Supreme Court Upholds Class Action Arbitration Waivers

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On May 21, 2018, the U.S. Supreme Court issued its much-anticipated decision addressing whether employers can include class action waivers in mandatory arbitration agreements that employers often require their employees to sign as a condition of employment. Such waivers require employees to arbitrate employment claims against the employer individually, rather than as a class action or other joint arbitration. Such waivers had been challenged as violating employees' right to engage in concerted activities under federal labor law. In a 5-4 decision, however, the Court ruled that such agreements do not violate federal labor law and are enforceable.

The Court's decision stems from a trilogy of cases (*Epic Systems Corp. v. Lewis*; *Ernst & Young LLP et al. v. Morris et al.*; and *National Labor Relations Board v. Murphy Oil USA, Inc., et al*) before the Court regarding the viability of class action waivers in mandatory arbitration agreements. In *Murphy Oil*, the National Labor Relations Board (NLRB) held that class action waivers violated employees' rights under Section 7 of the National Labor Relations Act (NLRA), which guarantees employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." According to the NLRB, class actions are a form of protected "concerted activity," and employees could not be required to forego that litigation remedy unless provided an equivalent alternative in the form of class-action arbitration.

On appeal, the Fifth Circuit disagreed and overturned the Board, finding that the Federal Arbitration Act (FAA) mandated that these class-action arbitration waivers be upheld. The FAA provides that arbitration acts will be generally enforceable unless there are "grounds as exist at law or in equity for the revocation of any contract." However, in the *Epic Systems* and *Ernst & Young* cases, the Seventh and Ninth Circuits agreed with the NLRB that the NLRA protection of concerted activity, including class and collective actions, took precedence over the FAA. The Court's decision resolved that split among the Fifth, Seventh and Ninth Circuits.

In reviewing the three decisions, the Court found that the FAA's clear provisions favoring arbitration agreements outweighed the NLRA's protections for "concerted activity." The Court held that the NLRA's language protecting "concerted activity" did not demonstrate "a clear and manifest congressional command to displace the [FAA] and outlaw agreements" that required individualized arbitration of employment claims. Because Section 7 does not mention class or collective actions explicitly but rather focuses on the right to organize and bargain collectively, the Court held that class actions were not a form of "concerted activity" protected by Section 7. Therefore, the NLRA could not be used to invalidate waivers of class-action arbitration that would otherwise be valid and enforceable under the FAA.

The Court's decision is significant in two regards. First, given the Court's approval of class action waivers, it is expected that more employers will include such provisions in their mandatory arbitration agreements, resulting in fewer class action and collective lawsuits against employers. Second, the decision adopts a narrow definition of "concerted activity" that arguably permits employers to prohibit other employee conduct that is not directly oriented towards collective bargaining or union organizing, such as employees' use of social media to complain about their employer. In the meantime, employers should review any arbitration agreements they have with employees and strongly consider revising them to include waiver of class action arbitration.

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