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High Court to Resolve Whether Class Action Waivers Violate NLRA

Article By:

Minal Khan

On Oct. 2, the U.S. Supreme Court will resume its fall session and tackle, among other issues, whether class action waivers in arbitration agreements are valid and enforceable under Section 7 of the National Labor Relations Act (NLRA). The court will consider a consolidated set of cases emerging from the U.S. Court of Appeals for the Fifth, Seventh and Ninth Circuits, which have taken conflicting views on this question. The court's resolution of this long-standing issue will create large implications for businesses that rely on such waivers in their employment agreements, and resolve a long-enduring circuit split.

The conflict over class action waivers has stemmed from the disagreement between the National Labor Relations Board (NLRB), state courts and federal courts as to whether arbitration agreements are legally valid and enforceable under the act. Specifically, Section 7 of the NLRA provides employees with the right to self-organize, and engage in "concerted activities" for the purpose of collective bargaining or other mutual aid and protection.

The NLRB has taken the position that Section 7 precludes such waivers. Indeed, it has found that Section 7 protects the filing of class or collective actions in court by employees as a form of "concerted activity." The NLRB's recent decisions in *D.R. Horton* and *Murphy Oil USA, Inc*. thus establish that employees cannot waive their right to file or participate in collective actions. The Ninth and Seventh Circuits, have agreed with the board's position.

The majority of federal courts, however, approve of class actions waivers. Indeed, this viewpoint is consistent with the Supreme Court's own precedent in *AT&T Mobility LLC v. Concepcion*, where the court upheld the applicability of class action waivers in arbitration agreements under the Federal Arbitration Act (FAA). Several federal courts, including the Fifth Circuit, have adhered to the *Concepcion* decision in finding class action waivers enforceable. Notably, the Trump administration has also backed employers, arguing that the FAA and *Concepcion* case strongly favor the validity of arbitration agreements that include class action waivers.

Whether the Supreme Court will adhere to its *Concepcion* decision remains to be seen. In either event, the outcome of the court's decision will provide clarity to numerous employers who rely on such class action waivers as part of their employee onboarding process.

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