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MANAGEMENT

More Companies Block Employees From Filing Suits

Arbitration clauses with class-action waivers rise sharply after 2011 court ruling

By **LAUREN WEBER**
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Companies are quietly eliminating a long-held employee privilege: the right to band together to take the boss to court.

As employers try to stem the costs of lawsuits, more companies are requiring workers to bring serious complaints to arbitration and forbidding employees from participating in class actions.

The percentage of companies using arbitration clauses to preclude class-action claims soared to 43% last year from 16% in 2012, according to a survey of nearly 350 companies conducted by management-side law firm Carlton Fields Jorden Burt LLP.

Fueling the trend is a 2011 Supreme Court ruling that upheld such agreements. The result, say lawyers on both sides of the issue, has been a notable decline in actions that accuse corporations of wage theft, discrimination, and other systemic violations of labor laws.

Employers prefer arbitration because it is usually less expensive and faster than litigation.

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Drugstore chain CVS Health Corp., which began an arbitration program for employees last year, maintains that it is a faster and better way to resolve issues.

"In general, arbitration is less formal, more efficient and less time-consuming than the traditional court process," CVS spokesman Michael DeAngelis said. "Employees who choose to participate in the program have the ability to make the same claims and recover the same remedies."

Employers also like it because it tends to go their way. A 2011 Cornell University study found that arbitrations favor employers more often than litigation does, and result in lower awards for employees.

Joseph Otis signed a contract containing an arbitration clause and class-action waiver in 2012 when he enlisted with Arise Virtual Solutions Inc. to become a remote customer-service agent for the Miramar, Fla., company's corporate clients.

As an independent contractor, Mr. Otis, of Marietta, Ga., paid about $1,500 for telephone and computer equipment, $239 for an unpaid three-month class on resolving problems for AT&T Inc. customers and even the $15 for Arise to conduct a background check on him.

Joseph Otis, an independent contractor from Marietta, Ga., signed a class-action waiver when he started working for Arise Virtual Solutions. *PHOTO: DUSTIN CHAMBERS FOR THE WALL STREET JOURNAL*

Over the course of a year, he started thinking the deck was stacked against Arise agents. They were subject to extensive control from the company, which recorded the calls and tracked their length, but they rarely, if ever, got the hours they were promised. In 2013, Mr. Otis and several other agents filed a class-action lawsuit against Arise, seeking

reimbursement for their unpaid training time, among other things.

The company challenged the workers' right to bring the class suit and won, forcing them to enter individual arbitrations. Arise said it doesn't comment on litigation.

Sears Holding Corp.'s Sears and Kmart units, Nordstrom Inc., Uber Technologies Inc., and Halliburton Co. are among the large employers that require or ask workers to waive their right to sue as a class.

Lawyers agree that a 2011 Supreme Court case, AT&T Mobility v. Concepcion, gave employers confidence that courts would uphold class-action waivers. In the Concepcion case, the court ruled 5-4, with conservative justices prevailing, that customers trying to sue the telecom over a sales-tax issue couldn't do so because they had forfeited the right in the fine print of their service contract.

While that case involved consumers, corporations and lower courts have extended their interpretation of the ruling to cover employees as well.

"This is a very live area right now," said Zachary Fasman, a management-side attorney with Proskauer Rose LLP. "Avoiding class actions is very attractive to the extent that employers can avoid the cost of litigation, the complexities of federal or even state litigation, to the extent they can avoid jury trials."

Class actions are complex, expensive and lengthy, but they serve multiple purposes for enforcing labor laws, say plaintiffs' attorneys. They afford anonymity to individual workers who might be afraid to pursue a claim on their own.

Damages can be significant, so lawyers have more incentive to take on the cases and also front the money for costly research and statistical studies. And they can lead to orders for injunctive relief, forcing companies to make broad changes to their labor practices rather than simply paying damages to a single victim.

Arbitration claims can be brought on a class basis, though arbitrators have less discretion than judges over certain aspects of the process, such as calling witnesses. But when waivers leave even that type of class action unavailable, workers frequently abandon claims because individual damages are too small to interest attorneys.

"If workers are forced to be atomized and alone, they won't be able to find a lawyer to pursue the case, so the cases will just disappear," said Paul Bland, director of Public Justice, an organization that recently produced a documentary about binding

arbitration.

The Carlton Fields survey found that the percentage of class-action lawsuits that address employment issues slipped to 23% in 2014 from 28% in 2011. Class-action suits from workers cost employers $462.8 million in 2014, down from $598.9 million in 2011, according to the survey.

Before the Supreme Court's ruling, the vast majority of employers didn't require employees to waive their right to join a class action because lower courts routinely vacated such waivers. Employers are now confident the waivers will stand up to legal challenges, say lawyers for workers and companies.

The National Labor Relations Board has ruled that class-action waivers violate the National Labor Relations Act. Recent decisions in two NLRB cases—against gas station operator Murphy Oil USA Inc. and home builder D.R. Horton Inc.—put it at odds with the Supreme Court. But the NLRB's argument has been challenged in circuit courts, which have ruled against it, upholding the Supreme Court's direction.

Plaintiffs' lawyers are still arguing that the NLRB decision is a precedent, but the Supreme Court has refused to take several employment cases that might clear things up.

Craig Becker, a member of the NLRB's majority in the Horton case and now general counsel at the AFL-CIO, says he sees no conflict because the Concepcion case didn't explicitly consider labor laws.

"It's a lot scarier and the consequences are very different" than a consumer suing a product maker, he said. "Retaliation is much more likely. Requiring people to proceed individually is a much more serious threat to enforcement of the statutes."

Under employment arbitration, parties go before a single person, usually a retired judge or attorney, who listens to evidence and issues a decision. Several private organizations, including the American Arbitration Association and JAMS, formerly known as Judicial Arbitration and Mediation Services, offer the service.

Shannon Liss-Riordan, Mr. Otis's lawyer, is trying to wear down Arise by bringing claim after claim from different contractors. An arbitrator in Texas ruled in favor of one Arise worker in February, awarding her full damages and requiring Arise to pay her legal fees. Ms. Liss-Riordan hopes the company will decide facing dozens of individual cases is no longer in its interests. Arise declined to comment.

Lawyers also argue that the agreements and waivers exist on an unequal playing field, with workers either having no choice but to accept the clauses in order to work or having to embark on an arduous process to opt out, such as mailing a certified letter to company headquarters, usually within 30 days.

“There’s a fiction that workers’ entry into these agreements is fully voluntary,” said Joseph Sellers, a leading plaintiff-side attorney and a partner with Cohen Milstein Sellers & Toll.

Mr. Sellers recently represented a Spanish-speaking janitor named Jose Sanchez who signed an arbitration clause and class-action waiver in order to become a small franchisee—essentially, an independent contractor—with a commercial cleaning business called CleanNet USA Inc. The clause was part of a franchise agreement given to him only in English, with a representative from CleanNet explaining elements of the 41-page agreement in Spanish, Mr. Sanchez alleged; he said he was never told about the arbitration clause.

After he sued CleanNet arguing that he and others should have been classified as employees, the company moved to compel him into arbitration and to drop his class claims. In January, a federal judge in Illinois sided with CleanNet.

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