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Mandatory Class Action Waivers in Employment Agreements: Is a Final Answer Forthcoming?

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Many employers use or have considered using arbitration agreements that both require all employment-related claims to be adjudicated in arbitration and preclude class and/or collective claims. These agreements can be invaluable tools to limit costly and time-consuming class and collective actions brought by, or on behalf of, large groups.

In recent years, the U.S. Supreme Court has interpreted the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), to enforce arbitration agreements despite objections mounted by the plaintiffs' bar and some state courts.

While the Supreme Court has upheld class action waivers in the consumer context, it is unclear whether the FAA's liberal approach to arbitration applies in the employment context. The National Labor Relations Board ("NLRB" or "Board") contends that these provisions are unlawful because the potential formation of class or collective actions contesting employment issues is a "group activity" allegedly embraced by the National Labor Relations Act's ("NLRA's") Section 7 right of employees to engage in "protected concerted" activities.

On October 2, 2017, the first day of its fall 2017 term, the Supreme Court will hear arguments in three related cases involving the legality of class action waivers in arbitration agreements for employment-related claims: *Ernst & Young LLP v. Morris*, *Epic Systems Corp. v. Lewis,* and *NLRB v. Murphy Oil USA, Inc*. In all three cases, the plaintiffs, who had previously signed arbitration agreements containing waivers, asserted collective action claims under the FLSA, as well as state law wage claims. The defendant employers moved to dismiss the collective actions and compel individual arbitration of the employees' claims. At issue in all three cases is whether arbitration agreements prohibiting class and/or collective actions are enforceable or barred by the NLRA.

The Circuit Court Split

The Fifth Circuit, in *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), rejected the NLRB's position and held that adjudicating a claim collectively is *not* a substantive right protected by the NLRA, and that the Board's interpretation of the NLRA impermissibly conflicts with the FAA. The

Second and Eight Circuits have also held that class action waivers are enforceable.

The Seventh and Ninth Circuits, on the other hand, have adopted the Board's position that such agreements are a violation of the NLRA, in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), and *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), respectively.

In *Lewis*, the Seventh Circuit declined to enforce a clause that precluded employees from seeking any class, collective, or representative remedies in wage and hour disputes. The court found that the clause was unenforceable because it required employees to stipulate away their NLRA Section 7 rights. Moreover, the court found that the clause was unenforceable under the FAA. Because the court viewed the clause as unlawful under Section 7 of the NLRA, it was therefore an illegal provision and met the criteria of the FAA's saving clause for non-enforcement.

A few months later, the Ninth Circuit in *Morris* also held that the NLRA precludes agreements requiring employees to waive concerted legal claims regarding wages, hours, and terms or conditions of employment.

What Will the Supreme Court Do?

As noted, the Supreme Court has demonstrated a preference for arbitration in recent years. The confirmation of Justice Neil Gorsuch may also favor the enforcement of class action waivers in arbitration agreements. Justice Gorsuch's past arbitration rulings demonstrate that he favors the FAA's liberal approach to enforcement of arbitration agreements and sees the FAA as establishing substantive federal law favoring arbitration that preempts conflicting state law doctrines. Moreover, past decisions show a reluctance to defer to administrative agency interpretations and skepticism of aggressive agency action. He has already expressed the view that the NLRB should have a more limited scope of authority. Accordingly, Justice Gorsuch may, in the case of a split, cast the deciding vote, and there is reason to believe that the Court will again find in favor of the legality of class action waivers.

While we cannot definitively predict the Supreme Court's decision, we can be sure that the decision will greatly impact employers and employees alike, and that it will provide much-needed clarity on this key issue.

Takeaways

Once the Supreme Court issues its ruling, employers should (i) promptly review their existing mandatory arbitration and class waiver agreements and (ii) consider adopting them (if not already in use) if the Court rejects the NLRB's arguments.

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