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U.S. Supreme Court to provide guidance on the legality of employee class action waivers in arbitration agreements

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Conflicting appellate court decisions have created uncertainty among employers as to the enforceability of class action waivers in employment agreements. The United States Supreme Court recently granted certiorari and consolidated argument in three cases—*National Labor Relations Board v. Murphy Oil USA, Epic Systems Corp. v. Lewis,* and *Ernst & Young LLP v. Morris*— that present the question of whether class action waivers in employment arbitration agreements violate the National Labor Relations Act (NLRA). The Supreme Court's decision on these cases will hopefully resolve a circuit split and shed some much needed light on an issue affecting employers nationwide.

The split among the circuits

In recent years, the National Labor Relations Board (NLRB) has taken the position that the NLRA guarantees employees the right to engage in class or collective action. The NLRB has, therefore, repeatedly invalidated class waivers in employment arbitration agreements—finding that the Federal Arbitration Act (FAA), which has long been found to authorize the arbitration of individual employment claims, must yield to the NLRA, which protects the right to pursue employment claims of a class or collective nature.

The United States Circuit Courts of Appeal are split on the issue. The Second, Fifth and Eighth Circuits have disagreed with the NLRB, finding that class waivers are enforceable in light of a conflict between the FAA and the NLRA. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir. Dec. 3, 2013); *Murphy Oil USA, Inc. v. NLRB,* 808 F.3d 1013 (5th Cir. Oct. 26, 2015); *Owen v. Bristol Care, Inc.* 702 F.3d 1050 (8th Cir. January 7, 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 297 n. 8 (2d Cir. 2013). Drawing upon the reasoning of *AT&T Mobility v. Concepcion* (2011), the Supreme Court case that authorized class action waivers in consumer contracts, and later reiterated in *American Express Co. v. Italian Colors Restaurant* (2016), these pro-arbitration circuit courts have reasoned that, because the FAA "embod[ies] a national policy favoring arbitration and a liberal federal policy favoring arbitration agreements," *Concepcion*, 563 U.S. at 346, any law that even incidentally burdens arbitration—here, the NLRA—necessarily conflicts with the FAA.

Last year, the Seventh and Ninth Circuits both came to a different conclusion, finding instead that the FAA and the NLRA can co-exist harmoniously in light of the FAA's saving clause. *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. May 26, 2016); *Morris v. Ernst & Young, Inc.*, 834 F.3d 975 (9th Cir. Aug. 22, 2016). Specifically, the saving clause provides that agreements to arbitrate "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The reasoning of these circuits was that, because class action waivers are unlawful under the NLRA, arbitration provisions containing such waivers are illegal and "meet[] the criteria of the FAA's saving clause for nonenforcement." *Epic Systems* at *8.

While the Second Circuit sided with the pro-arbitration circuits in 2013 (*Sutherland v. Ernst & Young, Inc.*), a three-judge panel of that court wrote in September that it might otherwise have agreed with the Seventh and Ninth Circuits that class waivers are unenforceable absent controlling precedent (*Patterson v. Raymour Furniture,* Case No. 15-2820-cv (2d Cir. Sept 2, 2016).

The Court's grant of certiorari and possible outcomes

On January 13, 2017, the Supreme Court granted certiorari and consolidated argument in the three most recent circuit court cases from the Fifth, Seventh and Ninth Circuits: *National Labor Relations Board v. Murphy Oil USA*, Case No. 16-307 (on appeal from the Fifth Circuit); *Epic Systems Corp. v. Lewis*, Case No. 16-285 (on appeal from the Seventh Circuit); and *Ernst & Young LLP v. Morris*, Case No. 16-300 (on appeal from the Ninth Circuit).

In light of President Trump's promise to promote more conservative-leaning justices, a Trump-nominated justice who will fill the vacancy left by the death of Justice Scalia will likely be pro-arbitration. Justice Scalia was a vociferous supporter of the class action waiver and penned both *Concepcion* and *American Colors,* which were split opinions (Justices Breyer, Ginsburg, Sotomayor and Kagan dissented in *Concepcion,* with the same result in *American Colors* except that Justice Sotomayor took no part in the case).

In all likelihood, the Trump-nominated justice will be called upon to weigh-in on the issue (oral arguments could be set as early as April or during the next term in October). Of course, if President Trump nominates a justice who was a sitting judge involved in the lower court decisions, the appointee would likely recuse him/herself. If recusal occurs, it is possible that there could be a 4–4 split, meaning that the lower court appellate decisions will govern their respective jurisdictions, and no national precedent will be set. If no recusal occurs, and the Trump-nominated justice takes up the pro-arbitration mantle of Justice Scalia, the outcome could ultimately depend on the swing vote of Justice Kennedy.

As an initial matter, the result will depend on whether a majority of the Supreme Court agrees with the NLRB that employees have a right to engage in class or collective actions under the NLRA. While the Court is unlikely to find that the FAA supersedes the NLRA outright, the Court could find that the rights guaranteed by the NLRA are not as broad as the Obama-era NLRB has advocated. In *American Colors,* for example, the majority of the Court was not convinced that antitrust laws clearly prohibited waiver of the class-action procedure such that there existed a "contrary congressional command" against class waiver. Similarly, the NLRA does not specifically guarantee the right to file a class action. However, the NLRA does specifically speak to collective action—Section 7 guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Whether this language is a specific "congressional command" prohibiting class action waivers in employment agreements will be the crux of the dispute before the Supreme Court.

Assuming that the Court gets past this first step, the outcome will depend on whether a majority of the Court agrees with the Fifth Circuit to expand *Concepcion* to the employment context, or to find that the laws can be read harmoniously in light of the FAA's saving clause, as the Seventh and Ninth Circuits counsel. Although Justice Kennedy has voted alongside his conservative colleagues in prior arbitration decisions, he has historically taken the position that laws should be read harmoniously if possible. Notably, the Ninth Circuit and the Seventh Circuit, in finding that there was no conflict between the FAA and the NLRA on the basis of the FAA's saving clause, relied heavily on a pair of Supreme Court opinions authored by Justice Kennedy in reasoning that the two laws can co-exist. See, e.g., *Morris v. Ernst & Young, Inc.*, 834 F.3d at *20 (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 533 (1995)("[W]hen two statutes are capable of co-existence …. It is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *Lewis v. Epic Systems, Corp.,* 823 F.3d at 1157 (quoting *POM Wonderful LLC v. Coca-Cola Co.,* --- U.S. ---, 134 S. Ct. 2228, 2238 (2014)).

Practical tips for employers

Thus, the uncertainty for employers continues, at least until the Supreme Court weighs in. The conflicting opinions of the circuit courts and the NLRB make it difficult for employers to make plans and decide how to organize their workforce. The fact that the NLRB and Department of Labor under the new Trump administration is highly likely to be pro-employer (his nominee for Secretary of Labor has spoken out against class actions as a business person) adds to the uncertainty.

Adding to the mix of opinions, the California Supreme Court reviewed the issue in *Iskanian v. CLS Transportation Los Angeles, LLC,* 50 Cal. 4th 348 (2014), and found that an arbitration agreement that permits employees to file joint or class claims in arbitration satisfied the NLRA. Interestingly, none of the cases currently pending before the U.S. Supreme Court involved arbitration agreements that permit collective or class claims to be filed in arbitration, opting instead for an outright waiver of the right to pursue class or collective claims in all forums. Employers may want to consider the California-approved approach of permitting joint claims in arbitration when drafting arbitration agreements moving forward, particularly if they have California employees. Employers should also be cognizant that overly broad arbitration agreements, such as those that can be read as prohibiting employees from filing unfair labor practice charges with the NLRB, have been struck down outright.

For the time being, employers with pending cases in federal court in which they seek to enforce a class action waiver should consider whether to request a stay pending the outcome of the Supreme Court decision. That strategic decision may be different depending on the jurisdiction in which the case is pending. The uncertainties created by conflicting decisions and a new administration that appears intent on making changes to the labor status quo are, for now, unavoidable.

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