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Mandatory Waiver of Employee Class Actions Up for Supreme Court Review

January 30, 2017

Employers will soon have much more clarity on how far they can go to require employees to sign binding arbitration agreements that prohibit employees from participating in class action lawsuits against their employers.

Earlier this month, the U.S. Supreme Court agreed to review a set of appellate court decisions that have split on the issue of whether class action (and collective action) waivers in employment agreement arbitration clauses violate the National Labor Relations Act ("NLRA"). The cases are captioned *National Labor Relations Board v. Murphy Oil USA*, *Epic Systems Corp. v. Lewis*, and *Ernst & Young LLP v. Morris*.

Most courts over the past decade have ruled that the Federal Arbitration Act, and supporting decisions by the Supreme Court, gave employers great leeway to mandate that employees agree to arbitrate all disputes as a way of avoiding the expense and uncertainty of court litigation. The Federal Arbitration Act provides that written contracts to arbitrate a dispute generally shall be "valid, irrevocable, and enforceable," except when there are grounds "at law or in equity" to revoke such an agreement.

Following the Federal Arbitration Act's support of arbitration of employment disputes, many employers expanded their employees' binding arbitration clauses to include provisions that prohibit participation in any class or collective action lawsuits. This has been an effective tool for employers to fight back against the recent boom in class action overtime and discrimination litigation, which, in some cases, has mushroomed into lawsuits involving thousands of employees and tens of millions of dollars in damages and settlement payments. Encouraged by the success of such provisions, many employers expanded the prohibitions even further, to preclude any type of "collective" action in employment disputes, requiring instead that employees must arbitrate their disputes on an individual basis only.

Such class action and collective action waivers have been approved by the Supreme Court in *non-employment* contexts, such as consumer goods and services contracts, in which the purchasers of goods or services agree not to participate in class or collective actions against the seller, but, instead, agree to arbitrate their individual claims.

The employment agreements, however, will be reviewed by the Supreme Court against a more complicated legal backdrop: the NLRA has provided since 1935 that employees have the right to form unions, bargain collectively, and, importantly here, "to engage in other concerted activities for the purpose of . . . mutual aid or protection." These "Section 7 rights" of employees to engage in "concerted activities" have long been interpreted by the Supreme Court to nullify contracts that require employees to renounce such rights.

So, the basic question before the Supreme Court now is whether binding arbitration clauses that include a waiver of the right to bring a class action or collective action violate the NLRA's mandate that employees be free to engage in "concerted activities" with other employees. In the *Epic Systems* decision, the Seventh Circuit Court of Appeals held that the provision did impermissibly violate the NLRA, noting that the Supreme Court has previously ruled that the use of administrative and judicial forums is a protected concerted activity, and that other courts have held that participation in a collective or class action lawsuit is a protected concerted activity. The Ninth Circuit Court of Appeals agreed with this argument in the *Ernst & Young* case. The Fifth Circuit disagreed in the *Murphy Oil USA* decision, and an earlier *D.R. Horton, Inc. v. NLRB* ruling.

From our review, there certainly is no question that an employer can require its employees to arbitrate their disputes, pursuant to the Federal Arbitration Act and prior Supreme Court rulings. At issue now is the second part of the contract clauses at issue, which requires that employees only arbitrate their claims individually, and not through any collective or class action process.

It is difficult and dangerous to predict what the Supreme Court will do with these cases, especially with the likelihood that the ninth Justice to decide the matter soon will be appointed by newly elected President Trump, who is undeniably pro-business.

As a result, employers that have such mandatory arbitration/class action waiver clauses in their employment agreements must understand that those provisions may soon be nullified or limited, requiring new agreements in the future. In addition, employers contemplating imposing such restrictions on employees in the next few months should consider whether they want to take the risk that the Supreme Court will uphold the clauses under the Federal Arbitration Act, or consider more limited provisions that do not run afoul of the NLRA.

We will update readers once the Supreme Court renders a decision – expected later this year – but, in the meantime, we offer these options to consider:

- Instead of barring any type of collective action, employers should consider clauses that require all collective actions to be brought in arbitration. This would avoid conflicts with the NLRA and, in our experience, greatly reduce the risk and liability of large class actions or collective actions by employees, as most plaintiffs' lawyers disfavor arbitration.
- Require that each employee participating in an arbitration, individually or collectively, must voluntarily "opt in" to such a dispute with a written certification, and that state and federal procedural rules as to class and collective actions and notice shall not apply. This is a procedural restriction, not a substantive one, and thus has a much greater chance of surviving court scrutiny, even under the *Epic Systems* analysis. Such a clause will protect an employer against state and federal class action rules and written notice and disclosure requirements, which often add significant expense to class action cases and spawn extensive expansion of a single employee's litigation to hundreds or thousands of employees who otherwise would not voluntarily participate.
- Provide a savings clause in employment agreements stating that if any portion of the restriction is deemed unlawful, then the remainder of the agreement shall remain enforceable.

- Instruct your employment counsel to schedule a review of such clauses in your employment agreements once the Supreme Court has issued its decision. If you don't have such clauses, that will be the perfect time to add them, with Supreme Court guidance hot off the presses. If you do have them, that will also be the perfect time to decide whether revision is needed.

If you have any questions about these proposed changes in the law, and how they could affect you or your business, please contact us.