An Epic Win for Employers: SCOTUS Upholds the Enforceability of Class Action Waivers in Arbitration Agreements

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In a long-awaited decision and a resounding victory for employers, the United States Supreme Court upheld, once more, the enforceability of mandatory class action waivers in employment agreements. In a 25-page majority opinion delivered by Justice Neil Gorsuch, and joined by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas and Samuel Alito, the Supreme Court ruled that the Federal Arbitration Act (FAA) directs that arbitration agreements be enforced according to their terms, including any provisions prohibiting collective litigation. Justice Gorsuch wrote that the policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it do so in the [National Labor Relations Act] – much less that it manifested a clear intention to displace the [FAA].

In a trilogy of consolidated cases, *Epic Systems Corp. v. Lewis* (7th Cir. 2016), *Ernest & Young LLP v. Morris* (9th Cir. 2016), and *NLRB v. Murphy Oil USA, Inc.* (5th Cir. 2015), the Court considered whether the National Labor Relations Act (NLRA) prohibits the enforcement of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than a collective, basis under the FAA. In each of these cases, the employers required that the employees sign arbitration agreements containing express class action waivers as a condition of their employment.

At issue in these cases was whether the NLRA prohibits the enforcement under the FAA of an agreement requiring an employee to arbitrate claims against an employer on a one-on-one, rather than on a class-wide, basis. On the one hand, the FAA provides that arbitration agreements shall be valid, irrevocable, and enforceable. On the other hand, the NLRA guarantees the right of employees to engage in concerted activities for their mutual aid or protection, and declares employer interference with this right to be an unfair

labor practice.

Adopting the relatively new position of the National Labor Relations Board (NLRB), the employees argued that the class action waivers they were required to sign by their employers interfered with their right to engage in concerted activity under the NLRA. The Fifth Circuit disagreed, finding the employer had not violated the NLRA by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing arbitration agreements with class action waivers. However, the Seventh and Ninth Circuits subsequently ruled the other way, finding that the filing of a class action lawsuit is protected concerted activity and prohibiting employees from bringing class-wide claims interfered with this right under the NLRA. The Supreme Court granted *certiorari* to resolve the circuit split.

The Majority and Minority Opinions

Building on a long line of decisions upholding the liberal federal policy favoring arbitration agreements, the Supreme Court once again reiterated that the FAA requires courts to respect and enforce agreements to arbitrate, along with the procedures agreed to by the parties. The conservative majority noted that the FAA and the NLRA have coexisted for decades without conflict until recent years. Highlighting that the NLRA does not even mention class or collective action procedures, the Court found that the statute is focused on the right of employees to organize unions and bargain collectively and that it is unlikely that Congress intended to confer a right to class or collective actions when the statute was adopted in 1935. In the absence of clear legislative intent to the contrary, the Court found that the NLRA does not displace the FAA or otherwise prohibit individualized arbitration proceedings. Because the Court concluded that it could read the FAA and the NLRA in harmony, it reversed the judgments in and remanded for further proceedings *Epic* and *Ernst & Young*, and affirmed the judgment in *Murphy Oil*.

Breaking along party lines, the four liberal Justices, led by Justice Ruth Bader Ginsburg, all joined in dissent. In a 30-page dissenting opinion, Justice Ginsburg construed the history, text, and purpose of the NLRA as safeguarding the rights of employees to band together to match employers' clout and superior strength in establishing the terms and conditions of employment. Describing the majority's decision as egregiously wrong and destructive, Justice Ginsburg wrote that the Court's holding will result in the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. Justice Ginsburg called on Congress to act urgently to correct the Court's elevation of the FAA over workers' rights to act in concert.

While a decisive win for employers, the Supreme Court's decision will simply preserve the status quo in wage and hour litigation. The Court's decision once again reaffirms the ability of employers to avoid costly class action lawsuits by requiring employees to sign arbitration agreements containing class action waivers as a condition of employment.

Whether the Court's decision will have any effect on discrimination class actions, brought under disparate-impact or pattern-or-practice theories, remains to be seen. The decision may also undermine legislative attempts on a federal and state level to foreclose the arbitration of sexual harassment and sex discrimination cases.

California's Private Attorneys General Act

Notably, in California, in the absence of the class action device, employers can expect an increase in employees filing representative actions under the Private Attorneys General Act of 2004 (PAGA). PAGA deputizes claimants to stand in the shoes of the attorney general and seek civil penalties (not damages) for violations of the California Labor Code, on behalf of themselves, other similarly aggrieved employees, and the State. In 2014, the California Supreme Court held that PAGA claims are not subject to arbitration because, in part, they seek redress on behalf of the State of California, which is not in privity of contract with employers. The United States Supreme Court has, to date, declined to address the California Supreme Court's ruling.

Other states are attempting to follow California's lead and implement their own private attorneys' general bills; e.g., New York, Vermont, Connecticut, Illinois, and Oregon. Moreover, there have been recent efforts to challenge California's PAGA. Thus, it remains to be seen whether PAGA-type representative actions will survive.

Next Steps for Employers

Employers that already have mandatory arbitration agreements in place should review those agreements to ensure they meet state requirements regarding procedural and substantive conscionability, and include an appropriate and enforceable class action waiver. Employers who do not have arbitration agreements in place, or are using agreements without express class action waivers, should consult with knowledgeable counsel about the potential advantages and disadvantages of such agreements and waivers, and appropriate provisions to ensure enforceability. Given the #MeToo Movement and related pending legislation, consideration should also be given to the scope of arbitration agreements, including whether discrimination and harassment claims should be excluded.