

Court rules employers can require employees to execute arbitration agreements with class or collective action waivers

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[Facts](#)
[Decision](#)
[Comment](#)

On 15 August 2018 a unanimous panel of the Sixth Circuit held in *Goffers v Kelly Services, Inc* that the Fair Labour Standards Act does not prohibit employers from requiring employees to execute arbitration agreements with class or collective action waivers.

Facts

A former employee filed a Fair Labour Standards Act collective action against his former employer, Kelly Services, alleging that the company had failed to pay its call centre workers for the time that they spent logging into and out of the company's computer network. After the district court conditionally certified a class and more than 1,600 employees opted into the lawsuit, Kelly Services moved to compel individual arbitration of the claims of approximately 800 of the employees who had signed individual arbitration agreements.

Decision

The Sixth Circuit upheld Kelly Services' arbitration agreements, rejecting challenges to the class waiver in those agreements made under the National Labour Relations Act and the Fair Labour Standards Act. The court explained that the Supreme Court's recent decision in *Epic Systems Corporation v Lewis* (584 US ___ (2018)) foreclosed the argument based on the National Labour Relations Act. In *Epic*, the Supreme Court held that class and collective actions are not "protected concerted activities" under the National Labour Relations Act and that individual arbitration agreements are generally protected by the Federal Arbitration Act.

The Sixth Circuit also held that there is no inherent conflict between the Fair Labour Standards Act and the Federal Arbitration Act because the Fair Labour Standards Act does not include language demonstrating a "clear and manifest" congressional intent to preclude the enforcement of individual arbitration agreements. The court pointed out that agreements to arbitrate individually (and thereby waive the use of class and collective actions) are voluntary: "employees who do not sign individual arbitration agreements are free to sue collectively, and those who sign individual arbitration agreements are not."

Comment

The *Goffers* decision joins decisions from other federal courts of appeal in holding that claims under the Fair Labour Standards Act are subject to agreements to arbitrate on an individual basis. *Goffers* follows a long line of Supreme Court precedent consistently holding that federal statutes cannot be interpreted to prohibit arbitration agreements – including agreements with class waivers – unless the statute reflects a "clear and manifest" congressional intent to preclude arbitration. That said, arbitration agreements remain subject to potential challenges under generally applicable state law

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rules (eg, unconscionability) reaching the manner in which employees agree to arbitration and the fairness of arbitration procedures.

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