The Attack on Class-Action Waivers in Employment Arbitration Agreements

By Sara D. Kula

No company wants to face a wage and hour class action.[1] They are disruptive, time-consuming and costly. But the risk is real. Of course, to reduce the risk of a wage and hour class action you should ensure that your company is in compliance with the numerous applicable federal, state, and sometimes even local, wage laws. But, unfortunately, that is not always enough. A rogue manager may decide to edit employees' time-cards to save money on overtime costs. Or a group of workers may claim that they weren't actually permitted to take that meal break you've been deducting time for. Or a legitimate dispute may arise concerning whether your assistant managers really are "managers" exempt from overtime after all.

With these risks in mind, more and more employers have turned to arbitration agreements with class-action waivers. These agreements are often included in new-hire paperwork and considered a condition of employment. They require employees to pursue any and all claims that may arise against the employer in arbitration on an individual basis, meaning that the employee waives his or her right to pursue any claims against the employer in court, before a jury, and as part of a class action.

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But are mandatory arbitration agreements enforceable? Well, it depends.

Enforceability of Arbitration Agreements with Class Action Waivers

Here in New York, the answer is yes—the Second Circuit has held that class-action waivers in employment arbitration agreements are enforceable.[2] But for employers with employees in other states, the answer may vary. The circuit courts are split on this issue, creating confusion and administrative headaches for many multi-state employers.

For better or worse, clarity is coming. On January 13, 2017, the Supreme Court granted the petitions for writ of certiorari in three cases that it will review together to determine whether class-action waivers in arbitration agreements are lawful. The central issue before the Court is whether arbitration agreements with class action waivers are prohibited as an unfair labor practice under the National Labor Relations Act (NLRA or the "Act"). Typically, when we think of the NLRA, we think of unionized employees. However, Section 7 of the Act protects the rights of all employees, whether unionized or not, to engage in "concerted activities for the purpose of…mutual aid or protection."[3] And Section 8 of the Act provides that it is an "unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."[4]

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In recent years, the National Labor Relations Board (the "Board") has acted aggressively in scrutinizing routine employer policies for interference with employees' right to engage in protected concerted activity—attacking, for instance, employers' confidentiality policies, social media policies, and policies regarding the use of company logos and trademarks. In addition, the Board has taken the position that requiring employees to sign an arbitration agreement with a class-action waiver is a violation of the Act.

In 2012, the Board determined that "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA," and that an individual who files a class action regarding wages, hours or other working conditions is clearly seeking to initiate or induce group action, which is conduct protected by Section 7.[5] Thus, the Board concluded, a mandatory arbitration agreement which bars employees from exercising their Section 7 rights to proceed collectively constitutes an unfair labor practice.

On appeal, the Fifth Circuit disagreed. In 2013, the Fifth Circuit held that adjudicating a claim collectively is not a substantive right protected by the NLRA, and that the Board's interpretation of the Act impermissibly conflicts with the Federal Arbitration Act (FAA), which establishes a liberal federal policy favoring arbitration agreements.[6] Two years later, the Fifth Circuit reiterated

this conclusion in *Murphy Oil USA, Inc. v. National Labor Relations Board*,[7] which is one of the three cases that will be heard by the U.S. Supreme Court.

Like the Fifth Circuit, the Second and Eighth Circuits have also held that arbitration agreements with class action waivers are enforceable. The Seventh and Ninth Circuits, however, have adopted the Board's position that such agreements are a violation of the NLRA.[8] The appeals arising from the Seventh and Ninth Circuits are the other two cases that will be heard by the U.S. Supreme Court along with *Murphy Oil*.

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Applying deference to the Board's interpretation of the NLRA, the Seventh and Ninth Circuits concluded that the Act does prohibit employers from requiring employees to waive their right to pursue claims collectively. In addition, these courts found no conflict between the NLRA and the FAA because the FAA includes a savings clause, which provides that arbitration agreements are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[9] Because, the courts reasoned, the FAA does not mandate enforcement of illegal agreements and because mandatory arbitration provisions are illegal under the NLRA, the FAA does not mandate the enforcement of the unlawful arbitration provisions.

What Now?

It is now before the Supreme Court to decide the circuit split. However, the Supreme Court will not hear the matter until its 2017 term, which begins in October. It is believed that the delay was, at least in part, so that the case can be heard by a full nine-Justice court and to avoid the possibility of a four-four split. Now that President Trump's nominee, Neil Gorsuch, has been confirmed, the delay may favor employers. Of course, we can only guess what Justice Gorsuch's decision on this matter will be, but we do know that Justice Gorsuch has authored opinions in which he demonstrates a commitment to enforcing the FAA's preference for arbitration, and a skepticism regarding deference to interpretations of laws by administrative agencies.

In the meantime, the Office of the General Counsel for the Board has directed its Regions to attempt to enter into informal settlement agreements with employers charged with maintaining and/or enforcing unlawful arbitration agreements, with the settlements conditioned on the Board prevailing before the Supreme Court. If an employer is unwilling to settle, Regions are directed to go forward on those cases found to have merit. In situations involving arbitration agreements with opt-in or opt-out clauses, or where some other feature of the arbitration agreement renders it distinguishable from those found unlawful by the Board, Regions are directed to hold such cases in abeyance.[10]

Takeaways for Employers

You may be wondering, what does all of this mean for me and my company? If your company and employees are based in New York, or anywhere in the Second, Fifth or Eighth Circuits, arbitration agreements with class action waivers remain enforceable. If you are located in the Seventh or Ninth Circuits, you should revise your arbitration agreements while the legality issue remains outstanding. For instance, including a provision whereby employees can opt-out of the arbitration requirement within a certain amount of time can save the enforceability of the arbitration agreements for those who don't take advantage of the opt-out provision. In addition, any arbitration agreement should make clear that it does not restrict an employee's right to file claims with the National Labor Relations Board. It is always a good idea to have an experienced employment law attorney review your arbitration agreement.

We will also have to wait and watch what happens with the Board under the Trump administration. There are currently two vacant seats on the Board, which Trump will be filling.[11] This is expected to result in a pro-business majority that may lead to a shift in the Board's interpretation of the law concerning class-action waivers, among other things.

At the very least, we can expect an interesting few years ahead for employers, who should watch closely as the legal landscape for employment law continues to shift.

Endnotes

1. In this article, the term "class action" refers to both opt-out class actions under Federal Rule of Civil Procedure 23 and opt-in collective actions under the Fair Labor Standards Act, 9 U.S.C. § 216(b).
2. *Sutherland v. Ernst & Young LLP*, 726 F. 3d 290 (2d Cir. 2013); *Patterson v. Raymours Furniture Co., Inc.*, No. 15-2820-cv (2d. Cir. Sept. 2, 2016).
3. 29 U.S.C. § 157.
4. 29 U.S.C. § 158.
5. *D.R. Horton Inc.*, 357 NLRB No. 184 (2012).
6. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).
7. 808 F.3d 1013 (5th Cir. 2015).
8. *Lewis v. Epic Systems, Inc.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016).
9. 9 U.S.C. § 2.
10. NLRB Office of General Counsel Memorandum re: Impact on pending cases due to Supreme Court's grant of certiori in *NLRB v. Murphy Oil USA*, available at https://www.nlrb.gov/reports-guidance/operations-management-memos.
11. Please note that this article was submitted in April 2017 and the seats may have been filled by the publication date.