

One Minute Memo®



Supreme Court Agrees to Rule on Legality of Class Action Waivers

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Seyfarth Synopsis: *The U.S. Supreme Court has agreed to decide whether workplace arbitration agreements containing class and collective action waivers are enforceable under the FAA, notwithstanding the provisions of the NLRA.*

Earlier today, the United States Supreme Court granted and consolidated three petitions for certiorari, to consider whether employers can require employment-related disputes to be resolved through individual arbitration, and waive class and collective proceedings, are enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

Three circuits—the Second, Fifth, and Eighth—have concluded that agreements that waive class and collective proceedings, thus requiring that claims be arbitrated on an individual basis, are fully enforceable. Two circuits—the Seventh and Ninth Circuit—as well as the National Labor Relations Board, have concluded that waivers in mandatory arbitration programs are unenforceable because the waivers prevent employees from engaging in concerted activities under the National Labor Relations Act.

The National Labor Relations Board asked the Supreme Court to review and reverse the Fifth Circuit's ruling, in which the Court rejected the Board's position that such agreements unlawfully interfere with employees' NLRA rights to engage in concerted activity for their mutual aid or protection.

Two employers also asked the Supreme Court to review decisions by the Ninth and Seventh Circuits in which the courts found the class waivers to be unlawful. The U.S. Supreme Court has consolidated all three cases and oral argument likely will be held in March.

The U.S. Supreme Court has decided time and again that the Federal Arbitration Act strongly favors private resolution of disputes, and that agreements to arbitrate that include these waivers must be afforded great deference and should be enforced. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. —, 133 S. Ct. 2304 (2013). Because the Supreme Court has not directly addressed these agreements in the context of employment arbitration or considered whether Section 7 of the National Labor Relations Act prohibits such agreements, the courts have come to opposite conclusions.

This critically important question has significant implications for employers, in that identical contractual provisions might be considered lawful and enforceable within some circuits, but not in others. Employers, particularly multi-state employers utilizing uniform arbitration agreements across the country, have been grappling with the uncertainty of the efficacy of their arbitration agreements for years. Stay tuned.

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