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The Employer's Toolkit

Wage, Hour, and
Class Action Issues

Dinsmore



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Classification of Workers



FLSA Generally Requires

Employees be paid at least the federal minimum wage for all hours worked

- ▶ Overtime pay at 1 ½ the regular rate of pay for all hours worked over 40 hours / workweek.

Exemptions for

- ▶ Bona fide executive, administrative, professional or outside sales employee. Also exempts certain computer employees.

Meeting certain job-duty tests

- ▶ Be paid on a salary basis at not less than \$455 per week.



Exemption Categories

Executive Exemption

Administrative Exemption

Professional Exemption

Computer Employee Exemption

Outside Sales Exemption

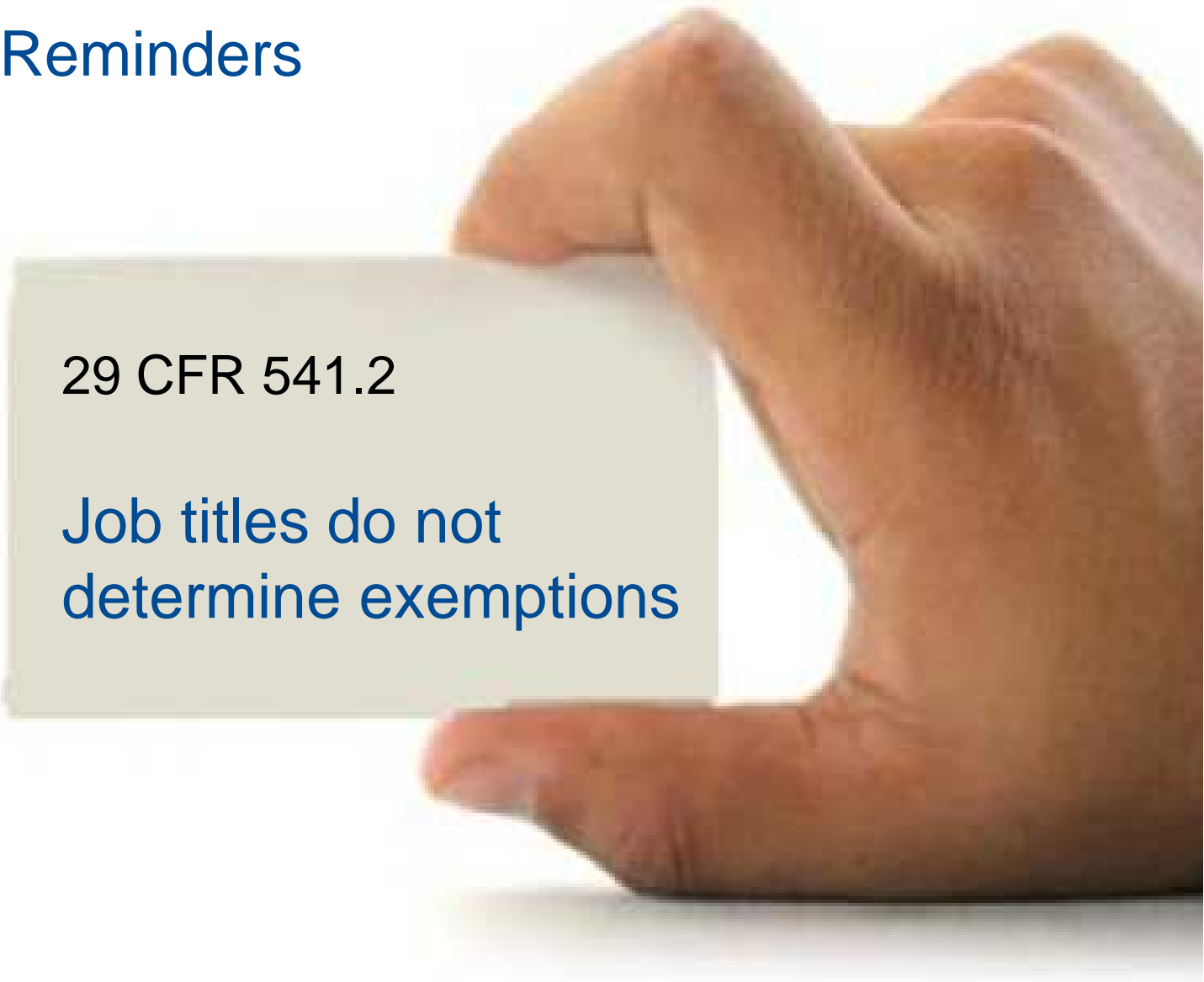
Highly Compensated Employee



Exemption Reminders

29 CFR 541.2

Job titles do not
determine exemptions

A close-up photograph of a person's hand holding a light-colored rectangular sign. The hand is positioned on the right side of the frame, with the thumb and index finger gripping the edges of the sign. The sign is held horizontally and contains two lines of text. The background is a plain, light color, and the lighting is soft, highlighting the texture of the skin and the edges of the sign.

Exemption Reminders

Proper vs. Improper Classification

- ▶ A medical doctor is a “Professional” while an accountant does not necessarily meet the “Professional” exemption.
- ▶ Under DOL guidelines, **ALL exemption tests** must be satisfied for an exemption to apply

Blue Collar Workers

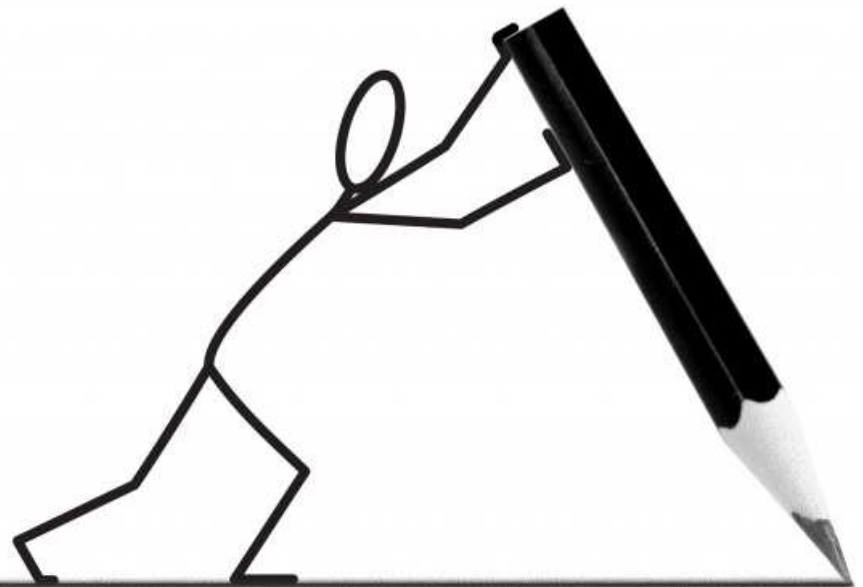
- ▶ Exemptions do not apply



FLSA as the floor, not the ceiling

States may enact more restrictive wage and hour standards

- ▶ California
- ▶ Colorado



Status Of Unpaid Interns



Generally:

“Closer scrutiny”

“Employee” versus “Trainee”

Recent increase in Collective Actions alleging miscategorization



Classification Tests



Wage and Hour Test – Six Factor Test

- ▶ Internship is similar to training given in an educational environment
- ▶ Experience benefits the intern
- ▶ Does not displace regular employees

Classification Tests



Wage and Hour Test – Six Factor Test

- ▶ No immediate advantage from intern's activities – operations may actually be impeded
- ▶ Intern not entitled to a job
- ▶ There is an understanding about wages

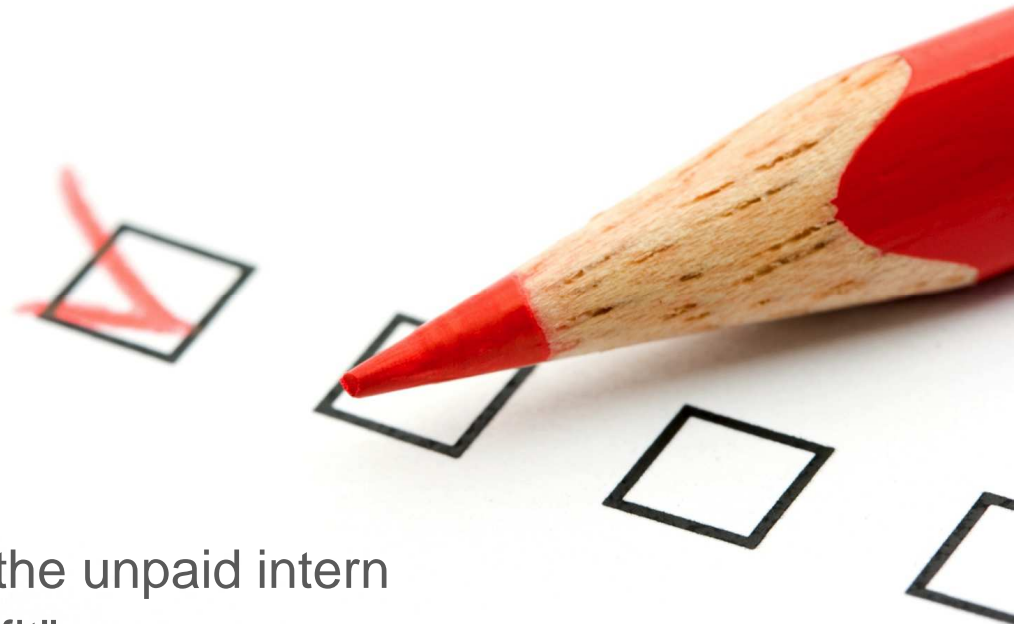
Classification Tests

Primary Benefit Test

- ▶ Court determines whether the unpaid intern received the “primary benefit”
- ▶ 6th Circuit adopted the “primary benefit test”

Hybrid Approach

- ▶ Combines both criteria
- ▶ “Totality of the Circumstances”



Recent Case Law

Recent Case Law

Glatt v. Fox Searchlight Pictures, Inc.,
2013 U.S. Dist. LEXIS 82079 (S.D.N.Y. June 11, 2013)

Xuedan Wang v. Hearst Corp.,
2013 U.S. Dist. LEXIS 65869
(S.D.N.Y. May 8, 2013)

Moore v. NBC Universal Inc.,
S.D.N.Y. No 13-4634, complaint filed
7/3/13; and *Ballinger v. Advance
Magazine Publishers Inc. No. 13-4036*,
complaint filed June 13, 2013



Tips to Avoid Intern Liability



Structure the internship to provide maximum educational benefits

Have interns “shadow” existing employees

Avoid performance of job function of a paid employee

Provide interns with faux training assignments

Tips to Avoid Intern Liability



Employers should choose their words wisely:

- ▶ Stipends vs. “wages” or “compensation”
- ▶ Intern vs. “employee” or a “new-hire”

Evaluate Interns throughout

Use signed acknowledgments

Telecommuting and Associated Issues





*“Census Bureau:
Approximately 13.4 million Americans
worked from home at least one day
per week in 2010”*

Increase attributable to:

- ▶ Evolving technology
- ▶ Employer savings on overhead costs
- ▶ Employee savings on commuting costs
- ▶ Savings on health costs

Telecommuting Wage and Hour Issues

Employers are responsible
to pay non-exempt workers
for all time worked

Knowledge Based Standard
for Compensation

“Knows or has reason to believe”.



Telecommuting Wage and Hour Issues

De Minimis Exception:

- ▶ Employers not required to compensate non-exempt employees for “de minimis” or negligible work time

Sweat the small stuff!:

- ▶ “de minimis” work time may be aggregated by the Plaintiff and subject the Employer to wage and hour liability

Problematic for employees using:

Remote Access Portals	Email via Smart Phones
Text Messaging	Video Teleconferencing



Tips to Avoid Liability



Limit the number of non-exempt employees granted telecommuting rights

Have a “telecommuter” policy

- ▶ Address how employees should track, report, and verify hours worked
- ▶ Utilize signed acknowledgements which include affirmations that employee will only conduct work during approved hours

Tips to Avoid Liability



Allow employees to request time adjustments should they work unscheduled and/or non-approved time

Compare employee time/overtime records to time logs to identify discrepancies

Review employer's pay policies with telecommuters

Recent Developments in Class/Collective Actions



Growth of the Class Action in the Employment World

Wage and hour class actions
– have more than quadrupled in
the last 10 years



Class Actions (opt out)

Plaintiff must show:

- ▶ Numerosity
- ▶ Common Questions
- ▶ Typicality, and
- ▶ Adequacy of representation

Common legal or factual questions predominate

Examination should be “rigorous.”



Collective Actions (opt in)



Collective Actions have a two step process.

- ▶ Conditional certification

Second examination at the end of discovery. Factors:

- ▶ Disparate factual and employment settings of plaintiffs
- ▶ Defenses available to defendants which appear to be individual to each plaintiff
- ▶ Fairness and procedural considerations

Recent Cases

Ginsburg v. Comcast
(W.D. Wash. Apr. 17, 2013)

Leyva v. Medline Indus.
(9th Cir. 2013)

Alequin v. Darden Rests., Inc.
(S.D. Fla. July 12, 2013)



Settlements in Class/Collective Actions

In 2012 companies paid, on average, \$4.8 million to resolve a case with a median of \$1.7 million

The average and median amounts of the settlements on a per plaintiff basis were \$5,800 and \$2,600, respectively

Settlements are always subject to judicial approval



Notable Settlements in Class/Collective Actions

Novartis Pharmaceuticals

H&R Block Enterprises

Prudential Insurance Co.



Best Practices



Demonstrate the existence and distribution of a lawful written policy

Policies should be in employee handbooks, posted on employee boards, and made a part of regular employee training

Avoid automatic deduction policies

Ensure quality timekeeping records (time clock adjustment forms)

Best Practices



Highlight the different job duties and/or timekeeping procedures for employees in different job classifications

Call attention to the discretion that local managers exercise

Collect affidavits from employees

Review records for any evidence that the plaintiffs' claims are not in accord with reality, even if only on occasion

Employers including arbitration clauses in their employment agreements more often

Restricting employees from bringing any collective claims





Arbitration Clauses and the Class Action Lawsuit

Gaining acceptance in federal and state courts

Legitimate means to avoiding litigation

Williams v. Parkell Prods., Inc., 91 Fed. Appx.
707, 708–09 (2d Cir. 2003)

Sutherland v. Ernst & Young LLP, 2013 U.S.
App. LEXIS 16513 (2d Cir. Aug. 9, 2013)

Mandatory arbitration agreements
as a condition of employment

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991)



Recent Case Law

AT&T Mobility v. Concepcion

American Express Co. v. Italian Colors Restaurant

DR Horton v. NLRB

Owen v. Bristol Care, Inc.

Richards v. Ernst & Young, LLP

Muriithi v. Shuttle Express, Inc.

AT&T Mobility v. Concepcion

Testing the purpose of the Federal Arbitration Act (FAA)

District court and 9th Circuit denied AT&T's motion to compel arbitration

SCOTUS reversed, citing FAA purpose

SCOTUS strongly criticized class arbitrations, holding that
“[a]rbitration is poorly suited to the higher stakes of class litigation”



American Express Co. v. Italian Colors Restaurant

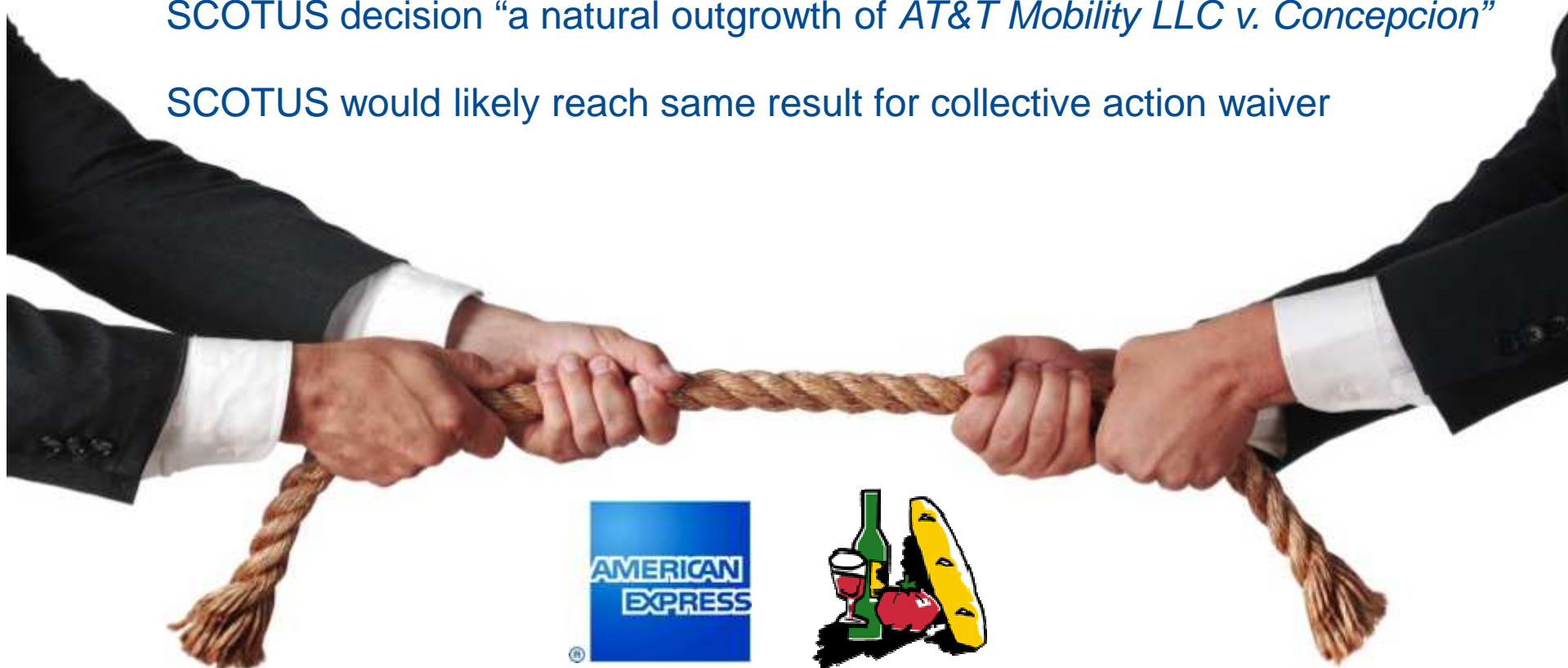
“AT&T Mobility all but resolves this case”

District court granted motion to compel arbitration; Second Circuit reversed

SCOTUS reversed Second Circuit

SCOTUS decision “a natural outgrowth of *AT&T Mobility LLC v. Concepcion*”

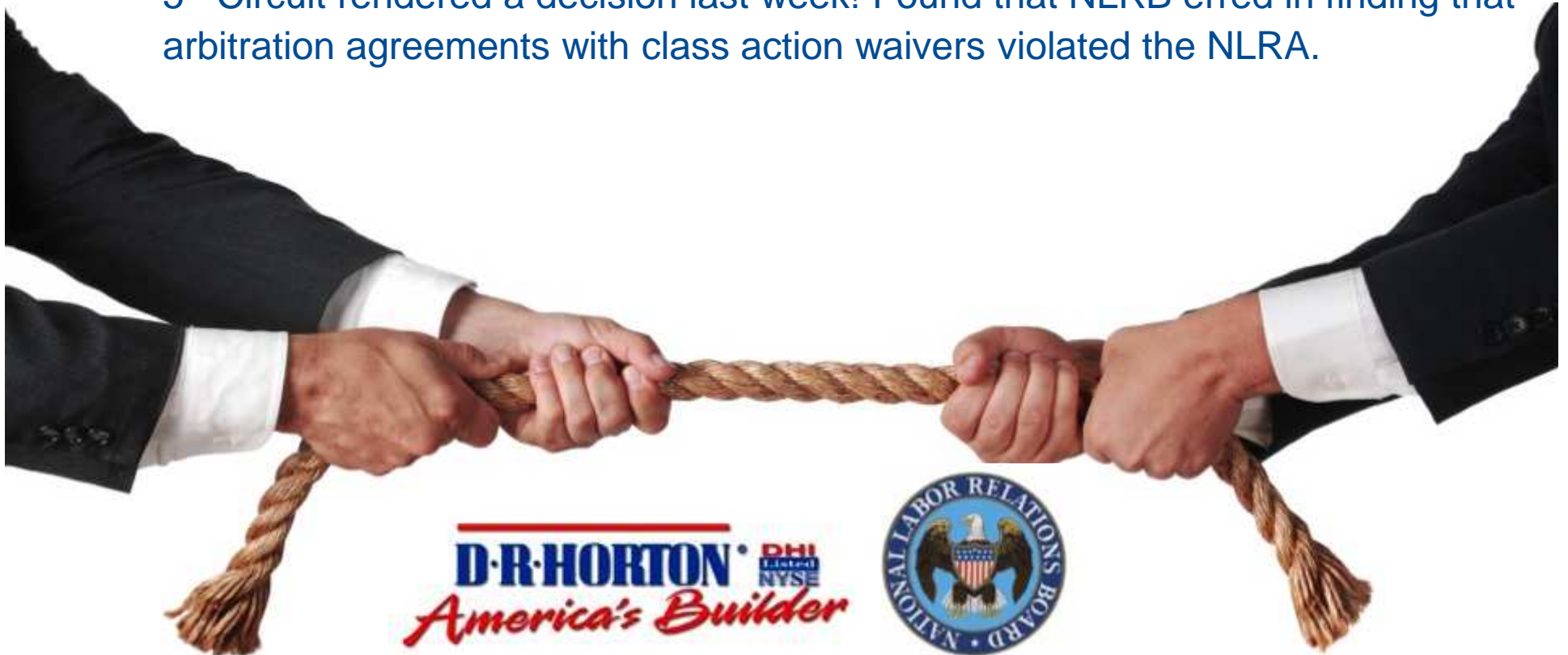
SCOTUS would likely reach same result for collective action waiver



DR Horton v. NLRB

Arbitration agreements prohibiting employees from filing employment-related class actions violated NLRA

5th Circuit rendered a decision last week! Found that NLRB erred in finding that arbitration agreements with class action waivers violated the NLRA.



Owen v. Bristol Care, Inc. —

Eighth Circuit directly addresses the *DR Horton* decision

Owen signs Mandatory Arbitration Agreement (“MAA”) barring class arbitrations, so district court denied motion to compel arbitration

Eighth Circuit reversed: *DR Horton* “carrie[d] little persuasive authority”

- ▶ MAA did not waive the employee’s right to file complaints with government agencies



Richards v. Ernst & Young, LLP:

9th Circuit refuses to adopt DR Horton decision

Argument conflicts with the “explicit pronouncements of the Supreme Court concerning policies undergirding the [FAA]”



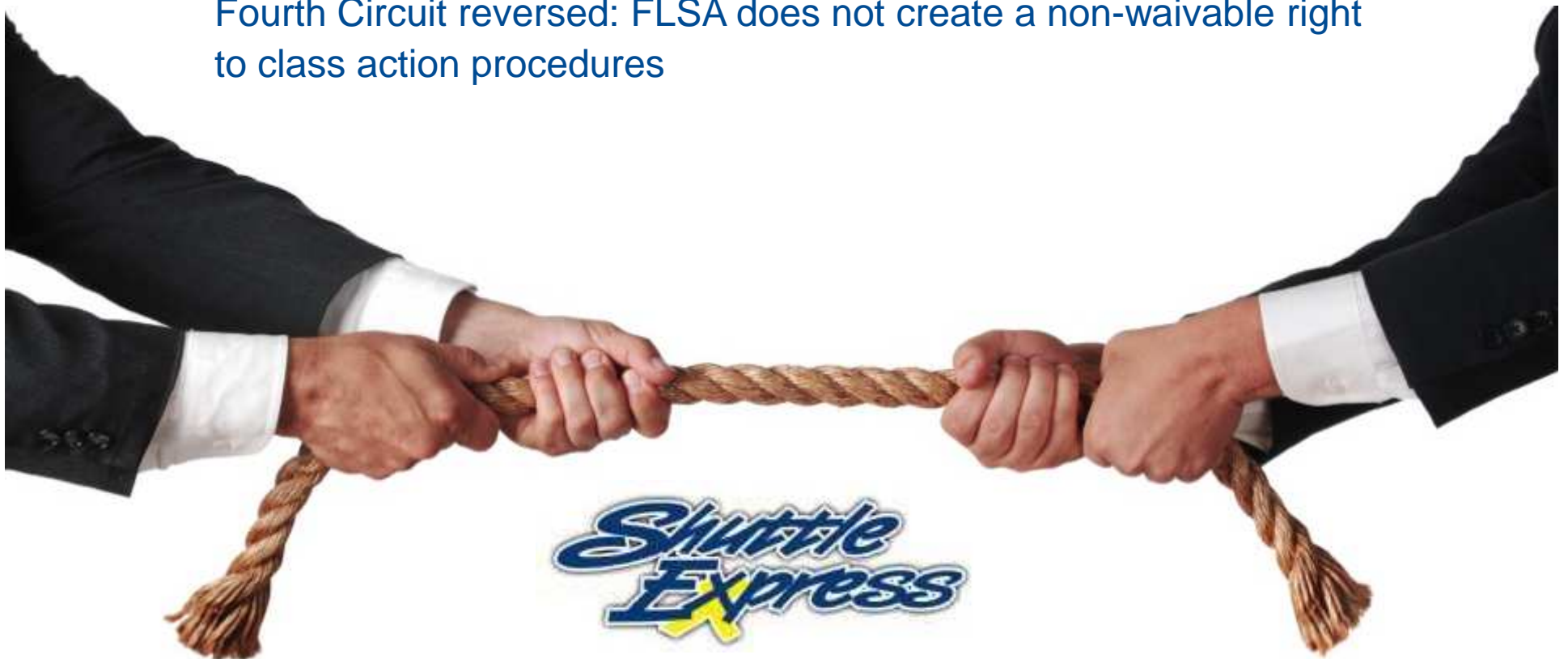
Muriithi v. Shuttle Express, Inc.

Arbitration clauses and class action waivers in the employment context

Unit Franchise Agreement contained arbitration clause and class waiver

District court denied the defendant's motion to compel arbitration

Fourth Circuit reversed: FLSA does not create a non-waivable right to class action procedures



The Future of Arbitration Clauses and Class Action Waivers



The law is unsettled in this area

Likely that most courts would uphold a
collective action waiver



Questions?



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