SEYFARTH SHAW

Management Alert

A Class Waiver Can Be A Condition of Employment

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Seyfarth Synopsis: *In one of the most significant employment cases in memory, a sharply divided United States Supreme Court held today that employers may require employees, as a condition of employment, to enter into arbitration agreements that contain waivers of the ability to participate in a class or collective action under various employment statutes.*

There is no longer any reason under the law why an employer cannot require its employees to waive the ability to bring a class or collective action under federal, state, and local employment laws.

While there are certain exceptions (explained below), the United States Supreme Court today removed the last potential legal barrier to the enforcement of class waivers in the employment sphere. In a 5-4 decision authored by Justice Neil Gorsuch, it held in three cases consolidated for review that requiring employees to agree to arbitration agreements with class waivers does not violate the National Labor Relations Act ("NLRA") and that such agreements are fully enforceable.

The only foreseeable barrier to enforcement of a class waiver would be federal legislation amending the Federal Arbitration Act ("FAA") or state legislation permitting private attorney general actions such as California's Private Attorneys General Act ("PAGA"). Employers who maintain mandatory arbitration programs with class waivers can be assured for the time being that those waivers provide a valid defense to a collective or class action. Employers who do not have such arbitration programs need to be aware of this significant development in the employment law landscape and at least consider whether an arbitration program with a class waiver is appropriate for them.

Be aware, however, that a class waiver in an arbitration program does not mean the end of all multi-claimant litigation. As those with operations in California know, employees who have entered into class waivers with their employers nevertheless may bring PAGA actions in that state. Likewise, agency-initiated actions are not impacted, leaving the Department of Labor and the Equal Employment Opportunity Commission free to pursue relief under the statutes they enforce on behalf of employees regardless of whether those employees have entered into class waivers. Meanwhile, some plaintiff-side attorneys have become skilled at bringing dozens of single-claimant arbitration matters against an employer at the same time, which might cost an employer more than defending a collective or class action in court.

An arbitration program with a class waiver isn't necessarily for every employer. But this ruling certainly will cause more employers to adopt arbitration programs with class waivers, and likely will reduce the number of class and collective actions employers face.

The Path Leading to the Decision

Beginning with its 2011 decision in *AT&T Mobility v. Concepcion*, the Supreme Court has blessed the validity and enforceability of class waivers in arbitration agreements. This was followed by decisions in *CompuCredit Corp. v. Greenwood* and *American Express Co. v. Italian Colors Restaurant*, where the Supreme Court forged jurisprudence that made class waivers seem unassailable in the commercial context. But because none of the cases involving class waivers before the Supreme Court were in the employment context, uncertainty existed as to whether class waivers in mandatory employment arbitration agreements were enforceable.

This uncertainty was amplified by the National Labor Relations Board's 2012 decision in *D.R. Horton*, which rejected workplace class waivers. In the Board's view, class waivers prevent employees from engaging in protected concerted activity in violation of Section 7 of the NLRA. The Board continued to press its view even after the Second, Fifth, and Eighth Circuits refused to enforce the rule. Then in 2016, the Seventh Circuit created a circuit split with its decision in Lewis v. Epic Systems Corp., which held that the right to bring a class or collective action is protected concerted activity under the NLRA, and that class waivers violate that right. The Sixth and Ninth Circuit followed the Seventh Circuit's reasoning, deepening the split.

The Supreme Court granted cert in three cases to resolve the issue of whether employers who require employees to arbitrate claims on an individual basis are preventing employees from engaging in protected concerted activity in violation of the NLRA. On October 2, 2017, the Supreme Court heard oral argument, and today it issued its decision in a split that is just as close as the circuit split below.

The Court's Reasoning

The Supreme Court began with the premise that the Federal Arbitration Act (FAA) is unequivocal in its mandate that courts enforce arbitration agreements. The Court's majority decision rejected the argument that the NLRA overrides that command by rendering a class waiver unlawful. In the majority's view, Section 7 of the NLRA does not create a right to pursue a collective or class action. Rather, Section 7 focuses on the right to organize unions and bargain collectively and does not mention class or collective action procedures, the majority reasoned.

Section 7's catch-all provision that employees must be permitted to engage in "other concerted activities for the purpose of . . . other mutual aid or protection" does not protect the right to participate in a class action because it only protects activities similar to those explicitly listed in Section 7 and thus reaches only to "things employees do for themselves in the course of exercising their right to free association in the workplace."

The majority supported its holding with other observations, including that: class and collective action procedures were "hardly known" in 1935 when the NLRA was passed; the NLRA states no rules on class or collective action, in contrast to the regulatory regime it imposes surrounding other concerted activities; and the collective action procedures under the Fair Labor Standards Act ("FLSA") -- the statute under which the employees' underlying causes of action arise -- is just like the collective action procedures under the Age Discrimination in Employment Act, which the Supreme Court previously has held does not prohibit mandatory individual arbitration.

At bottom, the Court's majority was unwilling to infer a Section 7 right to a class or collective action based on "vague terms or ancillary provisions" that would "dictate the particulars of dispute resolution procedures in Article III courts or arbitration proceedings--matters that are usually left to, *e.g.*, the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA."

The reasoning of the majority, as articulated by Justice Gorsuch, is broader than some expected. His majority opinion does not merely hold that between conflicting rights and interests of the FAA and NLRA, the FAA wins. Rather, the majority suggests that there may not be any Section 7 right to pursue a collective or class action in the first place. This raises the question of whether a collective or class action waiver that is *not* contained within an arbitration program may be enforceable.

The Dissent

As expected, Justices Ginsburg, Kagan, Sotomayor, and Breyer dissented in an opinion authored by Justice Ginsburg. The dissent focused on the circumstances that are unique to the employment context, including what Justice Ginsburg refers to as the "extreme imbalance once prevalent in our Nation's workplaces," and the reasons Congress enacted the NLRA in the first place, to "place employers and employees on more equal footing." Of paramount importance was the NLRA's recognition that an individual employee has unequal bargaining power against the employer, and that the right to engage in concerted activities levels the playing field.

In the dissent's view, class and collective actions qualify as concerted activities because in these actions, employees band together to improve their working conditions by holding employers accountable for violations of employment law.

What Should Employers Do

Employers will undoubtedly be asking: what does this decision mean for me? The answer depends on many factors, and like arbitration agreements themselves, there is no one answer that fits all.

For employers that already maintain a mandatory arbitration agreement with a class waiver, the Supreme Court's decision has minimal impact. A well-drafted agreement that does not overreach will be enforced. While there are no longer any barriers to enforcing mandatory class waivers, the Supreme Court's decision will not save a poorly drafted arbitration agreement. In many states, an arbitration agreement still can be found unenforceable if it is both procedurally and substantively unconscionable under state law principles. Some courts in some states may find that an arbitration agreement that is mandatory in nature is procedurally unconscionable, which makes it imperative that there is nothing in the arbitration agreement that can be substantively unconscionable.

Employers that have a voluntary arbitration agreement with a class waiver should consider whether making the arbitration program mandatory could yield additional benefits. If almost all employees participate in a voluntary arbitration program with a class waiver, the additional risk of a mandatory program – whether due to procedural unconscionability concerns or employee relations issues – may not outweigh the marginal benefit. But if the number of employees who opt out of or refuse to sign a voluntary arbitration agreement with a class waiver is higher than an employer is comfortable with, a mandatory program should be considered. This is particularly true for employers in the Ninth Circuit, which gave a hat-tip to the NLRA by permitting class waivers so long as employees could opt out of the arbitration agreement. An opt-out procedure, however, is no longer required in light of the Supreme Court's decision.

Employers that maintain arbitration programs without a class waiver should strongly consider revising their agreement to include a class waiver. An arbitration agreement without a class waiver leaves open the worst possible outcome, which is class arbitration. The potential exposure in any class action is too high to inject any uncertainty as to whether the parties intended to permit class arbitration or not. And an employer may want a court, rather than an arbitrator with potential financial incentive, to decide whether the parties intended to permit class arbitration. An express class waiver likely would avoid these issues. If an employer has an arbitration agreement already in place, there is now no reason to omit a class waiver.

For everyone else who has been waiting for the Supreme Court's decision before deciding what to do, there are various factors to consider. The threshold question is whether to even have an arbitration program. There are certainly many benefits to arbitration. These include quicker resolution of claims, more predictable outcomes compared to a jury, arguably lower attorneys' fees to take a case through completion in arbitration than in court, and greater chance of keeping the proceedings and outcome confidential.

But there also are numerous downsides to arbitration that employers have to consider. Arbitrator fees can be very significant, and in states like California, the employer must pay all of the arbitrator fees. Some plaintiffs' attorneys have resorted to filing a large number of individual arbitrations to make the arbitration process exorbitantly expensive for employers. Arbitrators also can be less likely to grant dispositive motions because they may feel a claimant has a right to take his or her claim through the evidentiary hearing (the equivalent of a trial in arbitration).

Another question is what the scope of the arbitration program should be. Given the costs associated with arbitration, some employers may want to limit an arbitration program to just wage and hour claims, which have the greatest likelihood of being brought as class claims. In addition, current federal and state legislative headwinds are pushing against mandatory arbitration of sexual harassment and other Title VII claims. Certain Department of Defense contractors have long been banned from imposing such agreements, and the State of New York recently passed legislation that seeks to prohibit private employers from requiring arbitration of sexual harassment claims. While state laws of this type are susceptible to preemption by the Federal Arbitration Act, federal bans have been proposed, and employers may wish to sidestep the controversy altogether by considering wage-hour only arbitration agreements. In this way, discrimination claims, which usually are brought on a single-plaintiff basis, could then be excluded from the arbitration program if the additional costs associated with arbitration exceed the confidentiality benefit of arbitration.

Employers considering implementing an arbitration program also need to be aware of the various exceptions. The FAA does not apply to certain employees, most notably transportation workers. In California, PAGA representative actions are not subject to class waivers and cannot be arbitrated. Complaints and charges filed with governmental agencies are not subject to arbitration agreements.

While there are many factors to consider, the Supreme Court's decision today assures employers that arbitration agreements with class waivers remain a valuable option for employers interested in reducing potential class and collective action exposure.

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