

## **Eleventh Circuit Limits Reach of Arbitration Agreements, Finds “Pay Your Own Fees” Clause Unenforceable**

Article By:

Edmund J. McKenna

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On November 22, 2019, the United States Court of Appeals for the Eleventh Circuit, the court with jurisdiction over Alabama, Florida, and Georgia, handed down a decision that invalidates certain provisions in arbitration agreements in Fair Labor Standards Act (FLSA) wage and hour cases. [\*Hudson v. P.I.P. Inc., Case No. 19-11004\*](#), has significant impact for any employer in Alabama, Florida, or Georgia that uses arbitration agreements with its employees.

In *Hudson*, the court addressed an arbitration agreement that contained a commonplace provision requiring the employee to pay half of the arbitration costs: “Any dispute arising out of this agreement shall be resolved by mediation or arbitration, each party agrees, the parties will equally divide cost of mediation. Each party to any arbitration will pay its own fees and expense, including attorney fees and will share other fees of arbitration.”

The court began its analysis by recognizing that the FLSA provides for reasonable attorneys’ fees and costs of the action if the employee is successful, stating, “[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” The court then held that the district court was not mistaken in ruling that the statement “[e]ach party to any arbitration will pay its own fees and expense, including attorney fees and will share other fees of arbitration” does not offer the arbitrator any discretion in determining who pays for fees and costs. The court found that an employee bringing a successful FLSA claim would be required to forego the attorneys’ fees provided by the FLSA, which would defeat the remedial purpose of the law. Thus, the clause requiring the employee to pay his or her own costs was unenforceable.

The court distinguished this provision from a “loser pays” provision because an employee, “if successful, would still be awarded fees and costs as provided by the statute” under a “loser pays” provision. The court held that “[h]ere, in contrast, the fees and costs clause defeats the purpose of the FLSA’s attorney’s fees and costs provisions—a mandatory ‘pay your own’ fees and costs clause removes the arbitrator’s ability to award a plaintiff what is provided by statute if the plaintiff is successful.”

The court remanded the case to the district court to determine if the offending provision could be severed from the agreement.

## Key Takeaways

While the case does not explicitly hold that the court would invalidate a provision requiring the employee to pay half of the arbitration costs if the employee were making a claim under another federal employment law that provides a successful employee with an award of attorneys' fees (which many do), there is also nothing in the decision suggesting that the result would be different under these other federal employment laws. Thus, employers with operations in Alabama, Florida, or Georgia that use arbitration agreements with their employees would be wise to examine their agreements to ensure compliance with the Eleventh Circuit's recent pronouncement in *Hudson*.

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