*** collective action, the waiver applies to its *Rule 23* cause of action, as well. Plaintiffs do not make an argument regarding the validity of the *Rule 23* class waiver. They do not argue it violates any South Carolina law, or is otherwise unconscionable **[*20]** under South Carolina law. *Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 332, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)* (***HN14***[⬆] "[T]he right of a litigant to employ *Rule 23* is a procedural right only, ancillary to the litigation of substantive claims."). Clearly, the right to employ *Rule 23* is a procedural right only. As such, it can be waived.

D. Waivers and the *National Labor Relations Act*

Plaintiffs argue that the contractual provision with Convergys' contract requiring its employees to waive their right to participate in collective or class action violates the *National Labor Relations Act* (the "*NLRA*"). Specifically, Plaintiffs focus on ***HN15***[⬆] *Section 7 of the NLRA* which protects the rights of employees to engage in concerted legal action. Defendants respond that the *NLRA* does not apply because it only protects the right of current, rather than former employees.

This Court also looks again to the analysis in *Feamster*, which considered the argument that the waivers are unenforceable as a matter law based upon the ruling in *Killion v. KeHE Distributors, LLC, 761 F.3d 574, 590 (6th Cir. 2014)*. This Court finds the analysis in *Feamster* persuasive, particularly in light of the fact that *Killion* has been called into doubt by *Convergys Corp. v. NLRB, 866 F.3d 635 (5th Cir. 2017)*. In *Convergys*, the Fifth Circuit Court of Appeals was considering an appeal of a determination by the National Labor Relations Board that *Convergys* violated the *National Labor Relations Act ("NLRA")* **[*21]** by requiring job applicants to sign a class and collective action waiver and by seeking to enforce this waiver. Thereafter, an employee brought a class action lawsuit, but it was withdrawn after the parties settled the matter. *Id. at 636*. Nonetheless, the Board's General Counsel issued a complaint alleging Convergys had

violated *Section 8(a)(1) of the NLRA* by requiring job applicants to sign this waiver. *Id.* The Fifth Circuit first stated that the use of class action procedures is not a substantive right. *See generally* *D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 357 (5th Cir. 2013)*; *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 332, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)* ("[T]he right of a litigant to employ *Rule 23* is a procedural right only"). The Fifth Circuit further pointed to several cases that have held there was not substantive right to proceed collectively under the ***FLSA***. *D.R. Horton, 737 F.3d 344 at 357-358*. Within the opinion, ***HN16***[↑] the Fifth Circuit also makes clear that it has previously rejected the opinion that *Section 7 of the NLRA* (describing "concerted activities") guarantees a right to participate in class and collective actions. *Id. at 637*. In fact the Fifth Circuit stated that it has previously held that the phrase "other concerted activities" does not contemplate participation in class and collective actions. *Id. at 640* (discussing the holding in *D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013)*). Accordingly, the Fifth Circuit determined that *Section 7 of the NLRA* does not **[*22]** include the right to participate in class and collective actions. Therefore, waivers, like the ones present in this case, do not constitute engaging in unfair labor practices for the purposes of the Board. *Id. at 640*. Other circuits disagree with this analysis. In *NLRB v. Alternative Entertainment, Inc., 858 F.3d 393, 403 (6th Cir. 2017)*, that court found that whether *Rule 23* provides a substantive right is irrelevant because the right to concerted activity under the *NLRA* is a "core substantive right."

In reviewing the case law, this Court finds persuasive the fact that a very similar waiver was upheld in a district court case wherein the Middle District of Georgia determined that class action waivers are going to be upheld because they are contractual provisions which do not affect any substantive rights. *Palmer v. Convergys Corp., No. 7:10-cv-145, 2012 U.S. Dist. LEXIS 16200, 2012 WL 425256, at *2 (M.D. Ga. Feb. 9, 2012)*. While this Court notes the apparent contrary language in *Killion*, the holding in the recent *Convergys* action as it relates to the *NLRA*, as well as the analysis in *Feamster*, provides good support for this Court to determine that these waivers do not implicate substantive rights, do not violate the *NLRA*, and therefore the contractual provisions agreed upon by the parties should be enforced.

Convergys v. NLRB, 866 F.3d 635 (5th Cir. 2017) is also instructive as to a further **[*23]** point made by Plaintiffs. Plaintiffs argue that Defendants willfully and intentionally violated the National Labor Relations' Board Order regarding the decision in question was based upon a district court case in the Eastern District of Missouri. In *Convergys v. Grant*, the district court determined that it was a violation of *Section 7* and *Section 8(a)(1) of the NLRA* to have employees sign class/collective action waivers that are not part of an arbitration agreement. However as subsequently pointed out by Defendants, on August 7, 2017, the Fifth Circuit granted a request for review of this decision and denied the Board's request to enforce the order. In *Convergys v. NLRB*, the Court of Appeals for the Fifth Circuit held that ***HN17***[↑] *Section 7 of the NLRA* does not include a right to participate in collective actions, and abrogation of this right does not constitute an unfair labor practice under *Section 8(a)(1)*.[7] This Fifth Circuit decision therefore calls into question the action referenced by Plaintiffs, *Convergys Corp. and Hope Grant, 363 NLRB No. 51 (2015)*, also filed by the same individual in front of the administrative law judge based on the same waiver language. Accordingly, this Court finds that there is no longer a basis upon which to find that Defendant has willfully and intentionally violated the cease and desist order by **[*24]** the National Labor Relations Board.

II. Motion to Conditionally Certify Class

Plaintiffs have also filed a Motion for Conditional Class Certification with respect to their ***FLSA*** claims. [ECF #10]. Although this Court believes the waiver is valid as to a collective or class action, regardless of that, and alternatively, the Court finds it inappropriate to conditionally certify a class due to an insufficient showing of "similarly situated" employees. This Court denies conditional class certification under the ***FLSA***. Plaintiffs seek to conditionally certify the following class: "[a]ll current and formerly hourly at-home customer service representatives that have worked for Defendants at any time from September 1, 2015 through the date of judgment on this matter." [ECF #10, p. 1]. Plaintiffs state that these individuals were all subject to a similar policy or scheme which created widespread ***FLSA*** violations, namely to receive proper compensation. As previously discussed in this Order, this Court is granting Defendants' Motion for Summary Judgment as to the ability to bring its collective active claims. However, even if the waivers were found to be unenforceable, this Court agrees with Defendants **[*25]** that Plaintiffs have not made a proper showing to certify this collective action.

HN18[↑] *Section 216(b) of the* ***FLSA*** sets forth the standard for class certification and provides: "[a]n action . . . may be maintained against any employer (including a public agency)

[7] Defendants filed a Notice of Supplemental Authority explaining that the Fifth Circuit granted Convergys' petition for review and denied the NLRB cross-application to enforce the order in *Convergys Corp. & Hope Grant, 363 NLRB No. 51 (Nov. 30, 2015)*. [ECF #40].

in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." Several district courts employ a two-step process in analyzing the certification of a collective action under the ***FLSA***. At the first step, the court generally considers "whether other similarly situated employees should be notified." *Curtis v. Time Warner Enter.-Advance Newhouse Partnership, No. 3:12-CV-2370-JFA, 2013 U.S. Dist. LEXIS 63603, 2013 WL 1874848, at *2 (D.S.C. May 3, 2013)*. The second step is triggered by an employer's motion for decertification and typically occurs after substantial discovery has taken place. *Id.*

HN19[] Under step one, Court's often require a plaintiff show a "reasonable basis" for his or her claim that there are other similarly situated employees. *Curtis, 2013 U.S. Dist. LEXIS 63603, 2013 WL 1874848, at *2* (citing *Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1258-62 (11th Cir. 2008)*). Alternatively, courts have required plaintiffs to "make a 'modest factual showing' that they and potential opt-in plaintiffs 'together were victims of a common policy or plan that violated **[*26]** the law.'" *Curtis, 2013 U.S. Dist. LEXIS 63603, 2013 WL 1874848, at *2* (citing *Myers v. Hertz Corp., 624 F.3d 537, 554-55 (2d Cir. 2010)*). Other courts have described this requirement as demonstrating "some identifiable factual nexus which binds the named plaintiffs and the potential class members together." *MacGregor v. Farmers Ins. Exchange, No. 2:10-CV-03088, 2011 U.S. Dist. LEXIS 80361, 2011 WL 2981466, at *2 (D.S.C. July 22, 2011)* (citing *Heagney v. Eur. Am. Bank, 122 F.R.D. 125, 127 (4th Cir. 1988)*). Under this step, the plaintiff's burden has been described as "fairly lenient" because the court is trying to determine whether "similarly situated" plaintiffs exist. *Id.* Still, the plaintiff bears the burden of demonstrating that notice is appropriate. *MacGregor, 2011 U.S. Dist. LEXIS 80361, 2011 WL 2981466, at *2* (citing *D'Anna v. M/A-COM, Inc., 903 F. Supp. 889, 894 (D. Md. 1995)*). Mere allegations will not suffice to make a proper showing; instead, some factual evidence is necessary. *MacGregor, 2011 U.S. Dist. LEXIS 80361, 2011 WL 2981466, at *2* (citing *Bernard v. Household Int'l, Inc., 231 F. Supp. 2d 433, 435 (E.D. Va. 2002)*).

Further, ***HN20***[] the court's discretion to facilitate notice in these cases is not without bounds. *MacGregor, 2011 U.S. Dist. LEXIS 80361, 2011 WL 2981466, at *2*. Courts should not exercise this discretion unless the plaintiff has shown that the facts and circumstances of the case present a class of "similarly situated" aggrieved employees. *Id.* (citing *Purdham v. Fairfax Cnty. Pub. Schs., 629 F. Supp. 2d 544, 547-48 (E.D. Va. 2009)*. If the Court determines that individualized determinations are more likely to predominate, a collective action would hinder, rather than promote, efficient case management. *MacGregor, 2011 U.S. Dist. LEXIS 80361, 2011 WL 2981466, at *2*. In such a case, notice should not be granted. *Id.* (citing *Syrja v. Westat, Inc., 756 F. Supp. 2d 682, 686-87 (D. Md. 2010)*; *see also England v. New Century Fin. Corp., 370 F. Supp. 2d 504, 511 (M.D. La. 2005)* (finding conditional certification **[*27]** inappropriate where adjudication would have required factual inquiries into employment relationships involving different managers at different locations)).

HN21[] If a court were to grant a motion for conditional certification, the defendant may file a motion for decertification, at which time a more stringent standard under the second step must be met. *2011 U.S. Dist. LEXIS 80361, [WL] at *3*. The second step usually occurs near the end of discovery, and the courts have considered a number of factors, including (1) disparate factual and employment settings of individual plaintiffs; (2) the various defenses available to defendants that appear to be individual to each plaintiff; and (3) fairness and procedural considerations. *Id.* The term "similarly situated" is not defined in the statute; however, courts have determined if potential class members are similarly situated based on the existence of "issues common to the proposed class that are central to the disposition of the ***FLSA*** claims and that such common issues can be substantially adjudicated without consideration of facts unique or particularized as to each class member." *LaFleur v. Dollar Tree Stores, Inc., 30 F. Supp. 3d 463, 467-68 (E.D. Va. 2014)* (quoting *Houston et al. v. URS Corp. et al., 591 F. Supp. 2d 827, 831 (E.D. Va. 2008)*). Courts determine whether conditional certification of a collective action is warranted by examining **[*28]** the parties' pleadings and affidavits. *Gordon v. TBC Retail Group, Inc., 134 F. Supp. 3d 1027 (D.S.C. Sept. 30, 2015)*.

Here, Plaintiffs argue that Defendants employed a common policy or practice in failing to properly pay employees by requiring them to follow a standard daily checklist while conducting business at their homes. [ECF #10-1, pp. 10-16]. This checklist provides thirteen login steps for the employee. [ECF #10, p. 10]. For example, Plaintiffs argue that employees must reboot a router, which Plaintiffs state takes "an appreciable amount of time" and that the checklist duties resulted in employees performing "a substantial amount of compensable work off the clock." [ECF #10, p. 11]. However, Plaintiffs do not suggest that the time was substantially the same for each employee or what factors that difference in time would hinge upon. Plaintiffs simply provide a range of time for each checklist activity. Plaintiffs argue that the declaration of the employees who have already "stepped forward" and joined the lawsuit establish Defendants' uniform and company-wide pay practices. The two declarations

provided are from Cynthia Fuerte, who is no longer a member of this lawsuit, and Plaintiff Terry Dimery. These two declarations mirror the same estimated time **[*29]** frame that Plaintiffs provided in their brief, but do not otherwise provide any other alleged common scheme. In their reply brief, Plaintiffs filed a declaration of a former employee who filed a declaration in another case approximately three years before this action was filed in this Court, and prior to the time frame covered by the putative collection action.

Defendants initially argue that the fact that there is an individualized inquiry into whether individual employees signed collective and class action waivers suggests that certification is not appropriate. [ECF #36, p. 22]. Defendants also argue that Plaintiffs have provided inadmissible evidence to support their motion in that the delcarations are essentially indistinguishable and in fact, include the same mistakes in them. [ECF #36, pp. 12-13]. Defendants further respond and argue that Plaintiffs have not met the "similarly situated" burden or otherwise show that the putative class members are victims of the same unlawful policy or practice. In doing so, Defendants provide a variety of differences that exist about the employed home-based customer service representatives. For example, Defendants argue that with respect to whether **[*30]** employees were compensated for work allegedly performed "off the clock" would include individualized inquiry into the project being worked on, the type of position held, access to tools and applications, whether the employees experienced technical issues, what types of habits they performed during their shifts, particularly at the beginning and end, and whether they used their computer for personal reasons during the day. [ECF #36, p. 23]. Defendants provide their own declarations to support their list of factual differences from other employees who refute that they were subject to an unlawful policy described by Plaintiffs. [ECF #36, p. 15]; [ECF #36-2]. Defendants also point out that in other Convergys cases that have granted a motion to conditionally certify a collective action, the class members were all "brick and mortar" agents. [ECF #36, p. 18].

This Court is mindful of the order provided in the *Cosby v. Convergys* case where another court certified a class, though it ultimately resolved as a *Rule 23* class. [ECF #10-11, p. 3]. The order is relatively brief and does not provide a sufficient basis upon which this Court can determine the facts in that case. In any event, this Court agrees, **[*31]** given the nature of the fact that these employees were all at-home technicians remotely logging in, that the individualized inquiry of their claims predominates. In order to consider whether each putative class member was paid appropriately, an individualized inquiry of each employee's claims is necessarily implicated. Even were this Court to agree that Plaintiff has established a common scheme or policy that violates the law, in order to resolve each claim, an individualized determination would be necessary. *Blaney v. Charlotte-Mecklenburg Hosp. Authority, No. 3:10-CV-592-FDW-DSC, 2011 U.S. Dist. LEXIS 105302, 2011 WL 4351631, at *10 (W.D.N.C. Sept. 16, 2011)*. This Court does not find that the declarations provided by Plaintiffs, when considered with the arguments and evidence presented by Defendants, meet the lenient standard for certification in this case. Plaintiffs have not satisfied the requirement that they show Plaintiffs are "similarly situated." Accordingly, this Court denies Plaintiffs' motion to conditionally certify the suggested proposed collective ***FLSA*** class.

As to a *Rule 23* class, Plaintiffs have not sought to certify a group of class members under *Rule 23*. In order to do so, Plaintiffs would have to meet the requirements of numerosity, common question of law or fact, **[*32]** and typicality. *Fed. R. Civ. P. 23*. This Court notes that currently there are two Plaintiff involved in this lawsuit, and this Court has previously determined that Plaintiffs have not established that the parties have similar claims. However, this Court does not need to consider whether such a certification would be appropriate in this circumstance, especially in light of the fact that this Court finds Plaintiffs have waived their right to bring a *Rule 23* class action.

III. Motion to Strike Consent to Join

On June 17, 2017, This Court entered its Conference and Scheduling Order providing the parties until September 5, 2017 to amend their pleadings. Approximately a month after this deadline, on October 10, 2017, Plaintiffs filed a Notice of Joinder seeking to include Lashea Moore in this lawsuit. Three days later, Defendants filed a Motion to Strike the Consent to Join Lashea Moore as untimely under *Rule 16 of the Federal Rules of Civil Procedure*. In response, Plaintiffs argue that Ms. Moore contacted them on October 9, 2017 to join this action. Plaintiffs argue that it is necessary to add Ms. Moore because she was employed from December 8, 2015 until November 21, 2016, and her statute of limitations begins to run in approximately two months from their response **[*33]** date. Moreover, Plaintiffs argue that the ***FLSA*** is remedial in nature and requires Ms. Moore to file a consent, thus she should not be punished for doing what the law requires. Plaintiffs argue that opting in to a class action under *Section 216(b) of the* ***FLSA*** is distinguishable from *Rule 20* joinder cases. Finally, Plaintiffs argue good cause exists to permit Ms. Moore to file this consent because Ms. Moore's claim bolster and support the other claims, and without allowing her to join this lawsuit, she would have to file a completely separate lawsuit or will not be able to

vindicate her rights. [ECF #43, p. 10]. Defendants filed a reply, arguing that Plaintiffs did not make the proper showing for good cause under *Rule 16*, and further that contrary to Plaintiffs' assertions, the statute of limitations is not at risk of expiring because, according to an declaration filed by Pam Castillo, Ms. Moore was not hired by Defendants until July 11, 2016. [ECF #44-1, p. 2].

HN22[↑] *Rule 16(b)(4) of the Federal Rules of Civil Procedure* provides: "[a] schedule may be modified only for good cause and with the judge's consent." Good cause means that scheduling deadlines cannot be met, despite a party's diligent efforts. *Dilmar Oil Co. v. Federated Mut. Ins. Co., 986 F. Supp. 959, 980 (D.S.C. March 25, 1997)*, aff'd *129 F.3d 116 (4th Cir. 1997)*. This Court is mindful of the fact that circumstances within each case **[*34]** sometimes necessitate for leeway within scheduling order deadlines. However, Plaintiffs have not demonstrated diligence in complying with the scheduling order deadline, and this Court is satisfied as to the veracity of Ms. Castillo's representations regarding Ms. Moore's employment dates and the subsequent bearing that has upon any statute of limitations. Moreover, this Court has previously determined in this Order that the motion to certify the class should be denied. Thus, this Court does not believe judicial economy will be served by allowing Ms. Moore to file a consent to join this lawsuit. Accordingly, the Motion to Strike Ms. Moore's Consent to Join is granted.

Conclusion

The Court has thoroughly reviewed the entire record, including all pleadings and exhibits filed in this case. For the reasons stated above, this Court grants Defendants' Motion for Summary Judgment to the extent Plaintiffs' seek to pursue their claims in a representative capacity as collective and/or class action claims, and those claims are dismissed with prejudice. [ECF #35]. However, Plaintiffs' individual ***FLSA*** violations and breach of contract claims remain before this Court as independent claims by the two **[*35]** individual Plaintiffs involved in this lawsuit (Terry Dimery and Charlotte Jones). Plaintiffs' Motion for Conditional Class Certification and Notice is **DENIED**. [ECF #10]. Defendants' Motion to Strike Consent to Join by Lashea Moore is **GRANTED**. [ECF #42].

IT IS SO ORDERED.

Florence, South Carolina

March 26, 2018

/s/ R. Bryan Harwell

R. Bryan Harwell

United States District Judge

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Document (1)

1. *Gordon v. TBC Retail Grp., Inc., 2018 U.S. Dist. LEXIS 120433*
   Client/Matter: 00206.08008

Gordon v. TBC Retail Grp., Inc.

United States District Court for the District of South Carolina, Charleston Division

July 19, 2018, Decided; July 19, 2018, Filed

No. 2:14-cv-03365-DCN

Reporter
2018 U.S. Dist. LEXIS 120433 *; 2018 WL 3472622

ANDREW GORDON, TAVIS MCNEIL, DONALD WRIGHTON, NICHOLAS COLE, JACOB GRISSON, AND DAWN DEWEY, on behalf of themselves and others similarly situated, Plaintiffs, vs. TBC RETAIL GROUP, INC. d/b/a TIRE KINGDOM, Defendant.

Prior History: *Gordon v. TBC Retail Group, Inc., 2016 U.S. Dist. LEXIS 106205 (D.S.C., Aug. 11, 2016)*

Core Terms

employees, arbitration, signature, portal, collection action, opt-in, arbitration agreement, electronic, parties, motion to compel arbitration, Memorandum, signing, hired

Counsel: **[*1]** For Andrew Gordon, Individually and on behalf of all other similarly situated individuals, Tavis McNeil, Individually and on behalf of all other similarly situated individuals, Donald Wrighton, Individually and on behalf of all other similarly situated individuals, Nicholas Cole, Individually and on behalf of all other similarly situated individuals, Jacob Grisson, Individually and on behalf of all other similarly situated individuals, Dawn Dewey, Individually and on behalf of all other similarly situated individuals, Nick Adams, Plaintiffs: Marybeth E Mullaney, LEAD ATTORNEY, Mullaney Law LLC, Mount Pleasant, SC; William Clark Tucker, LEAD ATTORNEY, Tucker Law Firm, Charlottesville, VA.

For Justin Woody, Charles Mullis, Luan Truong, Michael Sienerth, Roger McQueen, Roger Carroll, Beamon Lucas, Andrew Cohn, George Whitener, Christopher Winemiller, Billy Griffin, David Valentine, Michael Smith, Andrew Montgomery, Jimmy Lawley, Dewayne Grau, Matthew Matheson, John Roop, Johnathan Jimenez, Denita Roberts, James Luper, Richard Cahall, Jacob Grissom, William Easterling, Johann Bridges, Patrick Maher, Adam Sesia, William Steverson, Pinkie Dabney, Joshua Pressley, Dennis Corneliussen, Kerwin **[*2]** Hall, James Bryan, James Green, William Roy, Rodney Powell, Justin Lancieri, Steven Boulis, James Nareau, Franklin Hoyt, John Gardner, Rudolph Goldman, Mike Burchfield, Jordan Anderson, Ricardo Campbell, David Varela, Elio Almenares, Christopher Cruise, Raymond Carr, Ronald Hartley, Mark Leiberick, Junior Espinal, Joshua Blackwelder, Ryan Matherne, Michael Kinney, Ricky McCray, Nelvis Rodriguez, Jeffrey Anderson, Hector Miranda, Matthew Laramee, Richard Hill, Johnathan Crapse, Ron Hewitt, Scott Flamholtz, David Gaona, Anthony Johnson, David Jenkins, Joshua Whitfield, George Hall, Alex Officer, Lee Heicher, Kenneth Bemis, Steven Fields, James Beckham, Leonard Thomas, David Leininger, Samuel Rivera, James Hammond, Luis Vazquez, Richard LeCompte, David Silva, Michael Micheli, Kenneth Jimenez, Rodrigo Rodriguez, Jimmy Hatchinson, James Godino, Steven Rucker, Pablo Torres, Martin Nazario, Pablo Ott, Michael Butka, Dwayne Gibbs, Alexis Alamo, Fernando Rivera, Steven McNeely, Gilberto Marrero, Marshall Woodall Shawn Wetmore, Robert Wala, Richard Kidwell, James Creech, Bryan Barlow, Randy Laffer, Cecil Samples, Michael Atkinson, Jason Ruyle, Jose Rios, Alan Ludden, Rene Battaglia, Jonathan **[*3]** Mejia, Nicolas Perez, Humberto Oliva, Dieutel Charles, Rashaad Collins, George Dolly, Gus Sikalis, Angel Nin, Brandon Stewart, Jonthan Batiste, Willys Carrasco, Anthony Perkins, Michael Dillow, Jonathan Cheshire, Ryan Glazebrook, Dion Williams, Joshua Weber, Kelly Greenard, Gregory Mixson, Delmar Huffman Tyler Chandler, Robert Harris, Francinildo Silva, Ayinde Lawal, Juan Lopez, Jeremy Wigglesworth, Stephen Mohammed, Christopher Marler, Richard Renzi, Franklin Frazier, Jose Velasquez, Ryan Hammer, Randall Bowman, Rodney Wendling, Roy Davenport, Joseph Marchisella, James Reposh, Jamey MacDonald, Sean Draughn, Richard Mielke, Raymond Dedeaux, Thomas Edwards, Jimmie Feo, James Houston, Vincent Panariello, Gregorio Muniz, Mario Guido, Miguel Gutierrez, Gabriel McNeill, Mathew Zachariah, Timothy Reighard, William Holbrook, Phillip Richardson, Noel Harper, Ransler Banks, Davon Estes, Ralph Miller, John Valentine, Angel Flores, Roberto Marrero, Ronald Hunt, Scott Kebert, Raymond Frieszell, Anthony Loveland, Timothy Scarberry, Don Powell, Charles Davidson, Steven Victorian, Jeremy Lane, Willie Williams, Kyle Petitt, Ronald McClelland, Brian Garrepy, Scott Sigurdson, Michael Andrews, Christian **[*4]** Wallace, Scott Parsons, Christopher

Johnson, Jeremy MacDonald, Christopher Goodyear, Rafael Brena, Michael Anderson, Don Hugh Powell, Joseph Conrad, Robert Hack, Egbert Porter, Christopher Dales, Neil Stevens, Christopher Cooksey, Gus DiBiasi, Gregory Harris, Jeremy Hurlocker, Randall Klapp, William Levert, Jan Moore, Brian Mulkey Anthony Parisi, Michael Robinson, Robert Rodriguez, Scott Sawyer, Daniel Schifflin, Michael Schroeder, Nicholas Shoun, Ronald Shurock, Andres Teran, Mike Trofibio, Joshua Willets, Devin Wilson, Anthony Biganini, Junior Cabeza, Nicolas Camacho, Anibal Colon, Patrick Crawford, Travis Espinosa, Eddie Foley, Thomas Gibson, Chris Kowalski, Shawn Lemons, Anthony Manfre, Leonard Purvee, Jamie Quinones, Jose Rivera, Shaun Robinson, Gerald Sawyer, Jonathan Vogelius, Thomas Williams, Daniel Wolinski, Wayne Young, Melendez Angel, Jonathan Atkins, Richard Berger, Adam Claypool, Nicholas Denzin, Chad Fox, Dale Hayes, Chris Hemingway, Jimmy Horton, Mike Hudak, Ricardo Jimenez, Ryan Logan, Douglas Louthian, Kenneth Schultz, Johnny Smith, Jamar Stewart, Jesus Tadeo, Kenneth Tucker, George Bell, Robert Blakeney, Albert Bruce, Duane Burton, Willie Carter, Timothy Chavanne, **[*5]** Marcus Coney, Daniel D'Avignon, Peter Gilzene, Emmanuel Hosoomel, John Janson, Mark Lugo, Wesley Maul, Frederick Mayle, Vernon McBride, Tyler Mraz, Anthony Ramirez, Aaron pounds, Fradel Baptiste, Colin Denney, Marcus France, Kenneth Hershkowitz, John Langville, Adam Leahy, Steven Lizarraga, Garry Louis, Mark Mahovetz, William Marin, Benjamin Ostenberg, Javier Perez, Michael Rhoades, Jeremy Root, Heather Sheridan, Perry Shockley, Jamie Smith, Myreon Stewart, Anthony Vazquez, Duane Vierk, Yves Alexander, Kevin Arcila, Marcelo Ascencio, Scott Branch, Phillip Burkwald, Vincent Catania, La'jarvis Cook, Richard Folk, Jesus Hernandez, Joel Hernandez, Emanuel Patterson, Victor Ray, Joseph Rock, Cornelius Rogers, Kenneth Rogers, John Scott, Jose Solares, Brian Stalls, Ashton Young, Omar Zapater, Craig Barnes, Christopher Barrilleaux, Douglas Deatherage, Vincent Delemos, Miguel Diaz, Yves Dubique, Charles Everett, Ferdinand Gutierrez, Gregory Hughey, Vincent Jesse, Michael Linette, Angel Mojica, Marvin Molina, Arlington Powell, John Rockas, Clark Schlinsog, Joshua Sowle, Lanny Bauyan, Matthew Beavers, Harold Busigo, Kevin Fryar, William Gauntt, Jesus Guevara, Carden Hiles, Chad Hoffmaster, Aspil **[*6]** Jean-Louis, William McDaniel, Brian Montalvo, Nathan Pinner, Robert Pritchard, James Ryan, Angel Sanchez, Jesse Sanford, Edwin Santoni, Donald Storrjohann, Jeffery Walker, Christopher Weller, Steven Bauer, Robert Boozer, Mark Brooks, Joel Edouard, Michael Holifield, Patrick Ink, Thomas Kleyla, Shiloh Nichols, Jonell Perez, Ralph Rawlins, Richard Reese, Joseph Rodgers, Joseph Schilk, Morris Singletary, Richard Truex, Michael Tucker, Manuel Waldo, Kyle Womble, Justin Zielinski, Glyn Anderson, Joseph Baiardi, Faton Bajrami, Lea Bartlett, John Davis, Bryan Dawson, Xavier Enriquez, James Eubanks, Randolph Ford, Officer Justin Hanna, Dylan Harper, Ronald Henderson, Ray Henigar, Robert Masciarelli, Maurice Mathis, Joseph Miraglia, Angel Rodriguez, Kevin Rosenthal, Nicolas Santiago, Eric Sindoni, Nicholas Barnes, David Cunningham, Mark Davis, Ricardo Estevez, Jeremy Fusillo, Chad Hoffman, Raymond Martin, Celes McCray, Frantz Miclis, John Pausch, Matthew Perez, Aaron Pitts, Travis Presnell, DeAntonio Stewart, Thad Tingcang, Leonard Traynum, Jose Velazquez, Michael Bingham, George Brown, Marcial Casillas, Michael Castillo, Marcus Crawford, Scot Dunham, Williams Edwins, James Fisher, Richard **[*7]** Fuerneisen, Zachary Gilmor, Brian Goodwin, Carlos Guzman, Michael Helms, Saint-Remy Joseph, Vincenzo Merra, Thomas O'Brien, Randall Reese, Joseph Sekel, Gerald Smith, Jerry Thomley, David Albelo, Cody Allen, Felipe Baltodano, Shahin Baradaranghasemi, Kevin Cabot, James Gaitan, Ramon Gonzales, Michael Hinson, Nicholas Jones, Jon LaChance, Raymond Mackinlay, Dennis Naquin, Christopher Romer, Anthony Sanchez, Davis Scott, Anthony Smith, Cameron Vadala, Pedro Valentin, Benjamin Blum, Dwight Boissiere, Anthony Clark, Thomas Clark, Chris Danner, Francisco Dominguez, John Goergen, Forrest Hatcher, Shawn Johnson, Matthias Karl, David Kuak, Salvatore Marco, Jason Merritt, Luis Miranda, Francis O'Brien, Christopher Richards, Noel Rivera, Guy Young, Kevin Bakun, Fermin Berrios, Joshua Carmack, Brian Carty, Kyle Chiovarou, James Dunne, Osman Fernandez, Juan Garza, James Hardenbrook, Richard Jackson, Alvin Miller, James Moore, Keith Moore, Vadim Pavon, Johnathon Robertson, Patrick Rodak, Joseph Sredniawa, James Swader, Mike Vielhauer, Ryan Wigdahl, Alvin Bushnell, John Clark, Michael Cook, Andrew Cumbie, Ian Friedman, Michael Fuller, Gerold Gail, Christopher Green, Emanuel Guindin, Marvin Gyant, **[*8]** Wendell Harrelson, Jerry Knox, Ray McCall, Jeremy Moore, Justin Page, William Pearson, John Saporita, Gabriel Seda, Oscar Tomlin, Gerald Brueggeman, Hector Corniel, Anthony Deboey, Alvin Dixon, Gerald Fouts, Christopher Freeman, Anthony Holler, Paul Huff, Michael Lewis, Joseph Looper, Wayne McCarthy, Stephen Meredith, Robert Miller, David Mowrer, James O'Connor, Shawn Patrick, Edward Plyler, Sidney Sellari, Raymond Sumner, Rafael Arevalo, James Bargeron, Jason Chapman, Dustin Compagno, Eric Debruin, Bryan Gould, Jordan Hagen, Derek Hosgood, Eddie Kirk, Kurtis Kraum, Christopher Mitchum, Charles Nash, Joshua Pate, Jason Phillips, Tod Reddicks, Thomas Rinaldi, Frederick Schultz, Harrison Tiller, Corey Whetsel, Robert Withrow, Ronald Babin, Robert Bass, David Calvert, Gary Cooper, Rodger Delancey, Brian Doersam, Christopher Doyle, Duston Everett, Taylor Hooks, Jacob Horton, Edison Isaza, Keith Kush William Manchester, Ymathio Nie, Carlos Rivera-Burgos, Daniel Taylor, Eric Taylor, Timothy Tiblis, Arthur Underwood, Christopher Valdes, Kevin Ward, James Wise, Andrew Wright, John

Doe1, John Doe2, John Doe3, Kenneth Savage, Kenneth Savage, Paul Anderson, David Baker, Deangelo Charles, Addison **[*9]** Collier, Baltazar Gonzalez, Shawn Jackson, Mark McKinney, Kenneth Mehrlich, Phillip Sibblis, Thomas Skoblow, Aaron Waller, Luis Caride, John Cooper, Andrew Duffels, Robert Elliot, Corey Hammett, Lawrence McAuliffe, Scott Miller, Jonathan Morris, Christopher Parshley, Thomas Wilder, Steven Williamson, Ryan Ketchum, Frederick McAninch, Evin Rubio, Michael Watkins, Kenneth Dennis, Lewis Lloyd, James Miller, Andrew Tootle, Mike Lepley, Jimmy Loftis, Janardan Nivens, Christopher Weathers, Plaintiffs: Marybeth E Mullaney, LEAD ATTORNEY, Mullaney Law LLC, Mount Pleasant, SC.

For TBC Retail Group Inc, doing business as Tire Kingdom, Defendant: Kristin Starnes Gray, Wade Edward Ballard, LEAD ATTORNEYS, Ford and Harrison, Spartanburg, SC; Louis Percival Britt, III, PRO HAC VICE, FordHarrison, Memphis, TN.

Judges: DAVID C. NORTON, UNITED STATES DISTRICT JUDGE.

Opinion by: DAVID C. NORTON

Opinion

ORDER

The following matters are before the court on Andrew Gordon, Tavis McNeil, Donald Wrighton, Jacob Grissom, Dawn Dewey, and Nicholas Cole's (collectively, "plaintiffs") motion for reconsideration, ECF No. 113, of the court's prior order granting in part and denying in part TBC Retail Group, Inc.'s ("defendant") motions to compel **[*10]** arbitration and motion for summary judgment, ECF No. 112. For the reasons set forth below, the court denies the motion.

I. BACKGROUND

On August 20, 2014, plaintiffs filed the instant action on behalf of themselves and "all other similarly situated employees." Compl. at ¶ 2. Plaintiffs allege that defendant violated the minimum wage and overtime provisions of the Fair Labor Standards Act, *29 U.S.C. § 201, et seq.* ("FLSA"), by utilizing a compensation plan that did not provide plaintiffs one and one-half times their regular rate of pay when they worked more than forty hours in a workweek. Id. at ¶ 23.

Cole was employed by defendant as a mechanic at the Tire Kingdom located at 7201-900 Two Notch Road in Columbia, South Carolina, from approximately May 2013 until April 2014. Id. ¶ 1. Between February 2013 and October 2013, defendant drafted and developed a Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions (the "Agreement"). ECF No. 32-2, Filoon Dec. ¶¶ 2-8; ECF No. 81-2, Third Filoon Dec. ¶¶ 2-4. Defendant finalized the Agreement in October 2013, and began requiring all new hires to sign the Agreement as of October or November 2013. Filoon Dec. ¶¶ 3, 4. Between October 2013 and March 2014, **[*11]** defendant made the Agreement available for "electronic signature" through the employee portal—a password protected, computer-based document system.[1] Id. ¶ 5; see also ECF No. 39-1, Second Filoon Dec. ¶ 9 (describing access and navigation of the employee portal). In March 2014, defendant circulated a company-wide communication notifying its employees that the Agreement and a related memorandum (the "Memorandum") were available via the employee portal. Filoon Dec. ¶¶ 7, 8; ECF No. 33-4, Memorandum 2.

The Memorandum explained that the portal now allowed employees to "review and acknowledge [defendant's] policies, processes, and documents," and that this feature was being implemented with two important documents, one being the Agreement. Id. The Memorandum further explained that the Agreement was "a contract" intended "to allow any [employee] to bring any legal claim(s) against [defendant] in a quicker, less formal, and typically less expensive forum than the traditional filing of a lawsuit in court." Id. All employees hired before October 15, 2013, were "required to acknowledge" the Agreement no later than Friday March 21, 2014. Id.

The Agreement provides that, except in certain circumstances **[*12]** not applicable here,

> [A]ny and all disputes, claims, complaints or controversies ("Claims") between you and TBC Corporation and/or any of its parents, subsidiaries, affiliates, agents, officers, directors, employees and/or any of its benefit plans, benefit plan fiduciaries, sponsors or administrators (collectively and individually the "Company"), that in any way arise out of or relate to your employment, the terms and conditions of your employment, your application for employment and/or the termination of your employment will be resolved by binding arbitration and NOT by a court or jury. As such, the Company and you agree to forever waive and

[1] The employee portal also appears to have been used by employees to record their time and the work they performed. See ECF No. 36-1, Cole Dec. ¶ 6.

> relinquish their right to bring claims against the other in a court of law.

ECF No. 33-3, Arbitration Agreement. The final page of the Agreement informs the reader as follows:

> YOUR SIGNATURE BELOW ATTESTS TO THE FACT THAT:
> 1. YOU HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS.
> 2. YOU ARE SIGNING THIS AGREEMENT VOLUNTARILY.
> 3. YOU ARE NOT RELYING ON ANY PROMISES OR REPRESENTATIONS BY THE COMPANY EXCEPT THOSE CONTAINED IN THIS AGREEMENT.
>
> 4. YOU UNDERSTAND THAT BY SIGNING THIS AGREEMENT, YOU ARE GIVING UP THE RIGHT TO HAVE **[*13]** CLAIMS DECIDED BY A COURT OR JURY.
> 5. YOU HAVE BEEN GIVEN THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH PRIVATE LEGAL COUNSEL AT YOUR EXPENSE.

Id. Directly below this language, the Agreement contains signature blocks for both the "Applicant/Employee" and the "Company." Id.

However, employees were not asked to "sign" or "execute" these signature blocks; instead, employees would "acknowledge" the Agreement by entering their employee number and the last four digits of their social security number into a field located on a separate portion of the Agreement's signature page. See Second Filoon Dec. Ex. A, 13-14. This field appeared below a prompt which stated: "I, __, hereby certify and affirm that I have read the Mutual Agreement to Arbitrate. Please enter your Employee Number and last four digits of your Social Security Number as your electronic signature." Id. Defendant has produced records indicating that numerous opt-in plaintiffs,[2] as well as Cole, electronically "acknowledged" the Agreement in this manner. See Third Filoon Dec. ¶ 12; ECF Nos. 33-2, 33-3, Attachments to Third Filoon Dec. (collecting signature pages, confirmation screen shots, and summary charts of employees who filled **[*14]** out acknowledgment field); ECF No. 33-5 (confirmation screenshot of Cole's acknowledgment, dated March 24, 2014). Cole, for his part, claims that he "does not recall" ever doing so. Cole Dec. ¶ 3.

Only then-current employees accessed the Agreement through the employee portal. The process was significantly different for new hires and rehires. These employees "signed" the Agreement through an "electronic onboarding process" known as the "Kronos System." Fifth Filoon Dec. ¶ 3. This system required newly hired or rehired employees to log in using their name and portions of their social security number. Id. The employees then agreed to a block of text labeled "e-Signature Acceptance," which stated that the employee agreed to "use the electronic click as [his or her] 'written' signature." Id. Attach. 22. The employee was then required to view a series of documents, including the Agreement, and "sign" each document by "clicking" an icon labeled "Sign." Id. After the employee provided this electronic signature, a message appeared saying that the document was now "signed," and giving the date and time of the signature. Id. ¶ 4. Employees could not complete the hiring process without "signing" **[*15]** each document.[3] Id.

On September 30, 2015, the court granted plaintiffs' motion for conditional class certification. Defendant filed a motion to compel arbitration against Cole on August 3, 2015, well before the opt-in period began. Plaintiffs filed a response to this motion on August 26, 2015, and defendant filed its reply in support on September 8, 2015. On March 7, 2016, defendant filed a second motion to compel arbitration against all opt-in plaintiffs who signed the Agreement and asked the court to stay a scheduled hearing on its first motion to compel arbitration, until both matters could be heard together. Defendant then filed a motion for summary judgment on April 22, 2016. Plaintiffs responded to the second motion to compel arbitration on April 29, 2016. Plaintiffs then filed a motion for the joinder of additional parties on May 6, 2016. On August 11, 2016, the court entered an order on these motions, denying the motion to compel Cole to arbitrate, and denying in part and granting in part the motion to compel arbitration for all other opt-in plaintiffs who signed the arbitration agreement. ECF No. 112. Specifically, the court granted defendant's motion as to all relevant opt-in **[*16]** plaintiffs except (1) those who electronically signed the Agreement through the employee portal, rather than the Kronos system, and who left their employment with

[2] Defendant has produced such evidence with respect to both opt-in plaintiffs who filed a consent form before the scheduled deadline, see Third Filoon Dec. ¶ 12, and opt-in plaintiffs who filed late consent forms, see ECF No. 88-2, Fourth Filoon Dec. Ex. 1 (providing summary chart).

[3] The conflicting verbiage used in the employee portal and Kronos System is a potential source of confusion when discussing these motions. Therefore, the court will use quotation marks only when referring specifically to the act of either "acknowledging" the Agreement through the employee portal or "signing" the Agreement through the Kronos System. When referencing the concept signatures or the act of signing a document, generally, quotation marks will be omitted.

defendant shortly thereafter; and (2) those who have submitted sworn affidavits claiming that their supervisors frequently accessed their employee portals and completed required tasks "for them." The court decided it would hold an evidentiary hearing on the issue of whether Cole and the other opt-in plaintiffs agreed to be bound by the Agreement and allow the parties to conduct limited discovery in connection with that hearing. The court granted in part and denied in part the motion for summary judgment and the motion for joinder.

On January 26, 2017, Gordon filed a motion for reconsideration of the court's order. ECF No. 113. On February 9, 2017, defendant filed its response in opposition. ECF No. 114. On February 16, 2017, Gordon filed his reply in support. ECF No. 115. On September 13, 2017, the court stayed the case, pending the outcome of Epic Systems v. Lewis, Docket No. 16-285, which was about to be heard before the Supreme Court. On May 31, 2018, defendant filed a supplemental response to the motion to reconsider, **[*17]** in light of the Supreme Court's ruling in Epic Systems. ECF No. 129. On June 7, 2018, plaintiffs also filed a supplemental reply in support of the motion to reconsider. ECF No. 131. This motion has been fully briefed and is ripe for the court's review.

II. STANDARDS

A. *Rule 59(e)*

Federal Rule of Civil Procedure 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." While *Rule 59(e)* does not supply a standard to guide the court's exercise of its power to alter or amend, the Fourth Circuit has recognized that a court may grant a *Rule 59(e)* motion "only in very narrow circumstances: (1) to accommodate an intervening change in controlling law, (2) to account for new evidence not available at trial, or (3) to correct a clear error of law or prevent manifest injustice." *Hill v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002)*. *Rule 59(e)* motions may not be used to make arguments that could have been made before the judgment was entered. See *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998)*. Moreover, "[a] party's mere disagreement with the court's ruling does not warrant a *Rule 59(e)* motion, and such a motion should not be used to rehash arguments previously presented or to submit evidence which should have been previously submitted." *Sams v. Heritage Transp., Inc., No. 2:12-cv-0462, 2013 U.S. Dist. LEXIS 116496, 2013 WL 4441949, at *1 (D.S.C. August 15, 2013)*.

Rule 59(e) provides an "extraordinary **[*18]** remedy that should be used sparingly." *Pac. Ins. Co., 148 F.3d at 403* (internal citation omitted); *Wright v. Conley, No. 10-cv-2444, 2013 U.S. Dist. LEXIS 11086, 2013 WL 314749, at *1 (D.S.C. Jan. 28, 2013)*. Whether to alter or amend a judgment under *Rule 59(e)* is within the sound discretion of the district court. *Bogart v. Chapell, 396 F.3d 548, 555 (4th Cir. 2005)*.

B. *Rule 54(b)*

Federal Rule of Civil Procedure 54(b) states, in relevant part, that

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

A "judgment," within the meaning of *Rule 54*, "includes a decree and any order from which an appeal lies." *Fed. R. Civ. P. 54(a)*. A motion brought under *Rule 54(b)* is judged by similar standards as a motion brought under *Rule 59(e)*, which may only be granted for the following reasons: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Grayson Consulting Inc. v. Cathcart, No. 2:07-cv-00593-DCN, 2014 U.S. Dist. LEXIS 18858, 2014 WL 587756, at *1 (D.S.C. Feb. 14, 2014)* (quoting *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998)*); *Slep-Tone Entm't Corp. v. Garner, 2011 U.S. Dist. LEXIS 146614, 2011 WL 6370364, at *1 (W.D.N.C. Dec. 20, 2011)*.

III. DISCUSSION

Plaintiffs' motion for reconsideration only asks the court to reconsider its decision to compel certain plaintiffs **[*19]** to proceed with their claims in arbitration. Plaintiffs point to a decision from the National Labor Relations Board ("NLRB"), issued after the court's ruling on the motion to compel arbitration, that found that the class and collective action waiver in defendants' arbitration agreement is unenforceable because it violates the National Labor Relations Act ("NLRA"). Plaintiffs argue that this NLRB ruling qualifies as "an intervening change in controlling law" and as "new evidence not [previously] available" under *Rule 54*. While the NLRB decision might otherwise have been persuasive, its usefulness for the plaintiffs is eviscerated by the Supreme Court's recent decision in ***Epic Sys. Corp. v. Lewis, 138 S. Ct.***

1612, 1626, 200 L. Ed. 2d 889 (2018). In Epic Systems, the Supreme Court upheld the validity of class and collection action waivers in arbitration agreements, finding that they do not violate the NLRA, but are instead valid contractual provisions under the Federal Arbitration Act.

In support of its holding, the Court discussed how the FLSA does not prohibit agreements for individualized arbitration or invalidate class / collective action waivers:

> The employees' underlying causes of action involve their wages and arise not under the NLRA but under an entirely different **[*20]** statute, the Fair Labor Standards Act. The FLSA allows employees to sue on behalf of "themselves and other employees similarly situated," *29 U. S. C. §216(b)*, and it's precisely this sort of collective action the employees before us wish to pursue. Yet they do not offer the seemingly more natural suggestion that the FLSA overcomes the Arbitration Act to permit their class and collective actions. Why not? Presumably because this Court held decades ago that an identical collective action scheme (in fact, one borrowed from the FLSA) does not displace the Arbitration Act or prohibit individualized arbitration proceedings. *Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)* (discussing Age Discrimination in Employment Act). In fact, it turns out that "[e]very circuit to consider the question" has held that the FLSA allows agreements for individualized arbitration. *Alternative Entertainment, 858 F. 3d, at 413* (opinion of Sutton, J.) [ ]. Faced with that obstacle, the employees are left to cast about elsewhere for help. And so they have cast in this direction, suggesting that one statute (the NLRA) steps in to dictate the procedures for claims under a different statute (the FLSA), and thereby overrides the commands of yet a third statute (the Arbitration Act).

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1626, 200 L. Ed. 2d 889 (2018).

Prior to Epic Systems, the Fourth Circuit **[*21]** had also explicitly found that courts may not alter an "otherwise valid arbitration agreement[] by applying the doctrine of unconscionability to eliminate a [contract] term barring classwide procedures." *Muriithi v. Shuttle Exp., Inc., 712 F.3d 173, 180-81 (4th Cir. 2013)*; see also *Adkins v. Labor Ready, Inc., 303 F.3d 496, 499 (4th Cir. 2002)* (finding "no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute."); *Carmax Auto Superstores, Inc. v. Sibley, 215 F. Supp. 3d 430, 435-36 (D. Md. 2016)* (acknowledging the "strong federal presumption in favor of arbitration agreements and the Fourth Circuit's holding that class action waivers are not incompatible with the FAA's savings clause on the basis of unconscionability").

In the current matter, there is nothing in the language of the class / collective action waivers to indicate that they are invalid or unenforceable. Thus, the NLRB's decision regarding defendants' arbitration agreements does not provide a sufficient basis for the court to reconsider its prior order compelling certain plaintiffs to arbitration.

IV. CONCLUSION

For the foregoing reasons, the court **DENIES** the motion for reconsideration and lifts the stay on this case.

AND IT IS SO ORDERED.

/s/ David C. Norton

DAVID C. NORTON

UNITED STATES DISTRICT JUDGE

July 19, 2018

Charleston, South [*22] Carolina

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User Name: AMY JENKINS
Date and Time: Tuesday, April 30, 2019 5:46:00 PM EDT
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Document (1)

1. *Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134*

Client/Matter: 00206.08008
Search Terms: Encino and Navarro
Search Type: Terms and Connectors
Narrowed by:

Content Type	Narrowed by
Cases	Sources: U.S. Supreme Court Cases, Lawyers' Edition

Encino Motorcars, LLC v. Navarro

Supreme Court of the United States

January 17, 2018, Argued; April 2, 2018, Decided

No. 16-1362.

Reporter
138 S. Ct. 1134 *; 200 L. Ed. 2d 433 **; 2018 U.S. LEXIS 2065 ***; 86 U.S.L.W. 4167; 168 Lab. Cas. (CCH) P36,610; 27 Wage & Hour Cas. (BNA) 1141; 27 Fla. L. Weekly Fed. S 147; 2018 WL 1568025

ENCINO MOTORCARS, LLC, Petitioner v. HECTOR ***NAVARRO***, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at, Judgment entered by *Navarro v. Encino Motorcars, LLC, 2018 U.S. App. LEXIS 20006 (9th Cir., July 19, 2018)*

Prior History: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Navarro v. Encino Motorcars, LLC, 845 F.3d 925, 2017 U.S. App. LEXIS 344 (9th Cir., Jan. 9, 2017)

Disposition: Reversed and remanded.

Core Terms

exemption, advisors, servicing, mechanics, automobiles, partsmen, selling, employees, partsman, salesman, salesmen, repair, dealership, overtime, distributive, legislative history, customers, Occupational, vehicles, canon, overtime-pay, implements, remarks, trucks, farm, disjunctive, repair and maintenance, establishment, categories, narrowly

Case Summary

Overview

HOLDINGS: [1]-Automobile service advisors were exempt from the *FLSA* overtime requirement because they were salesmen primarily engaged in servicing cars since they sold customers services for their vehicles and they were also primarily engaged in servicing cars since they were integral to the servicing process as they met customers, suggested and sold repair and maintenance services, and followed up as the services were performed; [2]-Although service advisors did not spend most of their time physically repairing cars, *29 U.S.C.S. § 213(b)(10)(A)* was not so constrained, and use of the disjunctive word "or" to join "selling" and "servicing" suggested that the exemption covered a salesman primarily engaged in either activity; [3]-There was no reason to construe *FLSA* exemptions narrowly, and neither an agency handbook nor the *FLSA's* legislative history supported a contrary interpretation.

Outcome
Decision reversed and case remanded. 5-4 Decision. One dissent.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Wage & Hour Laws > Scope & Definitions > Overtime & Work Periods

HN1[] **Scope & Coverage, Overtime & Work Periods**

The *Fair Labor Standards Act*, *29 U.S.C.S. § 201 et seq.*, requires employers to pay overtime compensation to covered employees.

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Exemptions

HN2[] **Scope & Definitions, Exemptions**

The *Fair Labor Standards Act* exempts from the overtime-pay requirement any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles at a covered

dealership. *29 U.S.C.S. § 213(b)(10)(A)*.

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Exemptions

HN3 **Scope & Definitions, Exemptions**

The *Fair Labor Standards Act's* overtime-pay requirement does not apply to any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers. *29 U.S.C.S. § 213(b)(10)(A)*.

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Scope & Definitions

Governments > Legislation > Interpretation

HN4 **Wage & Hour Laws, Scope & Coverage**

The term "salesman" is not defined in the *Fair Labor Standards Act*, so courts give the term its ordinary meaning. The ordinary meaning of "salesman" is someone who sells goods or services.

Governments > Legislation > Interpretation

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Exemptions

HN5 **Legislation, Interpretation**

The word "servicing" in the context of *29 U.S.C.S. § 213(b)(10)(A)* can mean either the action of maintaining or repairing a motor vehicle or the action of providing a service.

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Exemptions

HN6 **Scope & Definitions, Exemptions**

The phrase "primarily engaged in servicing automobiles" in *29 U.S.C.S. § 213(b)(10)(A)* must include some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process.

Governments > Legislation > Interpretation

HN7 **Legislation, Interpretation**

"Or" in a statute is almost always disjunctive.

Governments > Legislation > Interpretation

HN8 **Legislation, Interpretation**

Statutory context can overcome the ordinary, disjunctive meaning of "or." The distributive canon, for example, recognizes that sometimes where a sentence contains several antecedents and several consequents, courts should read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.

Governments > Legislation > Interpretation

HN9 **Legislation, Interpretation**

The distributive canon of statutory interpretation has the most force when the statute allows for one-to-one matching. The distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible.

Governments > Legislation > Interpretation

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Exemptions

HN10 **Legislation, Interpretation**

Because the *Fair Labor Standards Act* gives no textual indication that its exemptions should be construed narrowly, there is no reason to give them anything other than a fair, rather than a narrow, interpretation.

Governments > Legislation > Interpretation

HN11 **Legislation, Interpretation**

Silence in the legislative history, no matter how clanging, cannot defeat the better reading of text and statutory context. If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative

history cannot lend any clarity.

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > Exemptions

HN12[] **Scope & Definitions, Exemptions**

Service advisors are exempt from the overtime-pay requirement of the *Fair Labor Standards Act* because they are salesmen primarily engaged in servicing automobiles. *29 U.S.C.S. § 213(b)(10)(A)*.

Lawyers' Edition Display

Decision

[433]** Automobile dealership's service advisors were exempt from general Fair Labor Standards Act (*29 U.S.C.S. § 201 et seq.*) overtime-pay requirements under *29 U.S.C.S. § 213(b)(10)(A)*, which exempted any salesman primarily engaged in selling or servicing automobiles.

Summary

Overview: HOLDINGS: [1]-Automobile service advisors were exempt from the FLSA overtime requirement because they were salesmen primarily engaged in servicing cars since they sold customers services for their vehicles and they were also primarily engaged in servicing cars since they were integral to the servicing process as they met customers, suggested and sold repair and maintenance services, and followed up as the services were performed; [2]-Although service advisors did not spend most of their time physically repairing cars, *29 U.S.C.S. § 213(b)(10)(A)* was not so constrained, and use of the disjunctive word "or" to join "selling" and "servicing" suggested that the exemption covered a salesman primarily engaged in either activity; [3]-There was no reason to construe FLSA exemptions narrowly, and neither an agency handbook nor the FLSA's legislative history supported a contrary interpretation.

Outcome: Decision reversed and case remanded. 5-4 Decision. One dissent.

Headnotes

Labor 175 > OVERTIME COMPENSATION > Headnote:
LEdHN1[] 1

The Fair Labor Standards Act, *29 U.S.C.S. § 201 et seq.*, requires employers to pay overtime compensation to covered employees. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

[434]**

Labor 170 > OVERTIME PAY -- EXEMPTION -- SELLING OR SERVICING AUTOMOBILES > Headnote:
LEdHN2[] 2

The Fair Labor Standards Act exempts from the overtime-pay requirement any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles at a covered dealership. *29 U.S.C.S. § 213(b)(10)(A)*. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Labor 170 > OVERTIME PAY -- EXEMPTION -- SELLING OR SERVICING AUTOMOBILES > Headnote:
LEdHN3[] 3

The Fair Labor Standards Act's overtime-pay requirement does not apply to any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers. *29 U.S.C.S. § 213(b)(10)(A)*. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Statutes 166.3Statutes 178 > SALESMAN -- ORDINARY MEANING > Headnote:
LEdHN4[] 4

The term "salesman" is not defined in the Fair Labor Standards Act, so courts give the term its ordinary meaning. The ordinary meaning of "salesman" is someone who sells goods or services. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Statutes 178 > WORD -- SERVICING > Headnote:
LEdHN5[] 5

The word "servicing" in the context of *29 U.S.C.S. § 213(b)(10)(A)* can mean either the action of maintaining or repairing a motor vehicle or the action of providing a service. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Statutes 178 > CONSTRUCTION -- SCOPE OF PHRASE > Headnote:
LEdHN6 6

The phrase "primarily engaged in servicing automobiles" in *29 U.S.C.S. § 213(b)(10)(A)* must include some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Statutes 179 > WORD -- OR > Headnote:
LEdHN7 7

"Or" in a statute is almost always disjunctive. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Statutes 113 > CONSTRUCTION -- CONTEXT > Headnote:
LEdHN8 8

Statutory context can overcome the ordinary, disjunctive meaning of "or." The distributive canon, for example, recognizes that sometimes where a sentence contains several antecedents and several consequents, courts should read them distributively and apply the words to the subjects which, by context, they seem most properly to relate. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

[435]**

Statutes 112 > CONSTRUCTION -- DISTRIBUTIVE CANON > Headnote:
LEdHN9 9

The distributive canon of statutory interpretation has the most force when the statute allows for one-to-one matching. The distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Statutes 200 > CONSTRUCTION -- FAIR LABOR STANDARDS ACT > Headnote:
LEdHN10 10

Because the Fair Labor Standards Act gives no textual indication that its exemptions should be construed narrowly, there is no reason to give them anything other than a fair, rather than a narrow, interpretation. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Statutes 143.5 > SILENCE IN LEGISLATIVE HISTORY > Headnote:
LEdHN11 11

Silence in the legislative history, no matter how clanging, cannot defeat the better reading of text and statutory context. If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Labor 170 > OVERTIME PAY -- EXEMPTION -- SERVICE ADVISORS > Headnote:
LEdHN12 12

Service advisors are exempt from the overtime-pay requirement of the Fair Labor Standards Act because they are salesmen primarily engaged in servicing automobiles. *29 U.S.C.S. § 213(b)(10)(A)*. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Syllabus

[436] [*1136]** Respondents, current and former service advisors for petitioner ***Encino*** Motorcars, LLC, sued petitioner for backpay, alleging that petitioner violated the *Fair Labor Standards Act (FLSA)* by failing to pay them

overtime. Petitioner moved to dismiss, arguing that service advisors are exempt from the *FLSA's* overtime-pay requirement under *29 U. S. C. §213(b)(10)(A)*, which applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." The District Court agreed and dismissed the suit. The Court of Appeals for the Ninth Circuit reversed. It found the statute ambiguous and the legislative history inconclusive, and it deferred to a 2011 Department of Labor rule that interpreted "salesman" to exclude service advisors. This Court vacated the Ninth Circuit's judgment, holding that courts could not defer to the procedurally defective 2011 rule, ***Encino** Motorcars, LLC v. **Navarro**, 579 U. S. ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382,* (***Encino** I*), but not deciding whether the exemption covers service advisors, *id., at ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382*. On remand, the Ninth Circuit again held that the exemption does not include service advisors.

Held:

Because service advisors **[***2]** are "salesm[e]n . . . primarily engaged in . . . servicing automobiles," they are exempt from the *FLSA's* overtime-pay requirement. *Pp. ___ - ___, 200 L. Ed. 2d, at 439-443*.

(a) A service advisor is obviously a "salesman." The ordinary meaning of "salesman" is someone who sells goods or services, and service advisors "sell [customers] services for their vehicles," ***Encino** I, supra, at ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, 389*. *P. ___, 200 L. Ed. 2d, at 440*.

(b) Service advisors are also "primarily engaged in . . . servicing automobiles." "Servicing" can mean either "the action of maintaining or repairing a motor vehicle" or "[t]he action of providing a service." 15 Oxford English Dictionary 39. Service advisors satisfy both definitions because they are integral to the servicing process. They "mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories **[*1137]** or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles." ***Encino** I, supra, at ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, 389*. While service advisors do not spend most of their time physically repairing automobiles, neither do partsmen, who the parties agree are "primarily engaged in . . . servicing automobiles." *Pp. ___ - ___, 200 L. Ed. 2d, at 440-441*.

(c) The Ninth Circuit **[***3]** invoked the distributive canon--matching "salesman" with "selling" and "partsman [and] mechanic" with "[servicing]"--to conclude that the exemption simply does not apply to "salesm[e]n . . . primarily engaged in . . . servicing automobiles." But the word "or," which connects all of the exemption's nouns and gerunds, is "almost always disjunctive." *United States v. Woods, **[**437]** 571 U. S. 31, 45, 134 S. Ct. 557, 187 L. Ed. 2d 472*. Using "or" to join "selling" and "servicing" thus suggests that the exemption covers a salesman primarily engaged in either activity.

Statutory context supports this reading. First, the distributive canon has the most force when one-to-one matching is present, but here, the statute would require matching some of three nouns with one of two gerunds. Second, the distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. But here, "salesman . . . primarily engaged in . . . servicing automobiles" is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth, starting with "any" and using the disjunctive "or" three times. *Pp. ___ - ___, 200 L. Ed. 2d, at 441-442*.

(d) The Ninth Circuit also invoked the principle that exemptions to the *FLSA* should be construed **[***4]** narrowly. But the Court rejects this principle as a guide to interpreting the *FLSA*. Because the *FLSA* gives no textual indication that its exemptions should be construed narrowly, they should be given a fair reading. *P. ___, 200 L. Ed. 2d, at 442*.

(e) Finally, the Ninth Circuit's reliance on two extraneous sources to support its interpretation--the 1966-1967 Occupational Outlook Handbook and the *FLSA's* legislative history--is unavailing. *Pp. ___ - ___, 200 L. Ed. 2d, at 442-443*.

845 F. 3d 925, reversed and remanded.

Counsel: Paul D. Clement argued the cause for petitioner.

James A. Feldman argued the cause for respondents.

Judges: Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Alito, and Gorsuch, JJ., joined. Ginsburg, J., filed a dissenting opinion, in which Breyer, Sotomayor, and Kagan, JJ., joined.

Opinion by: Thomas

Opinion

[*1138] Justice **Thomas** delivered the opinion of the Court.

HN1[↑] ***LEdHN[1]***[↑] [1]The Fair Labor Standards Act (FLSA), *52 Stat. 1060*, as amended, *29 U. S. C. §201 et seq.*, requires employers to pay overtime compensation to covered employees. ***HN2***[↑] ***LEdHN[2]***[↑] [2]The *FLSA* exempts from the overtime-pay requirement "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a covered dealership. *§213(b)(10)(A)*. We granted certiorari to decide whether this exemption applies to service advisors—employees at car dealerships who consult with customers about their servicing needs and sell them servicing solutions. **[***5]** We conclude that service advisors are exempt.

I

A

Enacted in 1938, the *FLSA* requires employers to pay overtime to covered employees who work more than 40 hours in a week. *29 U. S. C. §207(a)*. But the *FLSA* exempts many categories of employees from this requirement. See *§213*. Employees at car dealerships have long been among those exempted.

Congress initially exempted all employees at car dealerships from the **[**438]** overtime-pay requirement. See Fair Labor Standards Amendments of 1961, §9, 75 Stat. 73. Congress then narrowed that exemption to cover "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft." Fair Labor Standards Amendments of 1966, §209, 80 Stat. 836. In 1974, Congress enacted the version of the exemption at issue here. It provides that ***HN3***[↑] ***LEdHN[3]***[↑] [3]the *FLSA's* overtime-pay requirement does not apply to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *§213(b)(10)(A)*.

This language has long been understood to cover service advisors. Although the Department of Labor initially interpreted it to exclude them, *35 Fed. Reg. 5896 (1970)* (codified at *29 CFR §779.372(c)(4) (1971)*), the federal **[***6]** courts rejected that view, see *Brennan v. Deel Motors, Inc., 475 F. 2d 1095 (CA5 1973)*; *Brennan v. North Bros. Ford, Inc., 1975 U.S. Dist. LEXIS 12815, 76 CCH LC ¶33, 247 (ED Mich. 1975)*, aff'd *sub nom. Dunlop v. North Bros. Ford, Inc., 529 F. 2d 524 (CA6 1976)* (table). After these decisions, the Department issued an opinion letter in 1978, explaining that service advisors are exempt in most cases. See Dept. of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH-467) (1978), [1978-1981 Transfer Binder] CCH Wages-Hours Administrative Rulings ¶31,207. From 1978 to 2011, Congress made no changes to the exemption, despite amending *§213* nearly a dozen times. The Department also continued to acquiesce in the view that service advisors are exempt. See Dept. of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04(k) (Oct. 20, 1987), online at *https://perma.cc/5GHD-KCJJ* (as last visited Mar. 28, 2018).

In 2011, however, the Department reversed course. It issued a rule that interpreted "salesman" to exclude service advisors. *76 Fed. Reg. 18832, 18859 (2011)* (codified at *29 CFR §779.372(c)*). That regulation prompted this litigation.

B

Petitioner ***Encino*** Motorcars, LLC, is a Mercedes-Benz dealership in California. Respondents are current and former service advisors for petitioner. Service advisors "interact with customers and sell them services for their vehicles." **[*1139]** ***Encino*** *Motorcars, LLC v.* ***Navarro****, 579 U. S. ___, ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 388 (2016)* (***Encino*** *I*). They "mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; **[***7]** sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles." *Ibid.*

In 2012, respondents sued petitioner for backpay. Relying on the Department's 2011 regulation, respondents alleged that petitioner had violated the *FLSA* by failing to pay them overtime. Petitioner moved to dismiss, arguing that service advisors are exempt under *§213(b)(10)(A)*. The District Court agreed with petitioner **[**439]** and dismissed the complaint, but the Court of Appeals for the Ninth Circuit reversed. Finding the text ambiguous and the legislative history "inconclusive," the Ninth Circuit deferred to the Department's 2011 rule under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. ***Encino****, 780 F. 3d 1267, 1275 (2015)*.

We granted certiorari and vacated the Ninth Circuit's judgment. We explained that courts cannot defer to the 2011 rule because it is procedurally defective. See ***Encino*** *I, 579 U. S., at ___-___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 393-395*. Specifically, the regulation undermined significant reliance interests in the automobile industry by changing the treatment of service advisors without a sufficiently reasoned explanation. *Id., at ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 395*. But we did not decide whether, without administrative deference, the exemption **[***8]** covers service advisors. *Id., at ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 395*. We remanded that issue for the Ninth Circuit to address in the

first instance. *Ibid.*

C

On remand, the Ninth Circuit again held that the exemption does not include service advisors. The Court of Appeals agreed that a service advisor is a "'salesman'" in a "generic sense," *845 F. 3d 925, 930 (2017)*, and is "'primarily engaged in . . . servicing automobiles'" in a "general sense," *id., at 931*. Nonetheless, it concluded that "Congress did not intend to exempt service advisors." *Id., at 929*.

The Ninth Circuit began by noting that the Department's 1966-1967 Occupational Outlook Handbook listed 12 job titles in the table of contents that could be found at a car dealership, including "automobile mechanics," "automobile parts countermen," "automobile salesmen," and "automobile service advisors." *Id., at 930*. Because the *FLSA* exemption listed three of these positions, but not service advisors, the Ninth Circuit concluded that service advisors are not exempt. *Ibid.* The Ninth Circuit also determined that service advisors are not primarily engaged in "servicing" automobiles, which it defined to mean "only those who are actually occupied in the repair and maintenance of cars." *Id., at 931*. And the Ninth Circuit further concluded that the **[***9]** exemption does not cover salesmen who are primarily engaged in servicing. *Id., at 933*. In reaching this conclusion, the Ninth Circuit invoked the distributive canon. See A. Scalia & B. Garner, Reading Law 214 (2012) ("Distributive phrasing applies each expression to its appropriate referent"). It reasoned that "Congress intended the gerunds—selling and servicing—to be distributed to their appropriate subjects—salesman, partsman, and mechanic. A salesman sells; a partsman services; and a mechanic services." *Id., at 934*. Finally, the Court of Appeals noted that its interpretation was supported by the principle that **[*1140]** exemptions to the *FLSA* should be construed narrowly, *id., at 935*, and the lack of any "mention of service advisors" in the legislative history, *id., at 939*.

We granted certiorari, *582 U. S. ___, 138 S. Ct. 54; 198 L. Ed. 2d 780 (2017)*, and now reverse.

II

The *FLSA* exempts from its overtime-pay requirement "any salesman, **[**440]** partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *§213(b)(10)(A)*. The parties agree that petitioner is a "nonmanufacturing establishment primarily engaged in the business **[***10]** of selling [automobiles] to ultimate purchasers." The parties also agree that a service advisor is not a "partsman" or "mechanic," and that a service advisor is not "primarily engaged . . . in selling automobiles." The question, then, is whether service advisors are "salesm[e]n . . . primarily engaged in . . . servicing automobiles." We conclude that they are. Under the best reading of the text, service advisors are "salesm[e]n," and they are "primarily engaged in . . . servicing automobiles." The distributive canon, the practice of construing *FLSA* exemptions narrowly, and the legislative history do not persuade us otherwise.

A

A service advisor is obviously a "salesman." ***HN4***[↑] ***LEdHN[4]***[↑] [4]The term "salesman" is not defined in the statute, so "we give the term its ordinary meaning." *Taniguchi v. Kan Pacific Saipan, Ltd., 566 U. S. 560, 566, 132 S. Ct. 1997, 182 L. Ed. 2d 903 (2012)*. The ordinary meaning of "salesman" is someone who sells goods or services. See 14 Oxford English Dictionary 391 (2d ed. 1989) ("[a] man whose business it is to sell goods or conduct sales"); Random House Dictionary of the English Language 1262 (1966) ("a man who sells goods, services, etc."). Service advisors do precisely that. As this Court previously explained, service advisors "sell [customers] services for their vehicles." ***Encino*** *I, 579 U. S., at ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 388*.

B

Service advisors **[***11]** are also "primarily engaged in . . . servicing automobiles." *§213(b)(10)(A)*. ***HN5***[↑] ***LEdHN[5]***[↑] [5]The word "servicing" in this context can mean either "the action of maintaining or repairing a motor vehicle" or "[t]he action of providing a service." 15 Oxford English Dictionary, at 39; see also Random House Dictionary of the English Language, at 1304 ("to make fit for use; repair; restore to condition for service"). Service advisors satisfy both definitions. Service advisors are integral to the servicing process. They "mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles." ***Encino*** *I, supra, at ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 388*. If you ask the average customer who services his car, the primary, and perhaps only, person he is likely to identify is his service advisor.

True, service advisors do not spend most of their time physically repairing automobiles. But the statutory language is not so constrained. All agree that partsmen, for example, are "primarily engaged in . . . servicing automobiles." Brief for Petitioner 40; **[***12]** Brief for Respondents 41-44. But

partsmen, like service advisors, **[*1141]** do not spend most of their time under the hood. Instead, they "obtain the vehicle parts . . . and provide those parts to the mechanics." ***Encino I, [**441]*** *supra, at ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 389*; see also 1 Dept. of Labor, *Dictionary of Occupational Titles 33* (3d ed. 1965) (defining "partsman" as someone who "[p]urchases, stores, and issues spare parts for automotive and industrial equipment"). In other words,***HN6***[↑] ***LEdHN[6]***[↑] [6] the phrase "primarily engaged in . . . servicing automobiles" must include some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process. That description applies to partsmen and service advisors alike.

C

The Ninth Circuit concluded that service advisors are not covered because the exemption simply does not apply to "salesm[e]n . . . primarily engaged in . . . servicing automobiles." The Ninth Circuit invoked the distributive canon to reach this conclusion. Using that canon, it matched "salesman" with "selling" and "partsma[n] [and] mechanic" with "servicing." We reject this reasoning.

The text of the exemption covers "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." *§213(b)(10)(A)*. The exemption uses the word "or" **[***13]** to connect all of its nouns and gerunds, and***HN7***[↑] ***LEdHN[7]***[↑] [7]"or" is "almost always disjunctive." *United States v. Woods, 571 U. S. 31, 45, 134 S. Ct. 557, 187 L. Ed. 2d 472 (2013)*. Thus, the use of "or" to join "selling" and "servicing" suggests that the exemption covers a salesman primarily engaged in either activity.

Unsurprisingly, ***HN8***[↑] ***LEdHN[8]***[↑] [8]statutory context can overcome the ordinary, disjunctive meaning of "or." The distributive canon, for example, recognizes that sometimes "[w]here a sentence contains several antecedents and several consequents," courts should "read them distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A N. Singer & S. Singer, Sutherland Statutes and Statutory Construction §47:26, p. 448 (rev. 7th ed. 2014).

But here, context favors the ordinary disjunctive meaning of "or" for at least three reasons. First, ***HN9***[↑] ***LEdHN[9]***[↑] [9]the distributive canon has the most force when the statute allows for one-to-one matching. But here, the distributive canon would mix and match some of three nouns—"salesman, partsman, or mechanic"—with one of two gerunds—"selling or servicing." *§213(b)(10)(A)*. We doubt that a legislative drafter would leave it to the reader to figure out the precise combinations. Second, the distributive canon has the most force when an ordinary, disjunctive **[***14]** reading is linguistically impossible. Cf., *e.g.*, *Huidekoper's Lessee v. Douglass, 7 U.S. 1, 3 Cranch 1, 67, 2 L. Ed. 347 (1805)* (Marshall, C. J.) (applying the distributive canon when a purely disjunctive reading "would involve a contradiction in terms"). But as explained above, the phrase "salesman . . . primarily engaged in . . . servicing automobiles" not only makes sense; it is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth. It begins with the word "any." See *Ali v. Federal Bureau of Prisons, 552 U. S. 214, 219, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008)* (noting the "expansive meaning" of "any"). And it uses the disjunctive word "or" three times. In fact, all **[**442]** agree that the third list in the exemption—"automobiles, trucks, or farm implements"—modifies every other noun and gerund. But it would be odd to read the exemption as starting with a distributive phrasing and then, halfway through and without **[*1142]** warning, switching to a disjunctive phrasing—all the while using the same word ("or") to signal both meanings. See *Brown v. Gardner, 513 U. S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994)* (noting the "vigorous" presumption that, "when a term is repeated within a given sentence," it "is used to mean the same thing"). The more natural reading is that the exemption covers any combination of its nouns, gerunds, and **[***15]** objects.

D

The Ninth Circuit also invoked the principle that exemptions to the *FLSA* should be construed narrowly. *845 F. 3d, at 935-936*. We reject this principle as a useful guidepost for interpreting the *FLSA*. ***HN10***[↑] ***LEdHN[10]***[↑] [10]Because the *FLSA* gives no "textual indication" that its exemptions should be construed narrowly, "there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation." Scalia, Reading Law, at 363. The narrow-construction principle relies on the flawed premise that the *FLSA* "'pursues'" its remedial purpose "'at all costs.'" *American Express Co. v. Italian Colors Restaurant, 570 U. S. 228, 234, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)* (quoting *Rodriguez v. United States, 480 U. S. 522, 525-526, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987)* (*per curiam*)); see also *Henson v. Santander Consumer USA Inc., 582 U. S. ___, ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177, 184 (2017)* ("[I]t is quite mistaken to assume . . . that whatever might appear to further the statute's primary objective must be the law" (internal quotation marks and alterations omitted)). But the *FLSA* has over two dozen exemptions in *§213(b)* alone, including the one at issue here. Those exemptions are as much a part of the *FLSA's* purpose as the overtime-pay requirement. See *id., at ___, 137 S. Ct. 1718, 198 L. Ed. 2d 177, 184* ("Legislation is, after all, the art of compromise, the limitations expressed in

statutory terms often the price of passage"). We thus have no license to give the exemption anything but a fair reading.

E

Finally, the Ninth Circuit relied on two extraneous sources to support **[***16]** its interpretation: the Department's 1966-1967 Occupational Outlook Handbook and the *FLSA's* legislative history. We find neither persuasive.

1

The Ninth Circuit first relied on the Department's 1966-1967 Occupational Outlook Handbook. It identified 12 jobs from the Handbook's table of contents that it thought could be found at automobile dealerships. See *845 F. 3d, at 930*. The Ninth Circuit then stressed that the exemption aligns with three of those job titles—"[a]utomobile mechanics," "[a]utomobile parts countermen," and "[a]utomobile salesmen"—but not "[a]utomobile service advisors." *Ibid.*

The Ninth Circuit cited nothing, however, suggesting that the exemption was meant to align with the job titles listed in the Handbook. To the contrary, the exemption applies to "any salesman . . . primarily engaged in selling or servicing automobiles." It is not limited, like the term in the Handbook, to "automobile salesmen." **[**443]** And the ordinary meaning of "salesman" plainly includes service advisors.

2

The Ninth Circuit also relied on legislative history to support its interpretation. See *id., at 936-939*. Specifically, it noted that the legislative history discusses "automobile salesmen, partsmen, and mechanics" but never discusses service advisors. *Id., at 939*. Although the Ninth Circuit **[***17]** had previously found that same legislative history "inconclusive," ***Encino**, 780 F. 3d, at 1275*, **[*1143]** on remand it was "firmly persuaded" that the legislative history demonstrated Congress' desire to exclude service advisors, *845 F. 3d, at 939*.

The Ninth Circuit was right the first time. As we have explained, the best reading of the statute is that service advisors are exempt. Even for those Members of this Court who consider legislative history,***HN11***[↑] ***LEdHN[11]***[↑] [11]silence in the legislative history, "no matter how 'clanging,'" cannot defeat the better reading of the text and statutory context. *Sedima, S. P. R. L. v. Imrex Co., 473 U. S. 479, 495, n. 13, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity. See *Avco Corp. v. Department of Justice, 884 F.2d 621, 625, 280 U.S. App. D.C. 182 (CADC 1989)*. Even if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading. See *Union Bank v. Wolas, 502 U. S. 151, 158, 112 S. Ct. 527, 116 L. Ed. 2d 514 (1991)*.

***

In sum, we conclude that ***HN12***[↑] ***LEdHN[12]***[↑] [12]service advisors are exempt from the overtime-pay requirement of the *FLSA* because they are "salesm[e]n . . . primarily engaged in . . . servicing automobiles." *§213(b)(10)(A)*. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Dissent by: GINSBURG

Dissent

Justice **Ginsburg**, **[***18]** with whom Justice **Breyer**, Justice **Sotomayor**, and Justice **Kagan** join, dissenting.

Diverse categories of employees staff automobile dealerships. Of employees so engaged, Congress explicitly exempted from the *Fair Labor Standards Act* hours requirements only three occupations: salesmen, partsmen, and mechanics. The Court today approves the exemption of a fourth occupation: automobile service advisors. In accord with the judgment of the Court of Appeals for the Ninth Circuit, I would not enlarge the exemption to include service advisors or other occupations outside Congress' enumeration.

Respondents are service advisors at a Mercedes-Benz automobile dealership in the Los Angeles area. They work regular hours, 7 a.m. to 6 p.m., at least five days per week, on the dealership premises. App. 54. Their weekly minimum is 55 hours. Maximum hours, for workers covered by the *Fair Labor Standards Act* (*FLSA* or Act), are 40 per week. *29 U. S. C. §207(a)(1)*. In this action, respondents seek time-and-a-half compensation **[**444]** for hours worked beyond the 40 per week maximum prescribed by the *FLSA*.

The question presented: Are service advisors exempt from receipt of overtime compensation under *29 U. S. C. §213(b)(10)(A)*? That exemption covers "any salesman, partsman, **[***19]** or mechanic primarily engaged in selling or servicing automobiles." Service advisors, such as respondents, neither sell automobiles nor service (*i.e.*, repair or maintain) vehicles. Rather, they "meet and greet [car] owners"; "solicit and sugges[t]" repair services "to remedy the [owner's] complaints"; "solicit and suggest . . .

supplemental [vehicle] service[s]"; and provide owners with cost estimates. App. 55. Because service advisors neither sell nor repair automobiles, they should remain outside the exemption and within the Act's coverage.

I

In 1961, Congress exempted all automobile-dealership employees from the Act's overtime-pay requirements. See **[*1144]** Fair Labor Standards Amendments of 1961, §9, 75 Stat. 73. [1] Five years later, in 1966, Congress confined the dealership exemption to three categories of employees: automobile salesmen, mechanics, and partsmen. See Fair Labor Standards Amendments of 1966, §209, 80 Stat. 836. At the time, it was well understood that mechanics perform "preventive maintenance" and "repairs," Dept. of Labor, Occupational Outlook Handbook 477 (1966-1967 ed.) (Handbook), while partsmen requisition parts, "suppl[y] [them] to mechanics," *id.*, at 312, and, at times, have "mechanical responsibilities in repairing parts," Brief for International Association of Machinists and Aerospace Workers, AFL-CIO, as *Amicus* ***[***20]*** *Curiae* 30; see Handbook, at 312-313 (partsmen may "measure parts for interchangeability," test parts for "defect[s]," and "repair parts"). Congress did not exempt numerous other categories of dealership employees, among them, automobile painters, upholsterers, bookkeeping workers, cashiers, janitors, purchasing agents, shipping and receiving clerks, and, most relevant here, service advisors. These positions and their duties were well known at the time, as documented in U. S. Government catalogs of American jobs. See Handbook, at XIII, XV, XVI (table of contents); Brief for International Association of Machinists and Aerospace Workers, AFL-CIO, as *Amicus Curiae* 34 (noting "more than twenty distinct [job] classifications" in the service department alone).

"Where Congress explicitly enumerates certain exceptions . . ., additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews, 534 U. S. 19, 28, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001)* (internal quotation marks omitted). The Court thus has no warrant to add to the three explicitly exempt categories (salesmen, partsmen, and mechanics) a fourth (service advisors) for which the Legislature did not provide. The reach of today's ruling is uncertain, **[**445]** troublingly so: By expansively **[***21]** reading the exemption to encompass all salesmen, partsmen, and mechanics who are "integral to the servicing process," *ante, at ___, 200 L. Ed. 2d, at 440*, the Court risks restoring much of what Congress intended the 1966 amendment to terminate, *i.e.*, the blanket exemption of all dealership employees from overtime-pay requirements.

II

Had the *§213(b)(10)(A)* exemption covered "any salesman or mechanic primarily engaged in selling or servicing automobiles," there could be no argument that service advisors fit within it. Only "salesmen" primarily engaged in "selling" automobiles and "mechanics" primarily engaged in "servicing" them would fall outside the Act's coverage. Service advisors, defined as "*salesmen* primarily engaged in the *selling of services*," ***Encino*** *Motorcars, LLC v.* ***Navarro****, 579 U. S. ___, ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 396 (2016)* (Thomas, J., dissenting) (emphasis added), plainly do not belong in either category. Moreover, even if the exemption were read to reach "salesmen" "primarily engaged in *servicing* automobiles," not just selling them, service advisors would not be exempt. The ordinary meaning of "servicing" is "the action of maintaining or repairing a **[*1145]** motor vehicle." *Ante, at 200 L. Ed. 2d, at 440* (quoting 15 Oxford English Dictionary 39 (2d ed. 1989)). As described above, see *supra, at ___, 200 L. Ed. 2d, at 444*, service advisors neither maintain **[***22]** nor repair automobiles. [2]

Petitioner stakes its case on Congress' addition of the "partsman" job to the exemption. See Reply Brief 6-10. That inclusion, petitioner urges, has a vacuum effect: It draws into the exemption job categories other than the three for which Congress provided, in particular, service advisors. Because partsmen, like service advisors, neither "sell" nor "service" automobiles in the conventional sense, petitioner reasons, Congress must have intended the word "service" to mean something broader than repair and maintenance.

To begin with, petitioner's premise is flawed. Unlike service advisors, partsmen "'get their hands dirty' by 'working as a

[1] The exemption further extended to all employees of establishments selling "trucks" and "farm implements." Fair Labor Standards Amendments of 1961, §9, 75 Stat. 73. When Congress later narrowed the provision's scope for automobile-dealership employees, it similarly diminished the exemption's application to workers at truck and farm-implement dealerships. See, *e.g.*, Fair Labor Standards Amendments of 1966, §209, 80 Stat. 836.

[2] Service advisors do not maintain or repair motor vehicles even if, as the Court concludes, they are "integral to the servicing process." *Ante, at ___, 200 L. Ed. 2d, at 440*. The Ninth Circuit provided an apt analogy: "[A] receptionist-scheduler at a dental office fields calls from patients, matching their needs (*e.g.*, a broken tooth or jaw pain) with the appropriate provider, appointment time, and length of anticipated service. That work is integral to a patient's obtaining dental services, but we would not say that the receptionist-scheduler is 'primarily engaged in' cleaning teeth or installing crowns." *845 F. 3d 925, 932 (2017)*.

mechanic's right-hand man or woman.'" ***Encino** Motorcars, 579 U. S., at ___, n. 1, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 395* (Ginsburg, J., concurring) (quoting Brief for Respondents in No. 15-415, p. 11; alterations omitted); see *supra, at ___ - ___, 200 L. Ed. 2d, at 444* (describing duties of partsmen). As the Solicitor General put it last time this case was before the Court, a mechanic "might be able to obtain the parts to complete a repair without the real-time assistance of a partsman by his side." Brief for United States as *Amicus Curiae* in No. 15-415, p. 23. But dividing the "key [repair] tasks . . . between two individuals" only **[***23]** "reinforces" "that both the mechanic and the partsman **[**446]** are . . . involved in repairing ('servicing') the vehicle." *Ibid.* Service advisors, in contrast, "*sell . . . services* [to customers] for their vehicles," ***Encino** Motorcars, 579 U. S., at ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 388* (emphasis added)—services that are later performed by mechanics and partsmen.

Adding partsmen to the exemption, moreover, would be an exceptionally odd way for Congress to have indicated that "servicing" should be given a meaning deviating from its ordinary usage. There is a more straightforward explanation for Congress' inclusion of partsmen alongside salesmen and mechanics: Common features of the three enumerated jobs make them unsuitable for overtime pay.

Both salesmen and mechanics work irregular hours, including nights and weekends, not uncommonly offsite, rendering time worked not easily tracked. [3] As noted in the 1966 Senate floor debate, salesmen "go out at unusual hours, trying to earn commissions." 112 Cong. Rec. 20504 **[*1146]** (1966) (remarks of Sen. Bayh). See also *ibid.* (remarks of Sen. Yarborough) ("[T]he salesman . . . [can] sell an Oldsmobile, a Pontiac, or a Buick all day long and all night. He is not under any overtime."). Mechanics' work may involve similar "difficult[ies] [in] keeping regular **[***24]** hours." *Ibid.* For example, mechanics may be required to "answe[r] calls in . . . rural areas," *ibid.*, or to "go out on the field where there is a harvesting of sugarbeets," *id.*, at 20505 (remarks of Sen. Clark). [4] And, like salesmen, mechanics may be "subject to substantial seasonal variations in business." *Id.*, at 20502 (remarks of Sen. Hruska).

Congress added "partsman" to the exemption because it believed that job, too, entailed irregular hours. See *ibid.* This is "especially true," several Senators emphasized, "in the farm equipment business where farmers, during planting, cultivating and harvesting seasons, may call on their dealers for parts at any time during the day or evening and on weekends." *Ibid.* (remarks of Sen. Bayh). See also *id.*, at 20503 (remarks of Sen. Mansfield). In Senator Bayh's experience, for instance, a mechanic who "could not find [a] necessary part" after hours might "call the partsman, get him out of bed, and get him to come down to the store." *Id.*, at 20504. See also *id.*, at 20503 (remarks of Sen. Hruska) ("Are we going to say to the farmer who needs a part . . . on Sunday: You cannot get a spark plug . . . because the partsman is not exempt, but you can have machinery repaired by a mechanic who is exempt[?]"). Although some Senators **[***25]** opposed adding partsmen to the exemption because, as they understood **[**447]** the job's demands, partsmen did not work irregular hours, *e.g.*, *id.*, at 20505 (remarks of Sen. Clark), the crux of the debate underscores the exemption's rationale.

That rationale has no application here. Unlike salesmen, partsmen, and mechanics, service advisors "wor[k] ordinary, fixed schedules on-site." Brief for Respondents 47 (citing Handbook, at 316). Respondents, for instance, work *regular* 11-hour shifts, at all times of the year, for a weekly minimum of 55 hours. See App. 54. Service advisors thus do not implicate the concerns underlying the *§213(b)(10)(A)* exemption. Indeed, they are precisely the type of workers Congress intended the *FLSA* to shield "from the evil of overwork," *Barrentine v. Arkansas-Best Freight System, Inc., 450 U. S. 728, 739, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)* (internal quotation marks omitted).

I note, furthermore, that limiting the exemption to the three delineated jobs—salesman, partsman, and mechanic—does not leave the phrase "primarily engaged in selling or servicing," *§213(b)(10)(A)*, without utility. Congress included that language to ensure that only employees who actually perform the tasks commonly associated with the enumerated positions would be covered. Otherwise, for example, a worker who acts as a "salesman" in name only could lose the *FLSA's* **[***26]** protections merely because of the formal

[3] In addition to practical difficulties in calculating hours, a core purpose of overtime may not be served when employees' hours regularly fluctuate. Enacted in the midst of the Great Depression, the *FLSA* overtime rules encourage employers to hire more individuals who work 40-hour weeks, rather than maintaining a staff of fewer employees who consistently work longer hours. See *Overnight Motor Transp. Co. v. Missel, 316 U. S. 572, 577-578, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942)* (overtime rules apply "financial pressure" on employers to "spread employment"); 7 D. VanDeusen, Labor and Employment Law §176.02[1] (2018). But if a position's working hours routinely ebb and flow, while averaging 40 each week, then it does not make sense to encourage employers to hire more workers for that position.

[4] Recall that the exemption extends to salesmen, mechanics, and partsmen at dealerships selling farm implements and trucks, not just automobiles. See *supra, at ___ - ___, n. 1, 200 L. Ed. 2d, at 444*.

title listed on the employer's payroll records. See *Bowers* v. *Fred Haas Toyota World*, 2017 WL 5127289, *4 (SD Tex., June 21, 2017) ("[An employee's] title alone is not dispositive of whether he meets the . . . exemption."). Thus, by partsmen "primarily engaged in . . . *servicing* automobiles," Congress meant nothing more than partsmen primarily engaged in *the ordinary duties of a partsman, i.e.,* requisitioning, supplying, and repairing parts. See *supra, at ___ - ___, ___ - ___, 200 L. Ed. 2d, at 444-445, 445-446*. The inclusion of "partsman" therefore should not **[*1147]** result in the removal of service advisors from the Act's protections.

III

Petitioner contends that "affirming the decision below would disrupt decades of settled expectations" while exposing "employers to substantial retroactive liability." Brief for Petitioner 51. "[M]any dealerships," petitioner urges, "have offered compensation packages based primarily on sales commissions," in reliance on court decisions and agency guidance ranking service advisors as exempt. *Id.,* at 51-52. Respondents here, for instance, are compensated on a "pure commission basis." App. 55. Awarding retroactive overtime pay to employees who were "focused on earning commissions," not "working a set number of hours," petitioner argues, would yield an "unjustified windfal[l]." Brief for **[***27]** Petitioner 53.

Petitioner's concerns are doubly overstated. As the Court previously acknowledged, see ***Encino** Motorcars, 579 U. S., at ___, 136 S. Ct. 2117, 195 L. Ed. 2d 382, at 398*, the *FLSA* provides an affirmative defense that explicitly protects regulated parties from retroactive liability for actions taken in good-faith reliance on superseded agency guidance. See *29 U. S. C. §259(a)*. Given the Department of Labor's longstanding view that service advisors fit within the *§213(b)(10)(A)* exemption, see *ante, at ___, 200 L. Ed. 2d, at 438*, the reliance defense would surely shield **[**448]** employers from retroactive liability were the Court to construe the exemption properly.

Congress, moreover, has spoken directly to the treatment of *commission*-based workers. The *FLSA* exempts from its overtime directives any employee of a "retail or service establishment" who receives more than half of his or her pay on commission, so long as the employee's "regular rate of pay" is more than 1Â½ times the minimum wage. *§207(i)*. Thus, even without the *§213(b)(10)(A)* exemption, many service advisors compensated on commission would remain ineligible for overtime remuneration. [5]

In crafting the commission-pay exemption, Congress struck a deliberate balance: It exempted *higher* paid commissioned employees, perhaps in recognition of their potentially irregular hours, see **[***28]** *Mechmet v. Four Seasons Hotels, Ltd., 825 F. 2d 1173, 1176-1177 (CA7 1987)*; cf. *supra, at ___ - ___, 200 L. Ed. 2d, at 445-447*, but it maintained protection for *lower* paid employees, to vindicate the Act's "principal . . . purpose" of shielding "workers from substandard wages and oppressive working hours," *Barrentine, 450 U. S., at 739 739, 101 S. Ct. 1437, 67 L. Ed. 2d 641*. [6] By stretching the *§213(b)(10)(A)* exemption to encompass even the lowest income service advisors compensated on commission, the Court upsets Congress' careful balance, while stripping away protection for the most vulnerable workers in this occupation.

***

This Court once recognized that the "particularity" of *FLSA* exemptions "preclude[s] their enlargement by implication." **[*1148]** *Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607, 617, 64 S. Ct. 1215, 88 L. Ed. 1488 (1944)*. Employees outside the Act's "narrow and specific" exemptions, the Court affirmed, "remain within the Act." *Powell v. United States Cartridge Co., 339 U. S. 497, 517, 70 S. Ct. 755, 94 L. Ed. 1017 (1950)*. [7] The Court today, in adding an exemption of its own creation, veers away from that comprehension of the *FLSA's* mission. I would instead resist, as the Ninth Circuit did, diminishment of the Act's overtime strictures.

References

[5] The current *FLSA* minimum wage, for example, is $7.25 per hour. See *29 U. S. C. §206(a)(1)(C)*. The only commission-based service advisors at retail or service establishments who are *not* already exempt under *§207(i)*—and who thus remain eligible for overtime—are those earning less than $10.88 per hour. Providing such workers time-and-a-half pay, as Congress directed, would confer, at most, $5.44 per overtime hour.

[6] Congress struck a similar balance in *29 U. S. C. §207(f)*, which exempts employees whose duties "necessitate irregular hours of work," but only if they receive specified minimum rates of pay.

[7] This Court has long held that *FLSA* "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc., 361 U. S. 388, 392, 80 S. Ct. 453, 4 L. Ed. 2d 393 (1960)*. This principle is a well-grounded application of the general rule that an "exception to a general statement of policy is usually **[***29]** read . . . narrowly in order to preserve the primary operation of the provision." *Maracich v. Spears, 570 U. S. 48, 60, 133 S. Ct. 2191, 186 L. Ed. 2d 275 (2013)* (internal quotation marks omitted). In a single paragraph, the Court "reject[s]" this longstanding principle as applied to the *FLSA*, *ante, at ___, 200 L. Ed. 2d, at 442*, without even acknowledging that it unsettles more than half a century of our precedent.

29 U.S.C.S. § 213(b)(10)(A)

7 Labor and Employment Law § 177.08 (Matthew Bender)

L Ed Digest, Labor § 170

L Ed Index, Fair Labor Standards Act; Overtime

Construction and application of Portal-to-Portal Act (*29 U.S.C.S. § 251 et seq.*)--Supreme Court cases. *163 L. Ed. 2d 1207*.

Validity, construction, and application of "hot goods" provision of § 15(a)(1) of Fair Labor Standards Act (*29 U.S.C.S. § 215(a)(1)*), prohibiting interstate shipment of goods produced in violation of minimum wage or overtime provisions of act--Supreme Court cases. *97 L. Ed. 2d 827*.

Validity of federal regulation of wage rates and hours of service as affected by *commerce clause of Federal Constitution* (Art. I, § 8, cl. 3)--Supreme Court cases. *83 L. Ed. 2d 1163*.

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South Carolina Bar
Continuing Legal Education Division

2019 Recent Developments in Employment Law

Friday, May 17, 2019

Employee Reputation, Privacy and Dignity

D. Michael Henthorne

Biometrics and Beyond: The Evolution of Workplace Privacy Issues

Presented by

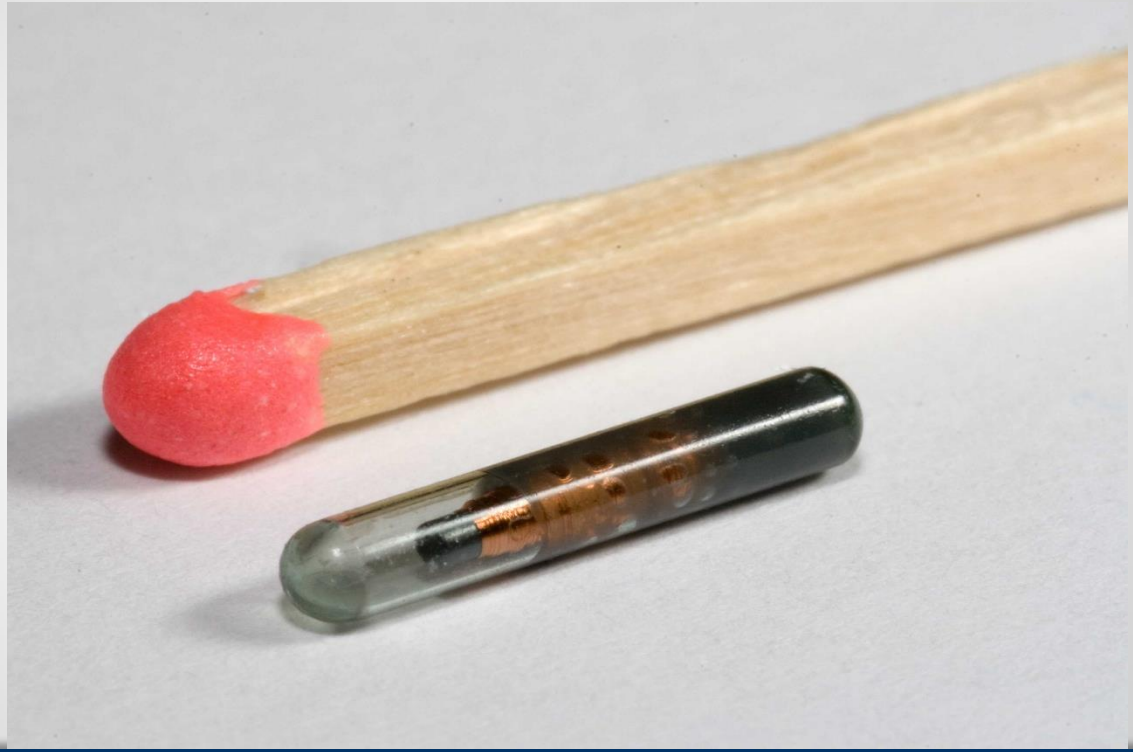
D. Michael Henthorne (Columbia)

Ogletree Deakins

Employers & Lawyers, Working Together

Roadmap of Discussion

What is Microchipping?

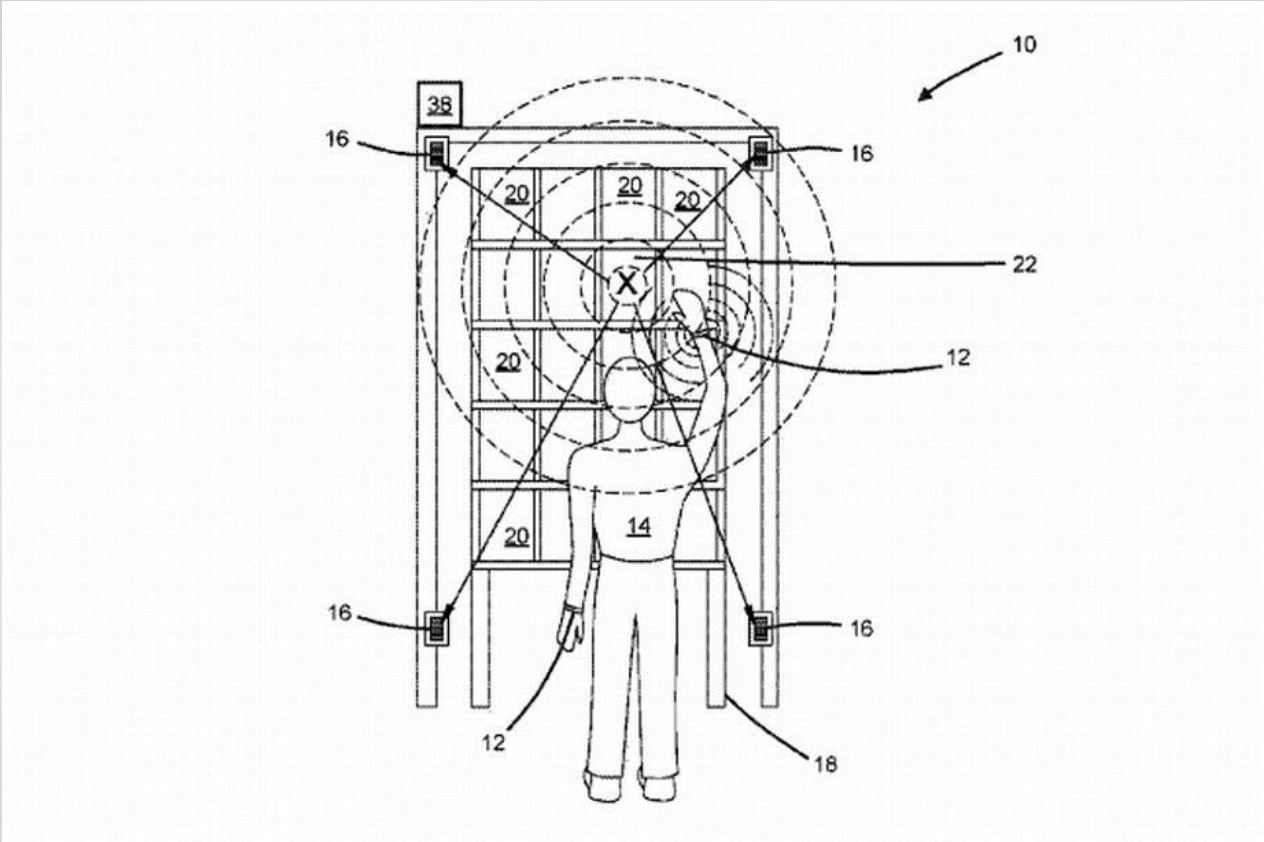


Benefits of Microchipping

- Easier access to company facilities and devices
- More secure access to facilities and devices
- Less cumbersome and more accurate timekeeping
- Facilitate sales transactions
- An opportunity to be at the forefront of technology

Risks of Microchipping

- State laws – regulation and compliance
- Workers' compensation claims
- Accommodation requests – religious and disability
- Privacy concerns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What are Wearables?

- Types:
  - Wristbands
  - Modular sensors
  - “Smart” hats
  - Clothing
  - Eyewear
  - Ear wear

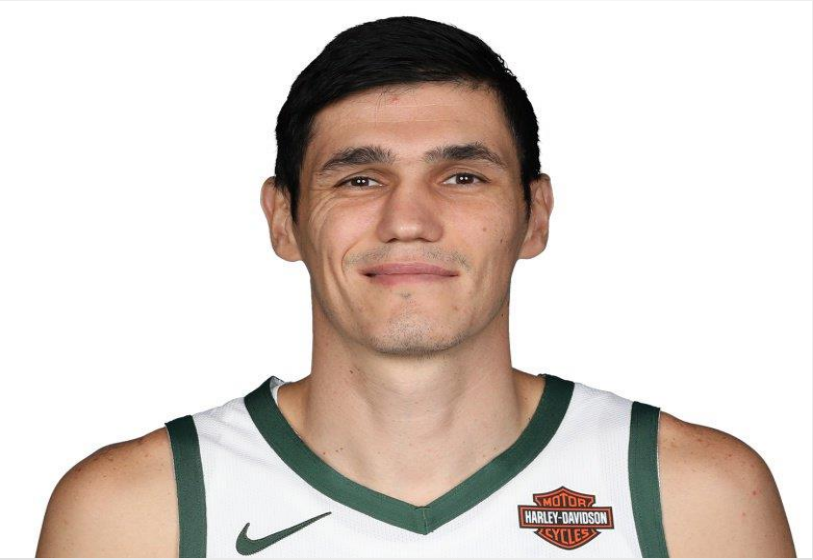
Benefits of Wearables

- Employee wellness
- Workplace safety
- Efficiency/productivity
- Connectivity

Risks of Wearables

- Unwanted discoveries/revelations
- Invasion of privacy
- Data security
- Employee morale
- Device abandonment

Who in the world is Ersan Ilyasova – and how hard is he working in practice.



What are Biometrics?

- Definition: “the measurement and analysis of unique physical and behavioral characteristics (such as fingerprint or voice patterns) especially as a means of verifying personal identity.”
- Examples: fingerprint, palm print, voice print, DNA, scans of retina, iris and facial geometry, gait analysis, and odor/scent

Benefits of Biometrics

- Fulfill timekeeping obligations
- Detect and reduce employee fraud
- Increase productivity
- Manage workflow/increase efficiency
- Minimize leave abuse
- Control access to facilities and equipment
- Process transactions

Risks of Biometrics

- Illinois' BIPA class actions – $1,000 or $5,000 for "each violation"
- Texas and Washington Attorney General actions
- Data breach notification laws – in 48 states
- California CPL – class action potential with $750 in damages per consumer per incident for security breaches involving biometric data; misdemeanor
- European Union Data Privacy Regulation
- Disability or religious discrimination claims

Biometric Information Privacy Act

- **Enacted** in 2008; over 220 class actions
- **Biometric identifier:** fingerprint, voiceprint and scan of retina, iris, hand or face geometry

Biometric Information Privacy Act

- **Biometric information**: any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual

BIPA Compliance Obligations

- Company may not collect biometric data <u>unless it first</u>:
  - Informs the individual in writing that a biometric identifier or biometric information is being collected or stored;

BIPA Compliance Obligations

- Informs the individual in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
- Obtains written consent from the individual.

Rosenbach Ruling and Defenses

Stacy Rosenbach v. Six Flags Entertainment Corporation et al.

- Ill. Supreme Court (Jan. 25, 2019)

Rosenbach Ruling and Defenses

- Illinois' Biometric Information Privacy Act imposes numerous restrictions on how private entities collect, retain, disclose and destroy biometric identifiers, including retina or iris scans, fingerprints, voiceprints, scans of hand or face geometry, or biometric information.

Rosenbach Ruling and Defenses

- Under the Act, any person "aggrieved" by a violation of its provisions "shall have a right of action … against an offending party" and "may recover for each violation" the greater of liquidated damages or actual damages, reasonable attorney fees and costs, and any other relief, including an injunction, that the court deems appropriate.

Rosenbach Ruling and Defenses

- Six Flags Great America amusement park in Gurnee, Illinois sells repeat-entry passes to the park.
- Since at least 2014, the park has used a fingerprinting process when issuing those passes.

Rosenbach Ruling and Defenses

- In 2014, Stacy Rosenbach's 14-year-old son, Alexander, visited the park on a school field trip.
- In anticipation of that visit, Rosenbach purchased a season pass for him online. She provided personal information about Alexander, but he had to complete the sign-up process in person once he arrived at the amusement park.

Rosenbach Ruling and Defenses

- The process involved two steps.
  - First, Alexander went to a security checkpoint, where he was asked to scan his thumb into defendants' biometric data capture system.
  - After that, he obtained a season pass card. The card and his thumbprint, when used together, enabled him to gain access as a season pass holder.

Rosenbach Ruling and Defenses

- Three alleged violations of the Act
  - Collecting and storing biometric identifiers and biometric information from Alexander (and other members of the proposed class) without informing them in writing;
  - not informing them in writing of the specific purposes for which they were collecting the information - or for how long they would keep and use it; and

Rosenbach Ruling and Defenses

- Three alleged violations of the act (cont.)
  - not obtaining a written release executed by Alexander, his mother, or members of the class before collecting the information
- Plaintiff sought injunctive relief and asserted a claim for unjust enrichment.

Rosenbach Ruling and Defenses

- Defense Arguments
  - No allegations of actual injury/damages or adverse effect
  - Preempted by Workers' Compensation Act
  - Barred by applicable Statute of Limitations (SOL)
  - 1-yr SOL for Privacy Violations
  - 2-yr SOL for Negligence or Statutory Penalties
  - 5-yr Catch-all SOL
  - Implied Consent

Rosenbach Ruling and Defenses

- "…an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an "aggrieved" person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act. The judgment of the appellate court is therefore reversed, and the cause is remanded to the circuit court for further proceedings."

Open Issues

- What does “each violation” mean?
- Increased class actions
- Insurance coverage concerns

Open Issues

- BIPA fails to account for biometric technology that protects biometric data. Compare data breach statute – Wis. Stat. §134.98(1)(b)
- Lobbying efforts to amend BIPA

Where (for now)?

- Illinois, Texas, Washington
- Coming soon?
  - Massachusetts
  - New York
  - Delaware
  - Alaska
  - Michigan

Where (for now)?

- What about states with Data Breach notification laws (like South Carolina)?
  - Does biometric data fall within the definition of “personal information?”

Where (for now)?

- Family Privacy Protection Act of 2002 (SC Code 30-2-10 et seq.)
  - State agencies must develop privacy policies
  - "Personal information" means information that identifies or describes an individual including, but not limited to, an individual's photograph or digitized image, social security number, date of birth … **biometric identifiers**, and any credit records or reports.

Best Practices

Best Practices

Biometrics and Beyond: The Evolution of Workplace Privacy Issues

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Employers & Lawyers, Working Together

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Continuing Legal Education Division

2019 Recent Developments in Employment Law

Friday, May 17, 2019

Public Employees

David T. Duff

Chapter 23 - Public Employees

David T. Duff
Duff & Childs, LLC

1

State Human Resources Regulations

S.C. Code of Regulations 19-700 to 19-720

2

HR Regulations

- 19-700 DEFINITIONS
- 19-701 GENERAL RULES
- 19-702 CLASSIFICATION PLAN
- 19-703 JOB VACANCY ANNOUCEMENTS
- 19-704 MOVEMENT AND STATUS
- 19-705 CLASSIFIED EMPLOYEE PLAN
- 19-706 ESTABLISHMENT OF UNCLASSIFIED POSITIONS AND THE UNCLASSIFIED EMPLOYEE PAY PLAN

3

HR Regulations

- 19-707 HOLIDAYS
- 19-709 ANNUAL LEAVE
- 19-710 SICK LEAVE
- 19-711 LEAVE TRANSFER PROGRAM
- 19-712 OTHER LEAVE PROGRAMS
- 19-713 DUAL EMPLOYMENT
- 19-714 GOVERNMENT EMPLOYEES INTERCHANGE PROGRAM
- 19-715 EMPLOYEE PERMANCE EVALUATION SYSTEMS

4

HR Regulations

- 19-716 STAFF DEVELOPMENT AND TRAINING
- 19-717 DISCIPLINARY ACTIONS
- 19-718 STATE EMPLOYEE GRIEVANCE AND APPEALS
- 19-719 SEPARATION FROM EMPLOYMENT
- 19-720 RECORD KEEPING

5

State Employee Grievances And Appeals

- ***Employees covered by and exempted from the State Employee Grievance Procedure Act***
- Generally, state employees in Full-Time Equivalent (FTE) positions who have successfully completed a probationary period attain grievance rights and are considered to be covered by the provisions of the State Employee Grievance Procedure Act. This includes employees in classified and unclassified positions.
- Faculty and academic personnel at four-year post-secondary educational institutions are exempt from the provisions of the Act. However, these education institutions are required to have a separate grievance procedure for faculty and academic personnel.

6

State Employee Grievances And Appeals

- ***Agency Grievance Procedure***
- A covered employee must file a grievance in writing with the agency in accordance with the agency's grievance policy. The grievance must be submitted within 14 calendar days of the effective date of the adverse action or when the employee receives notification of the action, whichever is later.
- An agency should process an employee's grievance within 45 calendar days after the employee files the grievance. If the agency fails to make a final decision within 45 calendar days, it is considered an adverse decision and the employee may appeal to the State Human Resources Director (Director). If the agency does not make a final decision within 45 days, the agency continues its internal grievance process and renders a decision even though the employee submits an appeal.

7

State Employee Grievances And Appeals

- ***State Appeal Process – General Information***
- An appeal cannot be filed prior to the 45 calendar day time frame for an agency to complete its process.
- An employee may file an appeal in writing either within 10 calendar days of receipt of the agency's final decision or within 55 calendar days after filing the grievance within the agency, whichever is later.
- The employee must submit a written request to the Director in order to initiate an appeal.

8

State Employee Grievances And Appeals

- When an appeal is received, a letter is sent to the employee confirming receipt of the appeal. In addition, a request is sent to the employing agency to provide documents relevant to the appeal.

9

State Employee Grievances And Appeals

- **Mediation**
- Mediation is mandatory and seeks to reach a mutually acceptable agreement between the parties before a final decision is required by the State Employee Grievance Committee or an Arbitrator. Mediation conferences are confidential and participants are limited to no more than three representatives, including legal counsel and the covered employee, for each party. Mediation is not an evidentiary hearing and does not involve fact-finding by the mediator; therefore, witnesses are not included in the process.

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State Employee Grievances And Appeals

- **State Employee Grievance Committee**
- Appeals that have met jurisdictional requirements for the following adverse employment actions are forwarded to the State Employee Grievance Committee for a hearing:
- Terminations;
- Salary decreases based on performance;
- Demotions;
- Suspensions for more than 10 days;
- Reductions in force when the Director determines there is a material issue of fact regarding inconsistent or improper application of the agency's reduction in force plan or policy.

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State Employee Grievances And Appeals

- The Grievance Committee can sustain, reject, or modify an agency’s decision. The Committee must issue its final decision in writing within 20 calendar days of the conclusion of the hearing.
- If the Grievance Committee reinstates an employee, the employee returns to his/her former position provided that the position has not already been filled. If the employee's former position has been filled, the employee would be reinstated to a comparable position within the agency

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State Employee Grievances And Appeals

- **Arbitration**
- Appeals that have met jurisdictional requirements for the following adverse employment actions are forwarded to a Mediator-Arbitrator:
- Lack of promotional consideration;
- Punitive reclassifications;
- Suspensions for 10 days or less;
- And involuntary reassignments in excess of 30 miles.

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State Employee Grievances And Appeals

- An arbitrator may uphold or overturn an agency's decision. For an arbitrator to overturn an agency's disciplinary action, the appellant must demonstrate that the agency's decision to administer the disciplinary action was unreasonable. The arbitrator must issue a final decision within 45 calendar days after the initial mediation conference. Under extenuating circumstances, the Director may extend this 45-day timeframe.

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State Employee Grievances And Appeals

- **Reconsiderations and Administrative Law Court Appeals**
- ***Denials***
- If an employee's appeal is denied, he/she may request reconsideration of the denial from the Director. This request must be made in writing and submitted within 30 calendar days of the employee's receipt of the denial. The employee may also appeal the Director's denial to the Administrative Law Court. This appeal must be initiated within 30 calendar days of receipt of the initial denial or the receipt of the response to a request for reconsideration, if applicable. Employees are not required to seek reconsideration prior to filing an appeal with the ALC.

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State Employee Grievances And Appeals

- ***Committee Decisions and Arbitrator Decisions***
- An employee or agency may ask the Grievance Committee or Arbitrator to reconsider their decision within 30 days from receipt of the decision. If the employee or agency requests reconsideration and the Committee or Arbitrator upholds their decision, the employee or agency may, within 30 days from receipt of the reconsideration decision, appeal directly to the ALC. Employees and agencies are not required to seek reconsideration prior to filing an appeal with the ALC.
- An agency must seek approval in order to appeal to the ALC.

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Public School Teachers & Administrators

- Primary state laws related to teachers and administrators are found in Chapter 25 of Title 59 of the Code of Laws
- Primary state regulations related to teachers and administrators are found at Chapter 43-50 to 43-64 of the Code of Regulations

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Public School Teachers & Administrators

- Teacher Employment and Dismissal Act, SC Code § 59-25-410 to -530
- Amended by 2016 Act 221 to allow delegation by the school board of duty to conduct hearing to a hearing officer

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Public School Teachers & Administrators

A “teacher” is defined as “any person who is employed either full-time or part-time by any school district either to teach or to supervise teaching.” For purposes of the Teacher Employment and Dismissal Act, a “teacher” is further defined to include “all employees possessing a professional certificate issued by the State Department of Education, except those working pursuant to multi-year contracts.”

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Public School Teachers & Administrators

Certification

No one may be employed as a teacher in the public schools unless he or she holds professional certification issued by the State Department of Education. The State Board of Education formulates and administers the teacher certification system. To be eligible for an Initial Certificate, an applicant must have completed an approved teacher education program and have scored the minimum qualifying score on the required teacher examinations for the subject area in which certification is sought. An applicant also must be at least 18 years of age. Further, a certification applicant must submit to a criminal record check through the Federal Bureau of Investigation. Initial certification is valid for three years and may be subject to renewal under conditions set by the State Board of Education.

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Public School Teachers & Administrators

Teacher Contract Levels Under South Carolina law, there are three types of teacher contracts.

1. Induction Contract

A person who receives a teaching certificate may be employed initially under a nonrenewable induction contract, which may be renewed each year of the three-year induction period.

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Public School Teachers & Administrators

2. Annual Contract

After successful completion of the one-year induction contract period, as determined by the district, a teacher shall become eligible for an annual contract. A teacher may be employed under an annual contract for no more than four years.

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Public School Teachers & Administrators

3. Continuing Contract

After successful completion of the statutorily mandated formal evaluation process at the annual contract level and the requirements set by the State Board for a professional certificate a teacher becomes eligible for a continuing contract.

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Public School Teachers & Administrators

- The State Board has adopted standards for teaching effectiveness that serve as the foundation for the processes used for assisting, developing, and evaluating teachers under each contract level. All teachers employed under an induction contract are to participate in an induction program developed or adopted in accordance with State Board regulations.
- All teachers employed under an annual contract must be evaluated or assisted with procedures developed or adopted in accordance with State Board regulations. Additionally, all annual contract teachers must complete an individualized professional growth plan established by the school or district.

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Public School Teachers & Administrators

All teachers employed under a continuing contract must be evaluated on a continuous basis. At the discretion of the district, the evaluation may be formal or informal, based on the individual teacher's needs and/or past performance. Formal evaluations must be conducted with a process developed or adopted in accordance with State Board regulations and must include an individualized professional growth plan established by the school or district. Informal evaluations must be conducted with a goals-based process in accordance with State Board of Education regulations. Professional development goals are to be established by the teacher in consultation with a building administrator.

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Public School Teachers & Administrators

Employment and Dismissal of Teachers

The Employment and Dismissal Act provides due process rights for teachers. The dismissal provisions of the Act do not apply to teachers employed pursuant to induction or annual contracts. Each local school board must decide and notify teachers in writing on or before May 1 of each year concerning their employment for the ensuing year. Failure to do so will cause the teacher to be deemed reemployed.

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Public School Teachers & Administrators

A teacher may be dismissed at any time who fails, or is incompetent, to give instruction in accordance with the direction of the superintendent, or who shall otherwise manifest an evident unfitness for teaching. Evident unfitness for teaching includes, but is not limited to, persistent neglect of duty, willful violation of rules and regulations, drunkenness, criminal conviction, gross immorality, dishonesty, and illegal use, sale or possession of drugs or narcotics. Whenever a teacher's supervisor finds it necessary to admonish a teacher for a reason that may lead to, or be cited as, a reason for dismissal, the supervisor must bring the matter to the teacher's attention in writing, make a reasonable effort to assist the teacher in correcting the concerns, and allow reasonable time for improvement.

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Public School Teachers & Administrators

A continuing contract teacher shall not be dismissed the teacher is given written notice specifying the cause for dismissal and an opportunity for a hearing. The hearing, if requested within the statutory period of 15 days, is public, unless the teacher requests in writing that the hearing be private. The teacher has the right to be present at the hearing with counsel, to cross-examine witnesses, offer evidence and witnesses, and present all defenses to the charges.

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Public School Teachers & Administrators

- 2016 Act No. 221 amended Section 59-25-460 to allow the board through board policy to delegate holding the evidentiary hearing to a hearing officer.
- The hearing officer must be a licensed attorney also certified as a mediator or arbitrator.

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Public School Teachers & Administrators

- After holding the hearing, the hearing officer must issue a written report and recommendation (R&R) to the board, superintendent and teacher within 15 days of the hearing.
- The superintendent and the teacher may submit responses to the R&R to the board within 10 days.

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Public School Teachers & Administrators

Within 30 days after the hearing, whether conducted by the board or a hearing officer, the board must render a decision as to whether the evidence showed good and just cause for the suspension and/or dismissal. The district board of trustees' decision is final unless, within 30 days, an appeal is made to the court of common pleas.

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Public School Teachers & Administrators

Annual contract teachers who are not recommended for reemployment at the end of the annual contract year may have an informal hearing before the district superintendent. The superintendent's decision may be appealed to the board, which will review the information presented at the hearing before the superintendent and decide whether or not to grant the teacher's request to be heard. The decision of the board is final.

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South Carolina Bar
Continuing Legal Education Division

2019 Recent Developments in Employment Law

Friday, May 17, 2019

Whistle Blower Protection

Tucker S. Player

WHISTLEBLOWER LITIGATION UNDER SARBANES OXLEY

PRESENTED BY TUCKER S. PLAYER

SOX TRIGGER EVENT

- THE TRIGGER EVENT FOR PURPOSES OF DETERMINING WHEN THE 180 DAY LIMITATION BEGINS IS WHEN THE EMPLOYEE BECOMES AWARE OF AN ADVERSE EMPLOYMENT ACTION, NOT WHEN THE ADVERSE ACTION TAKES EFFECT

SOX IMPORTANT DEADLINES

- 180 DAYS TO FILE CLAIM WITH OSHA AFTER NOTICE OF ADVERSE EMPLOYMENT ACTION
- OSHA SHOULD ISSUE A DECISION WITHIN 60 DAYS
- IF OSHA HAS NOT ISSUED A DECISION WITHIN 180 DAYS, THE CLAIMANT CAN REMOVE TO DISTRICT COURT FOR DE NOVO REVIEW

THE BURDEN SHIFTING FRAMEWORK

- We apply a burden-shifting framework to SOX whistleblower claims incorporated from the Whistleblower Protection Program of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). *Welch*, 536 F.3d at 275. The plaintiff must first establish a prima facie case by proving, by a preponderance of the evidence, that: "(1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008) (internal citations omitted). See 29 C.F.R. § 1980.109(a); 49 U.S.C. § 42121(b)(2)(B)(iii). If the employee meets this burden, the defendant must then "rebut the employee's prima facie case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity." *Welch*, 536 F.3d at 275 (citing [**11] § 42121(b)(2)(B)).

- *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 344-345, (4th Cir. 2014)

The “Definitively and Specifically” Requirement

- To satisfy the first element and establish that he engaged in protected activity, an employee must show that he had both "a subjective belief and an objectively reasonable belief that the conduct he complained of constituted a violation of relevant law. *Livingston,* 520 F.3d at 352. Additionally, an employee must show that his communications to his employer "definitively and specifically relate[d]" to one of the laws listed in § 1514A. *Platone v. FLYi, Inc.,* ARB Case No. 04-154, 2006 DOLSOX LEXIS 105 at *33 (ARB Sept. 29, 2006) (internal quotation marks omitted).

Welch v. Chao, 536 F.3d 269, 275, (4th Cir. 2008)

- **E. The ALJ Erred by Applying the "Definitive and Specific" Evidentiary Standard Established in Prior Cases**
- The ALJ also held that, "[u]ntil the [Complainants'] allegedly protected activities are shown to have a sufficiently definitive and specific relationship to any of the listed categories of fraud or securities violations under 18 U.S.C. § 1514A(a)(1), what Complainants might have believed or been told by Respondent regarding any relationship of such false reporting to SOX is irrelevant and immaterial to the legal sufficiency of their complaints under SOX." D. & O. at 10. In support of this conclusion, the ALJ cites to cases using the words "definitive and specific" or "definitively and specifically" in determining whether a complainant engaged [*40] in SOX-protected activity. But in relying upon those words to reject the Complainants' complaints, the ALJ failed to focus on the plain language of the SOX whistleblower protection provision, which protects "all good faith and reasonable reporting of fraud." 148 Cong. Rec. S7418-01, S7420 (daily ed. July 26, 2002); *see, e.g.,* Van Asdale, 577 F.3d at 1002.
- *Sylvester v. Perexel*, 2011 DOLSOX LEXIS 39, *39-40

THE RICHMOND PUNT

- In *Welch*, we held that in order to establish that he engaged in protected activity, "an employee must show that his communications to his employer 'definitively and specifically relate[d]' to one of the laws listed in § 1514A." 536 F.3d at 275(internal citations omitted). The Department of Labor has since concluded that this standard is applied too strictly, and that "the critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law." *Sylvester v. Parexel Int'l LLC*, ARB Case No. 07-123, 2011 DOLSOX LEXIS 39, 2011 WL 2165854, at * 15 (Dep't of Labor May 25, 2011) (emphasis in original). In light of our holding that Feldman did not satisfy the fourth prima facie prong, we need not clarify here where *Welch* stands since *Sylvester* was decided.

Feldman v. Law Enforcement Assocs. Corp., 752 F.3d 339 (4TH Cir. 2014)

PLATONE REDUX PART 1

- The Plaintiff argues that he held a subjective belief that the conduct he was reporting constituted a violation of a law covered under section 806 of SOX. He supports this by alleging that sports gambling was "unlawful" and he "was concerned it was affecting the business." ECF No. 76 at 24; Pl.'s Ex. 2, Plaintiff Dep. at 148:4-12. The Defendants argue the Plaintiff admitted that he [*28] had no reasonable belief that the conduct he alleged constituted a violation of the specific laws enumerated under SOX. ECF No. 74 at 19-20; Defs.' Ex. A, Plaintiff Dep. at 185:1-6, 186:9-19, 187:6-16. The Defendants base this argument on the Plaintiff's testimony that he did not know what mail fraud, wire fraud, bank fraud, securities fraud or the other enumerated laws were under SOX. Id.

  The Court would find it hard, if not impossible, for someone to hold a subjective belief of a violation if they have no understanding of the law. This is not to say the Plaintiff needed to know the elements of fraud or an exact definition, but to have a belief, he should have, at the very least, a basic understanding. "It would make no sense to allow [the Plaintiff] to proceed if he himself did not hold the belief required by the statute. . . ." Livingston, 520 F.3d at 352. Because this Court finds the Plaintiff did not hold a subjective belief that the conduct he reported violated one of the enumerated laws, it is not necessary to address if the Plaintiff's belief was objectively reasonable or if the "definitively and specifically" standard is still the appropriate test to apply. The Plaintiff did not reasonably believe the [*29] reported conduct constituted a violation of one of the laws covered by SOX.

- *Barrick v. PNGI Charles Town Gaming, LLC*, 2019 U.S. Dist. LEXIS 20444, *26-29, (N.D. W. Va. February 2019).

PLATONE REDUX PART DEUX

- Fraud has a defined legal meaning and "is not, in the context of SOX, a colloquial term." *Day*, 555 F.3d at 55. "To have an objectively reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud." *Id.*; *see also Riddle v. First Tenn. Bank, Nat'l Ass'n*, 497 F. App'x 588, 595 (6th Cir. 2012).
- In his complaint, Mr. Burrs states that he believed that the continued existence of the defect in the company's returns software, which circumvented the segregation of duties and which had previously allowed an employee to defraud the company, was an SOX violation. (*E.g*. Doc. 1 at ¶¶ 14-15). His response similarly offers a generalized and conclusory claim that management's refusal to agree with him about the importance of correcting problems with software could lead to financial losses and harm to the company's shareholders. (Doc. 18 at 2-5).

Burrs v. Walter Kiddie Portable Equip., Inc., 2016 U.S. Dist. LEXIS 189784, *3(M.D.N.C. November 2016).

DODD/FRANK INCENTIVES AND REWARDS VS. SOX

- SOX: 15 U.S.C. SECTION 1514A
- DODD/FRANK: 15 U.S.C. SECTION 78u-6
- *Digital Realty Trust v. Somers*, 138 S. Ct. 767 (2018)

South Carolina Bar
Continuing Legal Education Division

2019 Recent Developments in Employment Law

Friday, May 17, 2019

Employment-Related Torts

C. Frederick W. Manning II

Workplace Torts

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Common Workplace Torts

- Wrongful Discharge in Violation of Public Policy
- Negligent Hiring, Retention, and Supervision
- Intentional Infliction of Emotional Distress
- Defamation
- Invasion of Privacy
- False Imprisonment
- Assault
- Battery
- Interference with Economic Relations
- Civil Conspiracy

Wrongful Termination in Violation of Public Policy

- Typically two situations:
  - Employer requires employee to violate the law
  - Reason for termination is itself a violation of criminal law
- Courts hesitant to extend

Wrongful Termination in Violation of Public Policy: *Owens v. Crabtree*, 425 S.C. 513 (2019)

- **Facts:**
  - Owens worked for an engineering firm that, unbeknownst to him, was contracted to work on the new Shem Creek development in Charleston.
  - He was part of a public effort to stop the development.
  - Firm's client found out a firm employee was advocating against the development and cancelled the contract
  - Firm determined Owens had used his company computer and phone during work hours to advocate against the development
  - Firm fired Owens for using company time, equipment, materials, and employees to engage in activities that harmed the firm

Wrongful Termination in Violation of Public Policy: *Owens v. Crabtree*, 425 S.C. 513 (2019)

- SC Code 16-7-560
  - "It is unlawful for a person to …discharge a citizen from employment or occupation…because of political opinions or the exercise of political rights and privilege guaranteed to every citizen by the Constitution…."

- Supreme Court agreed (under these limited circumstances) a violation of SC Code 16-17-560 could support cause of action for wrongful termination.
  - BUT Owens was not discharged for political beliefs

Negligent Investigation?

- Scenario:
  - Employee is accused of stealing on company property
  - Company reviews video footage and believes they can identify employee
  - Company calls the police and provides video footage to police
  - Employee is arrested and Company fires employee
  - Charges are eventually dropped because video footage is not conclusive

- Possible Causes of Action?
  - Negligence
    - Assumption of duty to investigate?
  - False Imprisonment
  - Defamation by Conduct

Negligent Investigation? Voluntary Assumption of Duty

- Theory: Employer's voluntary undertaking of an investigation creates a duty of reasonable care in performing investigation.
- 2nd Restatement:
  - One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
    - (a) his failure to exercise such care increases the risk of such harm, or
    - (b) the harm is suffered because of the other's reliance upon the undertaking.

Negligent Investigation? Voluntary Assumption of Duty

- *Johnson v. Robert E. Lee Acad., Inc.*, 401 S.C. 500, 737 S.E.2d 512 (Ct. App. 2012).
  - Court of Appeals held Voluntary Assumption of Duty doctrine was not applicable where an accounting firm helped a school investigate whether the school bookkeeper was stealing money and erroneously concluded that she was.
  - Did not apply because:
    - 1. Accounting firm did not render a service to the bookkeeper
    - 2. The accounting firm's conduct was not undertaken for bookkeeper's protection
    - 3. Any negligence on the part of the accounting firm did not result in physical harm to the book keeper

Negligent Investigation?

- Not recognized cause of action
  - No duty to conduct an adequate investigation for at-will employees
    - *Gause v. Doe*, 451 S.E.2d 40 (S.C. Ct. App. 1994)

- *Shaw v. Psychemedics Corp*., ___ S.E.2d ____, 2019 WL 1272945 (S.C. March 20, 2019)
  - implicit recognition that an at-will employee has no claim against its employer for investigations

Negligent Investigation?
Huffman v. Sunshine Recycling, LLC, -- S.E. 2d --, 2019 WL 1372359 (March 27, 2019)

- Facts:
  - Copper wire was stolen from Aiken Electric. Aiken Electric investigated the theft and found that 1. The wire was taken by a black male driving a white truck and 2. the wire was sold to Sunshine Recycling.
  - Sunshine Recycling identified the stolen wire and an employee at Sunshine said that Plaintiff Huffman (a white female) had brought it in. Sunshine reported this to the police.
  - Huffman was arrested, but the charges were later dropped and another individual confessed to the theft.
- Issue: Whether a witness has a duty to perform their own investigation before providing information to police.

Negligent Investigation?

Huffman v. Sunshine Recycling, LLC, -- S.E. 2d --, 2019 WL 1372359 (March 27, 2019)

- Supreme Court held that there is no duty on witnesses and victims to investigate and analyze evidence in the same manner as law enforcement.
  - It would punish an individual who mistakenly identifies a criminal suspect and unwittingly provides (what is later discovered to be) incorrect information to law enforcement.

- Applicability to Employers

Defamation by Conduct or Implication

- South Carolina Supreme Court: "[a] mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain."
  - *Tyler v. Macks Stores of South Carolina, Inc*., 275 S.C. 456 (1980)

- Where Courts found Defamation by Conduct
  - Employee was gathering belongings and being escorted out of building and board of directors yelled "Thief" down the hall after him and demanded the sheriff search the employee's care.
    - *Moore v. Rural Health Servs., Inc.*, 2007 WL 666796 (D.S.C. Feb. 27, 2007).
  - Employee was stopped and questioned about a jacket he was wearing and escorted him to the back of the store where he was accused of shoplifting
    - *Mains v. K Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988).

Final Questions

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Thank You

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South Carolina Bar
Continuing Legal Education Division

2019 Recent Developments in Employment Law

Friday, May 17, 2019

Special Problems Relating to Race Discrimination

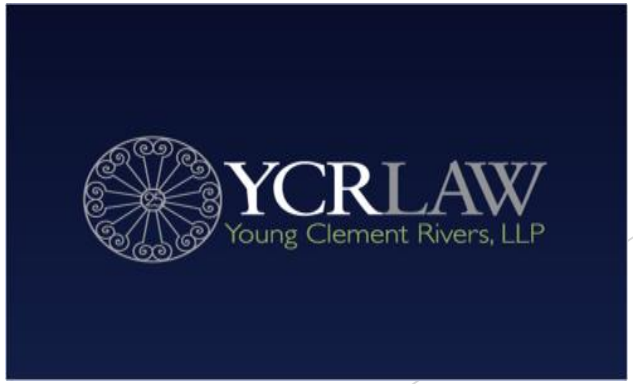
Stephanie N. Ramia

Ch. 21 Title VII – Special Problems Relating to Race Discrimination

Presented by: Stephanie N. Ramia, Esq.

May 17, 2019

Chapter Section written by Attorneys Shawn Daughtridge Wallace and Stephanie N. Ramia, with the assistance of Carol B. Ervin, Wilbur Johnson and Brian Quisenberry



What Constitutes Race

Finding the Standard

- Not defined by Title VII
- 2006 EEOC Compliance Manual provides five (5) racial categories, and one (1) ethnicity category:
  - (1) American Indian or Alaskan Native;
  - (2) Asian;
  - (3) Black or African American;
  - (4) Native Hawaiian or Other Pacific Islander; and
  - (5) White;
  - (6) Hispanic or Latino
- Adding physical characteristics to the mix of what constitutes "race"
  - Example - *Broom v. Saints John Neumann & Maria Goretti Catholic High Sch., et al.*, 722 F. Supp. 2d 626 (E.D. Pa. 2010) (finding the Brazilian student's allegation that the theology teacher commented about Brazilians being "hairy", among other things, sufficiently stated claim against Catholic high school for discrimination based on ethnicity or ancestry (and not just his national origin), in violation of §1981) .

Relationship Between Race and Color

- "Color" is not defined by Title VII or EEOC regulations
  - As a practical matter, color discrimination claims are rare because they are usually mixed with or subordinated to race claims.
- While overlapping, the two claims are not synonymous
- "Color" generally has its commonly understood meaning—pigmentation, complexion, or skin shade or tone. Thus, such discrimination occurs when based on one's lightness, darkness or other color characteristic
- Can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity.

What Constitutes Discrimination “Because of” Race

Disparate Treatment

- Overt discrimination against an individual “because of” his or her race
- Decisions affecting wide range of terms and conditions of employment – hiring, firing, promotion, demotion, pay, etc.
- Common examples:
  - Failure to Hire or Promote “because of” the individual’s race
  - Paying one employee a lower compensation rate “because of” his/her race

Racial Harassment

- Courts analogize these claims to sexual harassment claims and, thus, same/similar elements are required to establish a racial harassment claim:
  - (1) unwelcomed conduct and/or harassment occurred in a work related setting;
  - (2) that was based on the plaintiff's race (i.e., the harassment complained of was racially motivated);
  - (3) which, viewed from both a subjective and objective perspective, was sufficiently severe or pervasive to alter the plaintiff's conditions of employment (including, but not limited to, a term or privilege) and create an abusive work environment; and
  - (4) which is imputable to the employer in that the employer either knew or should have known of the harassment and took no effective remedial action.
- Crux of a claim is usually whether the conduct was sufficiently severe or pervasive to create an abusive working environment.
  - Subjective and Objective component to this element.
  - Status of the harasser is also relevant in measuring the severity of the of the harassing conduct at issue.

What constitutes racial harassment?

- Scenarios where a plaintiff's racial harassment claim may succeed:
  - Where he/she was subjected to shouting, berating, and threatening behavior by a supervisory employee, including close-to physical contact, being called a "porch monkey" on two occasions, and the threatening of his/her job
    - "[S]uggesting a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme" – Fourth Circuit in *Boyer-Liberto v. Fountainbleau Corp.*, 786 F.3d 264 (2015)

- Scenarios where an employer may be successful in its defense:
  - Employer establishes that (1) it exercised reasonable care to prevent and correct any harassing behavior and (2) the plaintiff unreasonable failed to take advantage of the preventive or corrective opportunities provided by the employer.
  - Where employer takes corrective action upon report of harasser's conduct does not mean employer incurs liability

What constitutes racial harassment? (cont'd)

- Examples of what employers should NOT to do:
  - Fail to train supervisors as to what to do if receive a report of racial harassment or other workplace misconduct/harassment.
  - Fail to take adequate remedial action to stop the harassment (repeated racial slurs and dolls being hanged by nooses in the workplace)
  - What may be "inadequate"
    - Merely mentioning to alleged offenders that racial slurs and such behavior would not be tolerated
  - What may be "adequate"
    - Demoting the primary offenders
    - Suspending the offenders from work
    - Written reprimands
    - Training or other counseling

Other Types of Race Discrimination Claims

- Intraracial Discrimination
- Discrimination by Association
  - Where employee suffers an adverse employment action because of his/her "association" with a member of a protected group.
  - Several examples:
    - (1) where the plaintiff has opposed a prison practice which discriminates against black inmates;
    - (2) where a white plaintiff sold his home in a predominantly white neighborhood to a black person;
    - (3) where a white plaintiff leased his property to a black tenant;
    - (4) where the plaintiff maintained a social relationship with a black person;
    - (5) where a white employee alleged that he was terminated because of his marriage to a black woman; and
    - (6) a woman alleged she was discriminated against because of her marriage to a person of Iranian descent.
- Race-Plus Discrimination

Disparate Impact Discrimination

- If an employment practice which operates to exclude a protected class cannot be shown to be related to job performance, the practice is prohibited.
  - A plaintiff must demonstrate that a challenged employment action, policy or practice disproportionately impacts upon a particular race (i.e. his/her race) protected by Title VII.
  - If employer demonstrates a business necessity for the action, practice or policy, the employer may avoid liability.
  - But, a plaintiff may overcome this business necessity defense by demonstrating alternative policies with less discriminatory effects are available and would serve the employer's stated business needs.
- One well-known example and semi-recent target of EEOC is background checks – conviction and arrest records.
  - 2012 EEOC Guidance suggests a more targeted individualized inquiry where arrests/convictions come up on an individual's background check.
  - "Ban-the-box" laws
- Policy imparting consequence on employees for wage garnishment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South Carolina Bar
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2019 Recent Developments in Employment Law

Friday, May 17, 2019

Retaliatory Discharge

Joseph D. Dickey, Jr.