

## **New wage policies favor employers**

By Graig F. Zappia A major debate over wages appears to be brewing for 2014. While many workers will be looking for higher minimum wages, they must also be on the lookout for new employer policies that could make it financially impractical for them to recover unpaid minimum and overtime wages. Employers are updating their employee handbooks to take advantage of recent changes in the law. Following the decision of the 2nd U.S. Circuit Court of Appeals

in *Sutherland v. Ernst & Young LLP*

in August, some employers may opt to include a policy enabling them to easily block employees' attempts to join class action lawsuits for unpaid minimum and overtime wages recoverable under the Fair Labor Standards Act (FLSA). The *Sutherland* decision allows New York employers to include waiver provisions requiring all wage disputes to be individually arbitrated rather than be litigated as part of a class action lawsuit. The plaintiff in *Sutherland* had argued that the only financially feasible way to collect her unpaid overtime was through a class action lawsuit; the arbitration route would cost her an estimated \$200,000 to collect \$2,000. Scores of Capital Region workers suffer from unpaid minimum wage and overtime wages each year. A Tully Rinckey PLLC review of U.S. Department of Labor Wage and Hour Division

(WHD) enforcement data identified at least 40 Capital Region companies that agreed to pay over \$396,000 in FLSA minimum or overtime back wages, or both, after WHD investigations in 2012 alone. When *Sutherland* was before the U.S. District Court for the Southern District of New York, that court noted the employer's arbitration policy created a situation where the plaintiff "is not able to vindicate her rights absent a collective action." So why would the Second Circuit let such an arbitration agreement stand, making it prohibitively expensive for workers to sue for wages they are owed? The answer, unfortunately, is painfully simple: Congress essentially never closed this loophole. "[T]he FLSA does not include a 'contrary congressional command' that prevents the underlying arbitration agreement from being enforced by its terms," the appellate court noted. As lawmakers debate whether the minimum wage should be increased, they should also consider whether this contrary congressional command should be incorporated into the FLSA for those who are not being paid what they legally are owed. There needs to be, at least, a debate over whether employers' interests in shielding themselves from expensive FLSA class action lawsuits should trump employees' interests in collecting unpaid overtime or minimum wages without having to break the bank. Or, is it simply a bargained-for provision that employees need to accept as part of their continued employment? Graig F. Zappia

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