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United States Supreme Court Holds Class Waivers in Arbitration Agreements are Lawful

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On May 21, 2018, the United States Supreme Court issued an opinion on a trio of cases challenging employer enforcement of arbitration agreements with class-action waivers. The Court held that the Federal Arbitration Act (FAA) allows enforcement of arbitration agreements limiting proceedings to an individual basis only, and barring class proceedings, and that the Arbitration Act's savings clause and the National Labor Relations Act (NLRA) did not prevent this enforcement. The opinion is available ***here***.

Each of the three underlying cases[1] arose when an employee signed an arbitration agreement that prohibited bringing collective claims in court and later sued the employer for wages allegedly due to that employee and alleged similarly situated employees subject to the same pay practices. In each case, the employer moved to dismiss the case based on the arbitration agreement prohibiting class claims.

Five Justice Majority Holds Class Waivers in Arbitration Agreements are Lawful

The majority opinion, authored by Justice Neil Gorsuch, concluded that prior agreements between an employee and employer to arbitrate disputes individually and forego collective remedy were binding. As the Supreme Court has done with almost universal consistency in the past, this week's decision applied the strong federal presumption in favor of arbitration to determine that the agreements were valid. The *Epic Systems* holding resolves a circuit split between the Second, Fifth, and Eighth Circuits (finding the agreements with class waivers enforceable) and the Sixth, Seventh, and Ninth Circuits (finding these agreements unenforceable).

Advocates for the employees argued that the National Labor Relations Board (NLRB) was correct in its position that Section 7 of the NLRA, which prohibits employers from interfering with employees' rights to participate in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," extended to the present situation – preventing employers from requiring employees to waive their ability to engage in class action as a condition to employment. 29 U.S.C. § 157. While the FAA affords arbitration agreements a presumption of validity, the Act includes an exception when "grounds… exist at law… for the revocation of any contract." 9 U.S.C. § 2. Collective bargaining supporters argued that the apparent conflict with the NLRA was just such a ground for nullifying the class action waiver.

Justice Gorsuch's opinion found no conflict between the operation of the FAA and the NLRA Section 7, finding Section 7's effect did not extend to prohibit waivers of class action and

commitments to arbitrate employment disputes individually. The Justice noted the two statutes had coexisted for over 75 years before the NLRB issued its new conclusion that the NLRA effectively nullified the FAA in 2012. In the wake of the NLRB's new interpretation prohibiting class waivers in arbitration agreements, a split emerged in the federal Courts of Appeals over whether such waivers were enforceable. An unusual split also appeared in the executive branch when the Trump Administration's Deputy Solicitor General adopted the position that the waivers were enforceable. Left with the choice of selecting between competing briefs from the executive branch, one from the NLRB and another from the Solicitor General's office, the Court determined no argument for deference to the politically accountable body existed "when the Executive speaks from both sides of its mouth."

Justice Ruth Bader Ginsberg provided a forceful thirty-page dissent – five pages longer than the majority opinion – joined by Justices Kagan, Sotomayor, and Breyer. In her dissent, Justice Ginsberg urged Congress to remedy the Supreme Court's decision to elevate the FAA over statutes safeguarding workers' collective rights. According to the dissent's historical analysis, class action litigation is precisely the sort of concerted action the NLRA was designed to protect, and the original legislative purpose behind the FAA did not intend to apply the arbitration mandate to employment contracts. While Justice Ginsberg argued the Court had "taken many wrong turns" in recent FAA analysis, her interpretation of those decisions did not compel the conclusion the majority opinion reached.

Court Acknowledges Public Policy Concerns

The Court both began and ended its opinion by expressing concern about the effect of class-action waivers, opening by saying "As a matter of policy these questions are surely debatable" and ending by reasserting that "The policy may be debatable but the law is clear." Based upon the Court's signal, it is possible that Congress could enact legislation designed to limit or reverse the Court's decision.

Considerations for Arbitration Agreements

Employers should review whether or not to require employees to sign arbitration agreements and, where applicable, review the language in these agreements.

The Supreme Court will hear next term another arbitration agreement case, *Lamps Plus, Inc. v. Varela*, which focuses on whether class arbitration is required when the agreement uses only general language regarding arbitration. Should employers desire to prohibit class-action litigation through arbitration agreements, they should ensure that the agreements are carefully and clearly worded to inform employees of the class-action waiver. Further, implications under state laws prohibiting arbitration of certain types of claims – for example, New York's newly signed law prohibiting mandatory arbitration of sexual harassment claims (effective July 2018) – will require consideration of whether federal law preempts (overrides) state law.

Bracewell attorneys are available to assist you with assessing the pros and cons of arbitration agreements for your business and in drafting arbitration agreements that achieve your business goals.

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[1] *Epic Systems Corp. v. Lewis*, *823 F.3d 1147* (7th Cir. 2016) (No. 16-285) cert. granted (U.S. Jan. 13, 2017) (No. 16-300); *NLRB v. Murphy Oil USA Inc.*, 808 F.3d 1013 (5th Cir. 2015) (No. 16-307);

and *Ernst & Young LLP et al. v. Stephen Morris et al.*, 834 F.3d 975 (7th Cir. 2016)).