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Supreme Court Gives Employers OK to Use Class Waivers

This week, the Supreme Court held that employers can include class waivers in arbitration agreements that workers sign as a condition of employment. The highly anticipated decision, which resolves the uncertainty over whether such waivers are lawful and enforceable, is expected to significantly limit the number of employment-related class and collective actions employers face. Employers that have or are considering adopting employment arbitration agreements should weigh their potential benefits in light of this development.

Background

In 2012, the National Labor Relations Board (NLRB) ruled in *D.R. Horton, Inc.* that section 7 of the National Labor Relations Act (NLRA) protects the right of employees to "join together to pursue workplace grievances, including through litigation" and arbitration. Thus, an arbitration agreement requiring employees to waive the right to pursue joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum violated workers' section 7 right to engage in concerted action. Two years later, a sharply divided board invalidated a similar agreement in *Murphy Oil USA, Inc.*, reaffirming that class waivers violate employees' section 7 rights.

The 5th Circuit disagreed, holding that the NLRA does not override the Federal Arbitration Act (FAA), under which employment-related arbitration agreements are generally enforceable according to their terms. Finding that the use of class action procedures is not a "substantive right" under the NLRA, the 5th Circuit concluded that an employer does not commit unfair labor practices by maintaining or seeking to enforce an arbitration agreement that requires employment-related claims to be resolved through individual arbitration. The 2nd and 8th Circuits have taken similar positions.

The 6th, 7th, and 9th Circuits have adopted or deferred to the board's view that arbitration agreements that preclude employees from filing class or collective actions against their employers are unlawful. Earlier this year, the Supreme Court agreed to resolve this circuit split.

Supreme Court Upholds Mandatory Arbitration Agreements

In a 5 to 4 decision on May 21, the Supreme Court of the United States ruled that arbitration agreements containing class waiver provisions that must be signed as a condition of employment are lawful and enforceable. In *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, and *NLRB v. Murphy Oil USA, Inc.*, the high court decided the use of such mandatory arbitration agreements does not violate the NLRA. In each of these cases, employees signed agreements that required employment-related claims to be resolved through individual arbitration, but later sought to litigate wage and hour claims under the federal Fair Labor Standards Act (FLSA) and related state laws in class or collective actions.

On the Docket

Last month, the Supreme Court agreed to decide whether class arbitration can be authorized under the FAA when the employment arbitration agreement is silent on the issue. On appeal from the 9th Circuit, the Court will hear *Lamps Plus, Inc. v. Varela* (**No. 17-988**) in the October 2018 term.

Writing for the majority, Justice Neil Gorsuch said that "[t]he policy may be debatable but the law is clear." Concluding that the Court cannot substitute its economic policies for those chosen by Congress, the opinion made clear that the FAA requires arbitration agreements like those before it to be enforced as written — even if they require workers to pursue employment claims against an employer individually rather than through class or collective actions.

While the FAA savings clause allows courts to invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," the Court found that those grounds (e.g., fraud, duress, unconscionability) did not apply in this case. Additionally, the Court found no conflict between the NLRA and FAA, as the NLRA does not mention class or collective action procedures or suggest that they were intended to fall within the scope of section 7. Neither did the Court find any congressional intent to allow the NLRA to trump the FAA with respect to employment arbitration agreements.

While Congress could act to limit the reach of this decision and the FAA, as Justice Ginsburg in her dissent called on it to do, it remains to be seen whether lawmakers will do so.

> **Comment.** Importantly, there are certain types of claims that cannot be forced into arbitration. For example, employment arbitration agreements with class waivers do not prevent an individual from filing a discrimination charge with the EEOC, or from participating in a pattern-or-practice suit filed by the agency. While to date arbitration agreements have not precluded class or collective actions brought under certain types of state laws, such as California's Private Attorneys General Act, it is not clear what, if any, impact this decision may have on those sorts of representative actions.

ERISA Litigation

This ruling does not specifically address ERISA class actions. However, in *Allen Munro v. USC*, the 9th Circuit recently heard **oral argument** on whether a mandatory employment arbitration agreement prevents a plan participant from pursuing an ERISA fiduciary breach claim on a class-wide basis. A key question is whether such a claim is individual in nature and thus covered by the arbitration agreement.

NLRB's Reaction

In a statement released earlier this week, the board acknowledged that the Supreme Court's decision clearly establishes that "arbitration agreements providing for individualized proceedings, and waiving the right to participate in class or collective actions, are lawful and enforceable." The board said it is committed to expeditiously resolve 55 pending cases in accordance with the Supreme Court's decision. Those cases allege employer violations of the NLRA "by maintaining or enforcing individual arbitration agreements or policies containing class- and collective-action waivers." The board noted that additional cases previously issued by the board are pending before the federal courts of appeals.

In Closing

Employers that have or are considering adopting mandatory arbitration agreements can now weigh the potential benefits of such agreements in light of this legal development — and the board's reaction to it. Employers that are currently involved in board or court proceedings that have been stalled over the enforceability of class or collective waivers in their employment arbitration agreements can now move forward.

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