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A Victory for Employers - SCOTUS Condones Class Action Waivers

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On Monday, the Supreme Court decided the long-contested issue of whether employment agreements that compel workers to give up their rights to pursue class and collective claims are permissible under the National Labor Relations Act. The Court split 5-4 among ideological lines, with Justice Neil Gorsuch writing for the majority. In a divisive but unsurprising decision, the Court sided with employers, permitting the use of class action waivers in arbitration agreements.

The Court's Reasoning:

The decision resolved a dispute between two federal statutes, that until recent years, had existed together without issue for over eight decades – the Federal Arbitration Act and the National Labor Relations Act. The Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The National Labor Relations Act (NLRA) provides that employees have the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

The Court addressed the issue of whether the collective-bargaining provisions of the NLRA prohibited the enforcement under the FAA of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis. The Court saw no such conflict. It held that clauses in arbitration agreements that employees must sign as a condition of employment that restrict an employee's ability to bring a class action, *do not violate Sections 7 of the NLRA that permit workers to join together for "mutual aid and protection."*

The Court rejected the National Labor Relations Board's position that class action waivers violate workers' rights to engage in concerted action under Section 7 of the NLRA. Pursuant to the FAA, arbitration agreements providing for arbitration of individual claims (and waiver of class claims) must be enforced, regardless of the FAA's savings clause or the language of the NLRA.

In 2012, the National Labor Relations Board had held that the NLRA nullified arbitration clauses in cases where employees were compelled to forgo their ability to bring a collective action. The Board reasoned that the FAA declared arbitration agreements "valid, irrevocable, and enforceable," except "upon such grounds as exist at law." Based on this language, the Board held that arbitration agreements that restrict employee's rights to engage in concerted activity contrary to the NLRA – for example, bringing class or collective claims against an employer – fall outside the scope of the FAA.

However, the Supreme Court rejected the NLRB's reasoning and found that class actions do not qualify as "concerted activities" for workers' "mutual aid" because the NRLA does not expressly mention them. "Concerted activities" include only activities "closely related to organization and collective bargaining, such as picketing." Thus, there was no conflict between the FAA and NLRA.

The Court's decision resolved a three-way circuit split. Epic Systems Corp. v. Lewis, from the Seventh Circuit, was consolidated with two other cases, Ernst & Young LLP v. Morris (Ninth Circuit) and National Labor Relations Board v. Murphy Oil USA (Fifth Circuit). In each case, an employee had signed an employment agreement that contained an arbitration provision waiving their right to bring class claims, but subsequently filed suit in an attempt to bring both individual and collective claims. In all cases, the employer had argued that pursuant to the terms of the arbitration agreements, the employees were compelled to arbitrate their claims individually and waive their right to bring a class or collective action in court. The Supreme Court sided with the Fifth Circuit's decision in Murphy Oil, permitting class action waivers.

The Court opined that Congress could always pass new legislation to reach a different result, but that it was not the duty of the Supreme Court to "substitute its preferred economic policies for those chosen by the people's representatives." The majority held that the "policy" may be debatable but that the law was clear.

An Impassioned Dissent:

Reading from her dissent, Justice Ruth Bader Ginsberg called the decision "egregiously wrong," citing the "extreme imbalance" that once existed with regard to the employer-employee relationship. She emphasized that the purpose of the NLRA was to help level the playing field by granting employees more power through collective action. Ginsberg stated that the ruling will harm workers, who are unlikely to pursue individual claims against their employers due to prohibitive costs or because they fear retaliation. She worries that this decision will incentivize employers to skirt their legal obligations.

This decision is undoubtedly a win for employers. Yet, despite this victory at the Court for employers, the statutes themselves are always susceptible to reworking by Congress. Democratic politicians will likely continue their efforts to amend the FAA in the wake of this decision.

What This Means for Employers:

This decision confirms one of a number of potential benefits for employers who maintain arbitration agreements – the ability to include a class action bar. This waiver will help minimize potential exposure from claims brought by employees. Beyond class action waivers, employers can benefit from having employees sign arbitration agreements. Often, arbitration proceeds more quickly than civil litigation, saving time and attorneys' fees. The arbitration process is confidential, and the parties can decide on an arbitrator who is familiar with employment law issues.

While the use of an arbitration agreement with a class action waiver will avoid class and collective actions, not all employment disputes are subject to mandatory arbitration, such as the New York statute explicitly prohibiting mandatory arbitrations for sexual harassment claims.

Moreover, in states like California, where employees still have rights to pursue "representative actions" under the Private Attorneys General Act (PAGA), which can carry substantial penalties, this ruling will have a more limited effect. This decision will not affect an employee's right to bring a civil action for PAGA penalties, which cannot be waived.

It is also important to emphasize that arbitration agreements are not a cure-all. For example, in a class or collective action context, the arbitration fee for the employer will be multiplied by the number of potential claimants, and the fees can be substantial. Arbitration proceedings also often limit the parties' ability to conduct discovery, and there are limited appeal rights. In addition, multiple arbitrations against the same employer give rise to the risk of conflicting decisions.

Finally, it is important that employers are aware of any state laws and/or authority affecting the enforcement of arbitration agreements. Employers must determine whether they should utilize a stand-alone arbitration agreement or include a mandatory arbitration clause in their employee handbooks or other policies, or whether the agreement should be mutual. State laws also vary with regard to what type of consideration is required when an employee signs an arbitration agreement – particularly whether continued employment is sufficient consideration for the agreement.

Ultimately, Benjamin Franklin provides the best advice in stating, "An ounce of prevention is worth a pound of cure." Despite this victory for employers, employers should continue to audit their wage and hour policies and practices to ensure compliance with Federal and state laws.

For more information regarding class action waivers or assistance in drafting a compliant arbitration agreement, contact Keith Gutstein, Esq., co-managing partner in the Long Island office of Kaufman Dolowich & Voluck, LLP and/or Emily Mertes, Esq. attorney at KD located in the San Francisco office.

Epic Systems Corp. v. Lewis, case number 16-285; Ernst & Young LLP et al. v. Stephen Morris et al., case number 16-300; NLRB v. Murphy Oil USA Inc., case number 16-307, in the Supreme Court of the United States.