



Published on *Ogletree Deakins* (<http://www.ogletreedeakins.com>)

Arbitration Agreement Awarding Fees to Prevailing Party in FLSA Case Held Not Enforceable by Florida's Second DCA

Published Date: November 4, 2013

Author: Guilène F. Theodore (Tampa)

Published Date: November 4, 2013

Author: Guilène F. Theodore (Tampa)

Published Date: November 4, 2013

Florida's Second District Court of Appeal recently held that an arbitration agreement was unenforceable in the context of a claim brought under the federal Fair Labor Standards Act (FLSA) when the agreement provides for an award of attorneys' fees and costs to the prevailing party, contrary to the FLSA's provision that only a prevailing *plaintiff* is entitled to an award of attorneys' fees.

In *Hernandez v Colonial Grocers, Inc.* (No. 2D11-3415), the state appellate court reversed the trial court's approval of the employer's motion to compel arbitration in an action by an employee claiming violations of the FLSA and the anti-retaliation provisions of Florida's Workers' Compensation Law.

The arbitration agreement, found in the company's employee manual and acknowledged by the employee, included the following objectionable language: "Although the parties shall initially bear the cost of arbitration equally, the prevailing party, if any as determined by the arbitrator at the request of the parties which is hereby deemed made, shall be entitled to reimbursement for its share of costs and reasonable attorneys' fees, as well as interest at the statutory rate."

The court rejected the employee's argument that any fee-splitting provision renders an arbitration clause unenforceable. However, the court held that while the parties' agreement did not contravene any of the employee's rights under the FLSA, "it does expose him to a potential liability to which he would not be exposed if the litigation occurred in a civil court because the federal statute specifically protects him from [liability for the employer's attorneys' fees]."

Moreover, the court held that exposing the employee to such potential liability has a sufficiently chilling effect as to defeat the remedial purpose of the FLSA, which is intended to encourage employees to seek redress when they believe that they have been wronged by an employer.

While courts in the Eleventh Circuit have held that arbitration agreements are enforceable in FLSA claims, employers with operations in Florida that rely on arbitration agreements containing general prevailing party attorneys' fees clauses should review such agreements and carve out an exception for claims under statutes that provide more restrictive attorneys' fees provisions.

Additional Information

Should you have any questions relating to this decision and its impact on Florida employers, please contact the author, the Ogletree Deakins attorney with whom you normally work, or the Client Services Department at clientservices@ogletreedeakins.com.

Note: This article was published in the November 4, 2013 issue of the *Florida eAuthority*.

Posting and viewing of the information on this website is not intended to constitute legal advice or create an attorney-client relationship.

Privacy & Cookie Policy Legal Notices and Disclaimer © [site-date-yyyy], Ogletree, Deakins, Nash, Smoak & Stewart, P.C., All rights reserved.

Source URL: <http://www.ogletreedeakins.com/publications/2013-11-04/arbitration-agreement-awarding-fees-prevailing-party-flsa-case-held-not-enfo>