

# Arkansas Supreme Court Upholds Validity of Class-Action Waiver Clause Even In Absence of Arbitration Clause



**Audra Hamilton**  
ahamilton@mwlaw.com  
(501) 688.8801

07/25/2022

*Arbitration agreements and class-action waivers have been important tools for employers seeking to reduce expense and exposure in cases brought by employees. These legal instruments have begun to be limited, though. Recently, Congress amended the Federal Arbitration Act to invalidate arbitration agreement provisions that required “pre-dispute” arbitration of sexual harassment claims (in other words, employers can no longer compel arbitration of a sexual harassment claim based upon an arbitration agreement signed at the commencement of employment). However, as some good news for Arkansas employers, an April Arkansas Supreme Court opinion reinforced the validity of class-action waivers under Arkansas contract law.*

In just March and April of 2022, employees in Arkansas filed at least 15 class-action lawsuits against employers for wage and hour violations. This averages to approximately two class actions filed in Arkansas per week in recent months.

There are a variety of methods to stay in compliance with the many complicated provisions of the FLSA, including review of handbooks and policies by legal counsel, audits on payroll practices, and internal complaint processes that might alert an employer to a potential violation. However, because violations of the Fair Labor Standards Act (“FLSA”) do not require any proof of intent (though there can be extra penalties for a “willful” violation), even employers who believe that they are following FLSA requirements may be caught in the equivalent of a very expensive “foot fault,” particularly if a violation is brought as a class action.

Among the most powerful tools employers have as protection against class actions are clauses in employment agreements waiving the right to file a class action, which often accompany a requirement to arbitrate any employment dispute under the Federal Arbitration Act (“FAA”). Recently, the Arkansas Supreme Court re-affirmed the validity of class-action-waiver clauses even without an agreement to arbitrate, in *Funding Metrics, LLC v. Letha’s Pies, LLC*, 2022 Ark. 73.

## **Class-Action Waiver Upheld**

In *Funding Metrics*, the plaintiff, Letha’s Pies, filed a class action against Funding Metrics alleging violations of Arkansas securities law. Funding Metrics opposed the class certification, pointing to the class-action waiver in its merchant agreement with Letha’s pies. The lower court, however, disagreed, noting that there was no arbitration provision in the agreement. The court certified the class. Funding Metrics requested an interlocutory appeal (an appeal before the case is over) to the Arkansas Supreme Court.

The Arkansas Supreme Court reversed and found that the class-action waiver was enforceable. The court noted that the language of the class-action waiver was broad, “waiving any right to assert any claims against the other party as a representative action . . . .” Important for employers, for the reasons below, the court found the absence of an arbitration provision did not affect whether the class-action waiver could be upheld under Arkansas law.

Rather, the class-action waiver should be analyzed pursuant to the principles of Arkansas contract law. The essential elements of a contract are: (1) competent parties, (2) subject matter, (3) consideration, (4) mutual agreement, and (5) mutual obligation. The court noted that all elements were present in the agreement between the parties.

Important also for employers, the court found sufficient “mutuality of obligation” (element 5 above), even though the class action waiver is only applicable to the plaintiff (as defendants in these types of cases rarely have grounds to bring a case on behalf of a class). Instead, the court found that mutuality of obligation does not require a “precisely even exchange of identical rights and obligations,” but that the duties “undertaken by each party be regarded . . . as sufficient consideration for the other’s promise.”

### **Relevance to Arkansas Employers**

This case was not one between employer and employees. Nonetheless, the principles discussed by the Arkansas Supreme Court are helpful to employers. First, the Arkansas Supreme Court upheld a class-action waiver even in the absence of an arbitration provision. That is important in the current political and lawmaking landscape. As noted above, earlier this year, in the wake of the #MeToo movement, Congress passed the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,” which precludes employers from enforcing pre-dispute arbitration agreements in sexual harassment or sexual assault claims. There are also states that have enacted similar bans on arbitration of employment disputes. The *Funding Metrics* decision, however, allows employers to enforce a class-action waiver in an employment agreement even in the absence of an arbitration provision.

In addition, the Arkansas Supreme Court upheld the class-action waiver in this case as having the required element of “mutuality of obligation” even though, effectively, the waiver was only enforceable against one side of the agreement. That has particular relevance to employers, as a class-action waiver only can be enforced against an employee (employers are not bringing cases against classes of employees). The important fact is whether the agreement *as a whole* requires sufficient duties from both parties as consideration for the agreement.

### **Key Takeaways**

The enforceability of arbitration clauses in employment agreements is evolving from a legislative and policy-making standpoint. In February of this year, the U.S. House of Representatives voted to advance a bill called the “Forced Arbitration Injustice Repeal Act” or “FAIR Act,” which, if enacted, would void *all* pre-dispute mandatory arbitration agreements in employment (and some other types of) disputes. The Senate has not followed suit. However, some states (*not* including Arkansas) have also enacted similar limitations on employment arbitration agreements.

In Arkansas, however, the Arkansas Supreme Court has affirmed in *Funding Metrics* and in two opinions from 2020, *Jorja Trading, Inc. v. Willis and BHC Pinnacle Pointe Hospital v. Nelson*, that *both* arbitration clauses (except in sexual harassment cases) and class-action waivers remain viable legal methods to reduce the risk of costly lawsuits in Arkansas. As long as employment agreements meet all of the elements required in Arkansas contract law, these types of clauses remain enforceable in Arkansas at this time.

*Audra Hamilton is an attorney with Mitchell Williams in Little Rock. You can reach her at [ahamilton@mwlw.com](mailto:ahamilton@mwlw.com).*

*Republished with permission. Originally published in the Arkansas Employment Law Letter.*