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Employers still seek clarity on mandatory arbitration agreements

On Jan. 13, the U.S. Supreme Court granted certiorari in three cases involving employers' use of mandatory arbitration agreements with class-action waivers. The Supreme Court will determine whether such arbitration agreements violate the National Labor Relations Act. For employers that rely on mandatory arbitration agreements to mitigate exposure to costly class action litigation, this is an issue of paramount importance.

Over the past several years, the Supreme Court has issued a series of decisions upholding arbitration agreements with class-action waivers under the Federal Arbitration Act (FAA). In so holding, the Supreme Court rejected several challenges to the enforceability of these agreements. In the seminal decision on this issue, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), the court held that state law doctrines that "disfavor arbitration" would be pre-empted by the FAA if "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Since Concepcion, the Supreme Court has continued to enforce arbitration agreements with class-action waivers, evidencing a "liberal federal policy favoring arbitration." See e.g., American Express v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013); Oxford Health Plans v. Sutter, 133 S. Ct. 2064 (2013); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 466 (2015).

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Most of the cases the Supreme Court decided have involved mandatory arbitration agreements in the context of consumer contracts. Concepcion, for example, involved a cell phone contract between the Concepcions and their cell phone carrier. The court's decisions, however, prompted employers to use arbitration agreements with class-action waivers with employees as a means of mitigating exposure to costly class action involving claims of systemic violations of employment laws. In executing the arbitration agreements with class-action waivers, employees agree not to pursue claims against their employer on a class or collective basis and, effectively, agree to seek redress through individual, single-plaintiff, arbitration.

In the employment context, employers that utilize arbitration agreements with class-action waivers enter into these agreements with their employees at the inception of employment or during the course of employment. The agreements are subject to state contract laws, requiring legal consideration and consent. And to be enforceable, the agreements should not require employees to waive statutory rights (e.g., right to recover attorneys' fees or certain damages). Attempts to curtail employees' rights through the arbitration agreements could subject the agreement to attack on the basis that the agreement is unconscionable.

The National Labor Relations Board has challenged employers' use of mandatory arbitration agreements with class-action waivers, ruling that the agreements violate the National Labor Relations Act. Section 7 of the NLRA affords employees a right to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection.

In D.R. Horton, Inc., 357 NLRB No. 184 (2012), the board held that the NLRA protects the right of employees to join together to pursue claims and that "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator ... is engaged in conduct protected by Section 7."

Thus, the board reasoned, employers who use arbitration agreements with class-action waivers commit an unfair labor practice under the NLRA because the agreements bar employees from exercising their rights under the NLRA. Since the ruling in D.R. Horton, the board has continued to rule that arbitration agreements with class-action waivers violate the NLRA as they "interfere with, restrain or coerce employees" in the exercise of their Section 7 rights. See e.g., Murphy Oil USA, 361 NLRB No. 72 (2014).

Seeking to preserve their right to file a class-action claim, plaintiffs' attorneys have asserted various challenges to the enforceability of arbitration agreements with class-action waivers. Recently, plaintiffs in several class-action cases have argued that the FAA does not compel enforcement of arbitration agreements that violate the NLRA.

The FAA's "savings clause" provides that arbitration agreements are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." See 9 U.S.C. § 2. Plaintiffs have argued that arbitration agreements with a class-action waiver violate the NLRA and thus are unenforceable under the FAA's savings clause. In a further challenge to the enforceability of arbitration agreements, plaintiffs have argued that the right to engage in "concerted activity" under the NLRA is a substantive right, as opposed to a procedural right, and cannot be waived by an arbitration agreement.

The federal circuit courts of appeal have reached inconsistent results concerning the lawfulness of arbitration agreements with class-action waivers. The Seventh and Ninth circuits concluded that class-action waivers in arbitration agreements violate the NLRA and are, therefore, unenforceable. See Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016); Morris v. Ernst & Young, 834 F.3d 975 (9th Cir. 2016).

Conversely, the Second, Fifth and Eighth circuits have upheld arbitration agreements with class-action waivers, notwithstanding the NLRA-based arguments. Sutherland v. Ernst & Young, 726 F.3d 290 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); Cellular Sales of Missouri v. NLRB, 824 F.3d 772 (8th Cir. 2016).

With certiorari granted, the Supreme Court will ultimately determine whether arbitration agreements that bar employees from pursuing work-related claims on a class basis in any forum are prohibited by the NLRA. In the meantime, employers awaiting clarity from the Supreme Court must continue to navigate a series of sharply divided circuit court decisions.

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