Entertainment Club to Face Collective Action Challenging Classification of Workers Due to Ineffective Arbitration Agreement

By Kevin J. O'Connor

The Third Circuit Court of Appeals has revived a misclassification lawsuit by a group of exotic dancers who claim they were misclassified as independent contractors rather than employees for purposes of the Fair Labor Standards Act ("FLSA"), due to a lukewarm arbitration clause in the contract with the class representative. Moon v. Breathless Inc., 2017 WL 3526692 (3d Cir. Aug. 17, 2017) demonstrates the hurdles that have to be overcome in order to keep these cases out of Court and in arbitration.

In Moon, the Court ruled that an arbitration clause signed by an exotic dancer did not cover her statutory claims under the FLSA and state wage-and-hour laws, because it was not broad enough to encompass such claims. There are two lessons to be learned from the opinion:

1. Arbitrability: A critical component of any arbitration agreement is to be sure that the agreement states that the parties are in agreement that all issues as to arbitrability (ie., whether the substantive claims are themselves within the scope of the arbitration clause) are to be reserved for an arbitrator to decide. In the

absence of such clear language, you can be sure the plaintiff will ask a Court to make that decision for you. That can be risky, and costly.

2. Breadth and Scope of the Arbitration Clause: This one is tricky when dealing with independent contractors, because in Moon the contract explicitly stated that the relationship between the company and the worker was that of an independent contractor. The Court used the absence of any language stating that disputes over the "employment relationship" were to be arbitrated (ie., statutory disputes concerning entitlement to wages), against the employer.

There is an onslaught of wage and hour lawsuits that started several years ago, and continues unabated. Misclassification of workers is a hot area of the law and it would appear that these claims are not going to die down. Every employer should take time to review their contracts to ensure that they meet the latest decisions in this area.

Contracts like these should be reviewed by counsel with experience in this area. The Court in Moon observed, like several other courts of late, that in order for statutory claims to be subject to arbitration, an arbitration clause must do three things. First, it must identify the general substantive area that the arbitration clause covers. If an employee is going to be deemed to have waived the right to proceed in court on a wage and hour claim, then the contract must state that the employee agrees to arbitrate all statutory claims arising out of the employment relationship. It

must reference the types of claims waived by the provision: It should reflect the employee's general understanding of the types of claims included in the waiver, e.g., wage and hour claims. And third, it must give an explanation of the differences between litigating in court and arbitrating, so that it is clear that the employee knowingly waived the right to proceed in court, before a jury of his or her peers.

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