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Mandated Individual Arbitration in the Employment Context: The Debate over Federal Legislation's Impact on Employee Rights, The Real Consequences, and the Need for Supreme Court Action

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Part I: Introduction

For decades, arbitration as a form of dispute resolution has been an essential and necessary element of labor and employment law. Yet as the law itself develops in this area, issues surrounding arbitration have taken on wholly new dimensions. One of the most hotly contested of these issues is concerned with the principle of "waiver," which is the intentional relinquishing of a certain claim or right. Specifically, there is substantial disagreement among courts surrounding group-action waivers in private arbitration agreements and whether such waivers ought to be as strictly enforced in the employment context as they currently are in the consumer context. This article will discuss the relevant issues, conflicting arguments, and the legal and practical implications of each side of the debate.

Supreme Court precedent in favor of mandatory arbitration in disputes arising out of consumer purchase agreements does not so easily apply to similar terms contained in employment contracts. This notion is directly related to the nature of the contracting parties. The private relationship between the employer and employee is fundamentally different from that of the consumer and the merchant and so warrants heightened protection under federal law. While the Federal Arbitration Act (FAA) *generally* provides that private agreements to arbitrate disputes are "valid, irrevocable, and enforceable" according to their terms, it also provides for a "savings clause."[1] This clause renders arbitration agreements unenforceable if they violate principles of contract law or public policy.[2] According to the National Labor Relations Board (NLRB), collective-action waivers upheld under the FAA directly violate federal labor law, specifically the National Labor Relations Act (NLRA) and the Norris-LaGuardia Act (NLGA).[3] The NLRB's judgment suggests the presence of an *implicit* congressional intent for such federal labor laws to override the FAA's mandate.[4]

The analysis to follow will posit that group-action waivers contained in mandatory arbitration agreements within employment contracts are fundamentally at odds with the very purpose arbitration aims to serve in the employment relationship. Therefore, such contractual policies must be prohibited or at the very least, restricted to appropriately preserve the balance of power between the

employees and the employer.

Part II: Cases Challenging Arbitration Jurisprudence and the Key Debate

In 2011, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*, which held in favor of a cell phone merchant seeking to utilize a group-action waiver in an arbitration agreement with consumers.[5] Justice Scalia's opinion for the majority relied heavily on the exact language of the FAA referenced above and found that no state law prohibiting arbitration could properly displace the FAA.[6] Just two years later, the Supreme Court reiterated its position in *American Express v. Italian Colors Restaurant*, where it stressed that courts should "'rigorously enforce arbitration agreements according to their terms'"[7] and added that this stringency remains true even for claims that assert a federal statute violation, unless a contrary congressional command supersedes the FAA's mandate.[8]

It is important to note that each of the Courts decisions above dealt solely in the *consumer* context. As such, lower district and circuit courts, as well as the NLRB, have disagreed as to their application in the employment law arena.[9] Early on, the NLRB fiercely set forth arguments against mandatory arbitration terms containing group-action waivers. Ultimately, however, the Fifth, Second and Eighth Circuits rejected the NLRB's view while the Seventh and Ninth Circuits adopted it, creating a circuit split.

In *D.R. Horton, Inc.*, the NLRB concluded that under Section Seven of the NLRA, group-action waivers in arbitration agreements, as a condition of employment, unlawfully constrained the exercise of employees' non-waivable substantive right to bargain as an entity in either an arbitral or a judicial forum for mutual aid or protection against the employer.[10] Furthermore, the NLRB argued that such waivers violated Section Eight of the NLRA, which provides that employers shall not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."[11] The underlying premise is that group-action waivers unlawfully restrict an employee's right to engage in concerted activity or, in effect, accomplishes the same result by inducing employees to *believe* their Section Seven rights are restricted. Either outcome is overtly prohibited by the NLRA.[12]

The NLRB further concluded that enforcing employees' substantive right to act concertedly under the NLRA neither conflicted with the language of the FAA nor undermined its inherent purpose.[13] The Board argued that the "illegality" of group-action waivers under the NLRA render such clauses in violation of general contract principles, thereby prohibiting their enforcement pursuant to the FAA's savings clause.[14] The Board went on to posit that even if the FAA was considered to be in direct conflict with the NLRA, the FAA must concede to the Norris-LaGuardia Act (NLGA), labor law legislation enacted several years after the FAA.[15] The NLGA considers agreements made between employers and employees to be unenforceable and contrary to public policy if they interfere with an employee's right to partake in concerted activities as a means of collective bargaining.[16] The Board asserted that agreeing to waive group action in arbitration does just that.

On appeal to the Fifth Circuit, however, *D.R. Horton* was overturned. Here, the court outlined the basic arguments in favor of mandatory arbitration agreements where group-action waivers are agreed upon. The opinion of the majority asserted that the NLRB failed to give appropriate weight to the FAA and Supreme Court precedent.[17] Though such precedent made no mention of the NLRA specifically, the circuit court opted to take a very narrow view of the NLRA's "concerted action" provisions.[18] The majority held that the NLRA did not give employees a non-waivable substantive right to engage in collective arbitration, but rather only afforded employees a general right to "act collectively."[19] Moreover, the court held that the savings clause exception did not apply to the NLRA.

In this regard, the court determined that applying of the NLRB's approach would substantially impede arbitration in the employment context and run counter to the principle purpose of the FAA.[20] Finally, the majority found that the NLRA lacked any *clear* congressional command to appropriately override the FAA because Section Seven did not have an "explicit provision mentioning arbitration by name in its text, history, or purpose."[21]

In 2013, the Second Circuit joined the Fifth Circuit's approach and, for many of the same reasons, held against the NLRB. In *Sutherland v. Ernest Young,* the Second Circuit found that the Fair Labor Standards Act (FLSA), another federal labor law comparable in nature to the NLRA and NLGA, "does not preclude the waiver of collective action claims."[22] The court believed that the FLSA's opt-*in* requirement for collective actions implied that employees had the option to waive that same right.[23] That same year, the Eight Circuit used a comparable rationale to uphold an arbitration agreement containing class waivers in *Owen v. Bristol Care Inc.*[24]

In 2014 despite the holdings of the Fifth, Second, and Eight Circuits, the NLRB in *Murphy Oil USA,* again struck down a group action waiver in an arbitration agreement mentioned in an employment contract.[25] As it did in *D.R. Horton*, the Board found that such waivers violate the NLRA as unfair labor practices that could not be justly enforced.[26] Two strong dissents accompanied the majority's controversial decision. Member Miscimarra vehemently argued, among other things, that Congress did not give the NLRB authority to dictate that non-NLRA claims must be granted class treatment.[27] Member Johnson went a step further and argued that the NLRA must succumb to the FAA given the plethora of Supreme Court decisions continuously advocating that federal policy favors arbitration.[28] Despite a second attempt to defend its ruling on appeal to the Fifth Circuit, the NLRB's decision was again overturned. Judge Jones for the majority articulated that the court was firmly bound by its previous decision in *D.R. Horton*.[29] The court went on to hold that the pro-arbitration policy of the FAA prevails over federal labor law interests and so requires the enforcement of group-action waivers in arbitration agreements as they are written.[30]

Notwithstanding the Fifth, Second, and Eight Circuit decisions, in 2016, the Seventh Circuit ruled *in favor* of adopting the NLRB's approach. In *Lewis v. Epic Systems,* the Seventh Circuit made invalid a group-action waiver in an arbitration agreement.[31] That same year, the Ninth Circuit followed suit and embraced the NLRB's interpretation of the NLRA in *Morris* v. *Ernst & Young LLP*.[32] Chief Judge Thomas wrote for the majority asserting that "Section Eight has long been held to prevent employers from circumventing the NLRA's protection for *concerted* activity by requiring employees to agree to *individual* activity in its place."[33] In dissent, Judge Ikuta supposed that workers, once they have willingly agreed to the arbitration terms, should not be able to rescind their contracts. Instead, under the "natural reading of [Section] Seven's right, employees can only "jointly arrange, plan, and carry out group efforts to dispute employer positions."[34]

Part III: Practical Implications

1. Pro-Group Arbitration Precedent is Inapplicable to the Employee-Employer Relationship

As noted above, circuit courts that disagree with the NLRB's interpretation of this issue generally do so in reliance on the precedent set by the Supreme Court in *AT&T* and *Italian Colors*.[35] In taking this position, the Fifth, Second, and Eight Circuits endorse the use of the FAA to enforce arbitration agreements according to their terms, regardless of whether the agreement arises in the consumer or employment context.[36] This interpretation, however, fails to recognize the crucial differences

between the consumer and employment relationships. Unlike in the consumer context, when dealing with the distinct nature of an employment relationship, courts must apply the FAA alongside federal labor laws.

A general, yet significant, distinction between these relationships stems from the differing roles of the promisor and promisee in the consumer agreement context as opposed to the employment agreement context. Consumers, such as those in *AT&T* and *Italian Colors*, elicit the business of merchants by entering into agreements to purchase particular products. Generally, if the consumer is not satisfied with the purchase agreement or contract, he may choose not to engage in the transaction and take his business elsewhere. Here, it is the consumer who has the upper hand in the private bargain. Furthermore, it is frequent for a merchant to change the terms of a purchase agreement as a means of enticing purchases or persuade consumers to choose his product over another's. Merchants, more so than employers, are encouraged to give consumers a more favorable contract because losing the consumer, especially to a competitor, negatively affects business.

While employees often seek out the opportunities advertised by employers, this does not provide employees with the same upper hand in the bargain that consumers possess in their contractual relationship. If employees decide not to settle for the contract they are given, an employer can very easily move on to another candidate among the vast pool of potential hires. A single employee exercising his right to refuse the terms of a contract does not negatively impact an employer in the same way that losing a customer might. In truth, only the employee suffers the consequences of his decision. Although employers may argue that employees are "at will" and can freely enter into any kind of private agreement agreed upon by both parties, the reality is that the employer is often the only one with any power to dictate the terms of the bargain.

Accordingly, employees are ultimately given no *real* choice in accepting or refusing a group-action waiver in an arbitration agreement if their employment is contingent on their consent. Since the large majority of prospective employees are unable to let pass a paid opportunity, they may be willing to sign a contract with terms they know unfairly disadvantage them. Consumers, by contrast, are readily able to purchase products from alternative sources and so have the luxury of "shopping around" to obtain a purchase agreement they find more appealing. Given these differences, when it comes to group-action waivers in arbitration agreements, the private relationship between the employer and employee must warrant heightened protection under federal law.

2. Federal Labor Laws Cannot be Reconciled with the FAA because Each Asserts Contrary Congressional Commands

The Supreme Court has made it clear that the *rigorous* enforcement of arbitration terms remains true even for claims that assert a violation of a federal statute unless a contrary congressional command overrides the FAA's mandate.[37] A contrary congressional command will assert that an otherwise "valid, irrevocable, and enforceable" arbitration agreement cannot be upheld because there is separate federal legislation that demands through its "text, history, or purpose" that such an arbitration agreement be unenforceable. In considering the judicial history of and congressional intent behind federal labor law, the argument for finding such a contrary command is strong.

The government has interjected itself into the relationship of parties in the employment context for decades. This is apparent through "national labor policy and judicial history protecting the rights of workers, including the right of workers to act collectively in a variety of forums."[38] By enacting the

NLRA, Congress's aim was "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."[39] Though Congress enacted the FAA after the NLRA, Congress gave "no indication that [it] intended to limit [the] protection [the NLRA provides] to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."[40] To further assert congressional intent to protect employee rights, after it enacted the FAA, Congress enacted the NLGA which provides that employees "shall be free from the interference, restraint, or coercion of employers" in concerted activities.[41]

Clearly, yielding to the terms of a group-action waiver in an arbitration agreement pursuant to the FAA poses a conflict where federal labor laws also apply to give employees the right to engage in concerted activity. Courts must not simply resort to one over the other. Instead, courts must reconcile the two when applying the FAA to the agreement when it violates the NLRA, NLGA, or any other federal labor law. This is accomplished by contemplating the legislative purposes of the FAA, NLRA, and NLGA together and determining what Congress ultimately intended to achieve when it enacted each piece of legislation. It is obvious that Congress could not have meant to render either law toothless in the presence of the other. As such, it cannot be logically concluded that the FAA is meant to trump all other federal labor legislation.

3. Group-Action Waiver as an Enabler of More Disruptive Dispute Resolution

Though it is unlikely that all employers will require all prospective employees to sign a group-action waiver, there are still negative practical consequences to allowing such agreements on any scale. Employers have argued that drawbacks can be overlooked because of such waivers while restricting certain procedural rights to act collectively, do not take away an employee's substantive rights to engage in concerted action.[42] This view, however, is problematic because it seems to encourage more disruptive forms of dispute resolution. Although waivers that prohibit collective action in arbitration may claim to hold open an employee's right to engage in concerted activity under Section 7 of the NLRA, they leave employees with the desire to exercise these rights frustrated as they now have few options at their disposal.

Without the ability to engage in group-action within the internal dispute resolution process, employees can seemingly only turn to strikes, picketing, and other boycotts that result in significant industrial unrest. Aggravated employees are forced to take matters into their own hands and engage in these more aggressive forms of concerted action so as to ensure the employer truly appreciates their concerns. Otherwise, they will have no real chance to level the bargaining power playing field.

The increased likelihood of more disruptive concerted action seems to deviate from the very purpose arbitration aims to serve.[43] Arbitration was created to give employees a more efficient, productive, and cost-effective avenue to peacefully address their concerns with employers. Group-action waivers, if enforced, take away an employee's only real "bargaining chip"—the ability to give claims a voice by demonstrating their applicability and significance to more than just an individual employee. If employees cannot use each other for leverage they stand little chance against the employer who often has access to better legal, financial, and other important resources.

Without the ability to arbitrate as a group, when the time comes to approach their employers with concerns, employees will resort to more disruptive collective action that can hurt not only individual businesses but also entire industries. If employers fail to realize this threat and choose to continue requiring group-action waivers in employment arbitration agreements, it is up to the courts to avoid

the negative consequences by protecting employees' rights to collective action in *all* forms, not just the ones employers decide to allow them.

Part IV: Conclusion

Although courts will try to avoid involving themselves into private labor agreements such as employment contracts, the Supreme Court must intervene where the issue of group-action waiver within arbitration agreements arises. Furthermore, the Court must set precedent making unenforceable collective-action waivers mandated within employment arbitration agreements. While it may be reasonable and even necessary to uphold such waivers in other contexts, there is much more at stake in the employment context. In the employer-employee relationship, it is imperative for the court to strike a balance between the sanctity of the private bargain and the rights of employees both individually and as a group that can be easily compromised as a result of unfair private bargaining.

The approach of the NLRB, Seventh Circuit, and Ninth Circuit attempts to strike such a balance by considering the distinct nature of the relationship between the parties in the employment context, congressional intent and the historical purpose of federal labor law, and the overall principles and purposes of arbitration. Any approach failing to make these considerations risks increasing labor unrest and in turn, the likelihood of severe consequences to business both economically and otherwise.

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[1] *See* Federal Arbitration Act, 9 U.S.C. §§ 2 (1947).

See id.

[3] *See* Catherine L. Fisk, Comment, *Collective Actions and Joinder of Parties in Arbitration: Implications of DR Horton and Concepcion*, 35 Berkeley J. Emp. & Lab. L. 175, 187 (2014).

[4] *See* Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454, at *13 (Oct. 28, 2014), *see also,* Fisk, *supra* note 3 at 184.

[5] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[6] *See id.* at 341.

[7] Sutherland v. Ernst & Young, LLP, 726 F.3d 290, 296 (2nd Cir. 2013) (citing American Express v. Italian Colors 99 Restaurant, 133 S. Ct. 2304, 2309 (2013)).

[8]*See* Dustin Dow, *High-Court Showdown Looming? NLRB Defends D.R. Horton Section 7 Decision with Full-Throated Rebuttal in Murphy Oil*, BAKERHOSTETLER: EMPLOYMENT CLASS ACTION BLOG (Nov. 4, 2014), https://www.employmentclassactionreport.com/arbitration/high-court-showdown-looming-nlrb-defends- d-r-horton-section-7-decision-with-full-throated-rebuttal-in-murphy-oil/ (citing American Express, *supra* note 6).

[9] *See* Katherine V. W. Stone, Comment, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. Rev. Discourse 164, 169-71 (2013).

[10] *See* Murphy Oil USA, Inc., 361 N.L.R.B. at *2; *see also*, National Labor Relations Act, 29 U.S.C. §§ 157 (1935).

[11] National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) (1935); *see* Lewis v. Epic Systems Corp., 823 F.3d 1147, 1155 (7th Cir. 2016) (citing D.R. Horton, Inc., 357 N.L.R.B. No. 184 (Oct. 28, 2014)).

[12] *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1016 (5th Cir. 2015).

[13] *See* Morris v. Ernst & Young, LLP 834 F.3d 975, 985 (9th Cir 2016); *see also* Lewis, 823 F.3d at 1159.

[14] *See id.*

[15] *See* Murphy Oil USA, Inc., 361 N.L.R.B. at *1; *see also* Norris-LaGuardia Act, 29 U.S.C. §§ 102, 103 (1932).

[16] *See id.*

[17] *See* Murphy Oil USA, 808 F.3d at 1018.

[18] *See* Murphy Oil USA, Inc., 361 N.L.R.B. at *9; *see also* Stone, *supra* note 9 at 167.

[19] *See* Murphy Oil USA, Inc., 361 N.L.R.B. at *22 (Miscimarra, dissenting).

[20] *See* Murphy Oil USA, Inc., 361 N.L.R.B. at *8.

[21] Fisk, *supra* note 3 at 187-89.

[22] *See* Sutherland, 726 F.3d at 297.

[23] *See* Sutherland, 726 F.3d at 296-97.

[24] See Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053 (8th Cir. 2013).

[25] Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454 (Oct. 28, 2014).

[26] *See id.*

[27] *See id.* at 22.

[28] *See id.* at 16-21.

[29] *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015).

[30] *See id.*

[31] *See* Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016).

[32] *See* Morris v. Ernst & Young, LLP 834 F.3d 975 (9th Cir 2016).

[33] *See id.* at 983.

[34] *See id.* at 996.

[35] *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); *see also* Sutherland v. Ernst & Young, LLP, 726 F.3d 290 (2nd Cir. 2013); *see also* Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053 (8th Cir. 2013).

[36] *See id.*

[37] *See* Dow, *supra* note 8.

[38] Murphy Oil USA, Inc., 361 N.L.R.B. at *9; *see also* Dow, *supra* note 8.

[39] Lewis, 823 F.3d at 1153; *see also* Ann V. Hodges, Comment, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173, 237 (2003).

[40] Lewis, 823 F.3d at 1153.

[41] Norris-LaGuardia Act, 29 U.S.C. § 102 (1932).

[42] *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); *see also* Sutherland v. Ernst & Young, LLP, 726 F.3d 290 (2nd Cir. 2013); *see also* Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053 (8th Cir. 2013).

[43] See Fisk, *supra* note 3 at 183.