

Articles + Publications | August 3, 2021

Locke Lord QuickStudy: A Renewed Warning to Massachusetts Employers: Arbitration Agreements Must Be Thoughtfully Composed

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In an unusual procedural context, Judge Nathaniel M. Gorton of the United States District Court for the District of Massachusetts sent another strong reminder to Massachusetts employers of the perils involved in drafting arbitration agreements. In essence, this decision is a reminder to employers that every word matters when preparing arbitration agreements, especially those that seek to avoid public judicial class or collective action litigation proceedings.

American Institute for Foreign Study, Inc. et al v. Laura Fernandez-Jimenez involved an effort by American Institute for Foreign Study d/b/a Au Pair in America (APIA) and its CEO to obtain a preliminary injunction requiring that the defendant arbitrate her claims on an individual basis rather than on behalf of herself in a putative class or collective action. After mis-filing a case in the Superior Court, Fernandez-Jimenez, an au pair alleging, *inter alia*, minimum wage and overtime payment violations pursuant to the Fair Labor Standards Act, commenced arbitration proceedings before the American Arbitration Association (AAA).

After Fernandez-Jimenez filed an amended demand for class and collective arbitration, the plaintiffs (APIA and its CEO) filed an action in the United States District Court seeking a preliminary injunction and declaration that only the court could decide class arbitrability. Not long thereafter, Fernandez-Jimenez filed a class action in Massachusetts Superior Court against APIA's CEO, which he then removed to federal court and the court consolidated as a case related to the action filed by APIA.

While Judge Gorton entered the injunction, what makes his ruling noteworthy are the instructive elements in his 24 page opinion, to wit, that

- the availability of class or collective action is for the court to decide “absent a clear and unambiguous delegation of such authority to the arbitrator,”
- “the role of the court is ‘to give effect to the intent of the parties,’”
- “a court may not compel class arbitration ‘unless there is a contractual basis for concluding that the party agreed’ to arbitrate on a class basis,” (emphasis in original),
- consent may be implied from the terms of an arbitration agreement,
- reference to the AAA’s Supplementary Class Rules is insufficient to manifest an intent to arbitrate class and collective actions, and
- a term considered ambiguous under local state law is, “as a matter of federal law,” insufficient to compel class or collective arbitration.

Employers should be mindful of the pitfalls in drafting class and collective waiver provisions and clearly express the parties' intentions. Without careful drafting, those efforts may be for naught.

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