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Management Alert

Will the Supreme Court Finally Remove Doubt That an Employer Can Mandate That Employees Enter into Arbitration Agreements with Class Waivers?

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***Seyfarth Synopsis**: In the first argument of the first day of its new term, the U.S. Supreme Court will hear oral argument in three cases presenting the issue of whether an employer may require employees to enter into arbitration agreements containing a waiver of the ability to join a class or collective action. The Court's decision—expected in early 2018—could significantly alter the landscape of multi-claimant employment litigation more than any other development in recent memory. Employers should start preparing now.*

Whether for claims of discrimination, ERISA violations, or, most frequently, wage-hour violations, employers have faced an increasing number of employment lawsuits brought as class or collective actions, and have spent more and more to defend and settle them. As a result, some employers have enacted mandatory arbitration programs for their employees, with a key feature of the arbitration program being a waiver of the ability to participate in a class or collective action.

The Supreme Court's Embrace of the Federal Arbitration Act

Enforcing arbitration agreements with class waivers has been successful for the most part in recent years, at least with respect to arbitration programs that are carefully drafted to avoid state contract defenses such as claims of lack of consideration or procedural unconscionability. This is largely due to the U.S. Supreme Court steadily removing the most significant hurdles to enforcement of class waivers in arbitration agreements.

At first, many argued that a class waiver violates public policy. But in 2011, the Supreme Court made clear in *AT&T Mobility v. Concepcion* that California's *Discover Bank* rule that effectively barred enforcement of class action waivers in consumer arbitration contracts is preempted by the Federal Arbitration Act ("FAA"). Then, some tried to distinguish *Concepcion* by arguing that it merely elevated the federal FAA above state law, and that a class waiver of a federal claim cannot be enforced. But the Supreme Court rejected that argument in 2012 in *CompuCredit Corp. v. Greenwood* and held that arbitration agreements must be enforced according to their terms "even when federal statutory claims are at issue." Next, some argued that class waivers should not be enforced because if small claims cannot be pooled together in a class or collective action, then there is no way effectively to vindicate rights, especially where the costs to pursue individual claims exceeds the potential recovery. The Supreme Court rejected that theory too, in 2013, in *American Express Co. v. Italian Colors Restaurant.*

The net effect of these favorable rulings could have caused most employers to adopt arbitration programs with class waivers. Many held back, however. One reason is that, in the employment context, a significant hurdle remained to the enforcement of class waivers in arbitration agreements: the National Labor Relations Board ("NLRB") and its *D.R. Horton* decision in 2012.

The NLRB—and Some Circuit Courts—Fight Back

The NLRB's theory, first articulated in *D.R. Horton*, is that the pursuit of class or collective actions constitutes protected concerted activity under Section 7 of the National Labor Relations Act ("NLRA"). Just as Section 7 protects the right to form a union, picket, strike or engage in other concerted activities for mutual aid or protection, it also protects the right of employees to band together to participate in a class or collective action, or so has said the NLRB. The Fifth Circuit, however, refused to enforce the NRLB's decision, and shortly thereafter, the Second and Eighth Circuits rejected similar arguments premised on the NLRB's theory. Similarly, all but a handful of district courts rejected the *D.R. Horton* theory even while the NLRB continued to espouse it.

That changed in May 2016 when the Seventh Circuit issued its decision in *Lewis v. Epic Systems Corp*. There, the Seventh Circuit endorsed the theory that bringing a class or collective action (Lewis brought both) is a form of protected concerted activity under the NLRA, and that because of that, an arbitration agreement that requires a class waiver is illegal. Accordingly, said the Seventh Circuit panel, the arbitration agreement cannot be enforced under the saving clause of the FAA (the "saving clause" 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").[1] A few months later, in May 2016, the Ninth Circuit followed the Seventh in *Morris v. Ernst & Young* (as did the Sixth Circuit a year later in May 2017 in *NLRB v. Alternative Entertainment, Inc.*).

The Supreme Court Steps In to Tackle the Most Significant Employment Case in Years

Due to the circuit split, the Supreme Court granted *cert* to three case presenting the issue of whether an employer may require its employees to arbitrate all claims against it on an individual (*i.e.*, non-class) basis, despite the provisions of the NLRA: *Epic Systems Corp. v. Lewis* from the Seventh Circuit, *Ernst & Young v. Morris* from the Ninth Circuit, and *NLRB v. Murphy Oil Co.* out of the Fifth Circuit.

Oral argument will take place on October 2, the first day of the Supreme Court's term. Indeed, the three cases constitute the first matter the Court will take up that day. The Court does not announce when opinions will be issued, but it is expected that the decisions in these cases likely will be issued in January or February 2018.

A decision in favor of the plaintiffs and the NLRB likely would preclude enforcement of class waivers as to the vast majority of employment claims and would allow to continue, if not further amplify, the wave of collective and class actions that have plagued employers. Those groups of employees not covered by the NLRA, including supervisors and independent contractors, likely could be compelled to enter into class waivers, but all other employees would remain free to lead or participate in class or collective proceedings.

A decision in favor of the companies, however, probably would clear the last foreseeable hurdle to the enforcement of arbitration agreements containing a waiver of the ability to participate in a collective or class action. It is even possible that the Court's reasoning could allow for class waivers outside of an arbitration agreement, as the Fifth Circuit held earlier this year in *Convergys Corp. v. NLRB*.

A green light for class waivers in arbitration agreements thus likely would cause many employers to adopt arbitration programs with class waivers. Those waivers likely would be enforced by courts under a favorable Supreme Court decision, provided the waivers and the arbitration agreements are carefully drafted to comport with state contract laws.

1 Seyfarth Shaw LLP is counsel for Epic in the Lewis case at the district court, was counsel for Epic in the appellate court, and is co-counsel for Epic at the Supreme Court. The views expressed in this article are Seyfarth Shaw's and not necessarily those of Epic.

There are some narrow exceptions for certain claims or employees that would not be covered. For example, claims under California's Private Attorneys General Act ("PAGA") cannot be compelled to arbitration, and certain transportation workers are exempt from the FAA (though arbitration agreements potentially could be enforced as to them under state arbitration acts). Also, employees must remain free to file administrative charges, and lawsuits initiated by the EEOC or Department of Labor would be unaffected by arbitration agreements with class waivers. There also could be multi-claimant actions brought in different ways, such as the assertion of serial arbitration demands on behalf of dozens of employees at a time. But on the whole, a favorable Supreme Court decision could enable employers to largely avoid the employment class action epidemic.

"So Should Our Company Have One of These Arbitration Agreements?"

Because of the potential significance of the Court's ruling, the October 2 oral argument is likely to receive a lot of media attention over the next few weeks. Company executives are likely to ask their in-house lawyers and human resource professionals some variant of the following question: "I just read about this case about arbitration agreements and class waivers. Do we have that? Should we have that?"

The answer to that question, in the short term, probably is to wait and see how the Court rules, which should be within a few months. But if the Court rules in favor of employers, the answer still will vary from company to company, as an arbitration program may not be right for every employer even though it may free a company from the burdens of an expensive class or collection action. There are several other advantages to consider, but also several disadvantages.

On the one hand, companies that implement such an agreement could avoid runaway jury verdicts, reach decisions on the merits more quickly than is typical in court, and likely count on greater confidentiality given the non-public nature of arbitration proceedings. On the other hand, an arbitration agreement means that, for covered claims, employment disputes are before an arbitrator rather than a judge. Arbitrators often are less predictable than judges, usually disfavor motions to dismiss or summary judgment motions, and issue binding decisions from which there is often limited opportunity for appeal. Arbitrations also can be more expensive: arbitrator fees can be high and generally must be borne by the employer. Also, arbitrations more typically result in an evidentiary hearing (rather than ending by a dispositive motion), meaning that attorneys' fees for arbitrations may be higher as well. Finally, many companies are concerned that employees may perceive an arbitration program with a class waiver to be a takeaway, potentially leading to a drop in employee morale or even giving a boost to a union organizing effort.

In addition to the above considerations, drafting and implementing an arbitration agreement requires great care. For example, employers need to ensure that they not give a court any basis on which to find that the provisions of an arbitration agreement could be unconscionable. Thought must be given to what claims are covered (*e.g.*, should the agreement cover wage-hour claims but not discrimination claims?). Questions often arise about whether a mutual exchange of promises to arbitrate constitutes sufficient consideration, or whether consideration beyond continued employment must be provided in some states. Above all, a thoughtful communications plan must be prepared to minimize employee relations risks.

Although a ruling in these cases is not likely until early 2018, it is not too early to start thinking of next steps. Please join us for a webinar on October 4, 2017 at 1:00 p.m. Eastern, during which we will provide our analysis of the Court's oral argument, predict what employers may expect from the Court's ruling, and whether, when, and how employers should enact or modify their arbitration programs. Click here to register.

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