May 23, 2018

Supreme Court Upholds Class Waiver Provisions in Employee Arbitration Agreements

Arbitration generally provides a more speedy and less costly means of resolving disputes. However, those benefits can be lost when a party is confronted with an arbitration involving a class or collective proceeding. In order to preserve the advantages of one-on-one arbitration, some businesses and employers have included class and collective action waiver provisions in their arbitration agreements with customers and employees, requiring individualized arbitration proceedings in the event of a dispute. On May 21, the U.S. Supreme Court held in *Epic Systems Corp. v. Lewis*[1] that such class and collective waiver provisions are enforceable in the context of workplace agreements. The Court found that such waivers do not violate the National Labor Relations Act (NLRA), which provides employees the right to engage in protected, concerted activity. In doing so, the Court continued its recent line of opinions strictly construing the mandate set forth in the Federal Arbitration Act (FAA).[2] The decision is likely to significantly curtail collective and class actions asserting claims under the Fair Labor Standards Act (FLSA).

The Court's decision arose in the context of three consolidated matters, arising from a circuit split[3] that originated from a 2012 decision by the National Labor Relations Board (NLRB) in *D.R. Horton*, 357 NLRB No. 184 (2012). In that matter, the NLRB found that employers violate the NLRA if they force employees to sign arbitration agreements containing class and collective action waivers as a condition of employment.

Each of the three consolidated matters before the Court posed the question of whether employment contracts containing individual arbitration provisions should be enforced in light of the employees' claims that such provisions are illegal under the NLRA. For example, in one of the cases, a junior accountant entered into an employment agreement which provided that claims "pertaining to different [e]mployees [are to] be heard in separate proceedings." Nonetheless, after his employment terminated, he commenced a collective action in federal court alleging that the employer violated the FLSA when it classified junior accountants as professional employees and paid them a fixed salary rather than overtime. The employer moved to compel arbitration of the employee's individual claim, which the trial court granted.

The Ninth Circuit reversed. It held that under the "savings clause" in the FAA, which permits arbitration agreements to be invalidated by generally applicable contract defenses such as fraud, duress or unconscionability, the employee's individual arbitration clause should not be enforced. The Ninth Circuit concluded that the NLRA's protection of employees' rights to engage in "concerted activities" would be violated by enforcement of the arbitration provision.

Justice Gorsuch, writing for a 5-4 majority of the Supreme Court, rejected the Ninth Circuit's reasoning. In his opinion, Justice Gorsuch concluded that there was no conflict between the FAA's requirement to enforce arbitration agreements and Section 7 of the NLRA, which protects certain concerted employee activities. Instead, the majority concluded that the NLRA only protects unionization and collective bargaining activities and does not even address any perceived right to participate in class or collective actions. The opinion acknowledged that, as a policy matter, there is room to debate whether employees should be granted the right to participate in class or collective actions. However, as a matter of law, "the answer is clear. ... This Court never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board."

Justice Ginsburg wrote the dissenting opinion. She likened arbitration clauses mandating individualized proceedings to "yellow dog" contracts, which were used historically to compel employees to agree not to join labor unions. According to the

minority, although the NLRA is primarily focused on protecting workers' rights to join unions and engage in collective bargaining, "the statute speaks more embracingly."

The Supreme Court's decision will be welcome news for many employers. The case allows employers to avoid class and collective proceedings, which often lead to increased defense costs and result in higher settlements and awards by virtue of larger pools of claimants, many of whom would not have brought claims but for their ability to join in a class or collective proceeding. However, arbitration agreements are still subject to challenge under traditional contract principles and, as such, should be reviewed by legal counsel. Because requiring current employees to sign arbitration agreements may lead employees to question what rights they are giving up and may spark or strengthen union organizing efforts, employers also should strategize rollout of any new or amended arbitration agreements with legal counsel, who can provide guidance on a method of rollout that will cause the least workforce disruption.

---

[1] 584 U.S. ___ (2018) (slip op. May 21, 2018).

[2] For example, in *AT&T Mobility, LLC v. Concepcion,* 563 U.S. 333 (2011), the Supreme Court rejected a challenge to class action waivers on the grounds of unconscionability in the context of a consumer contract.

[3] *See, e.g., D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (holding that class and collective action waivers did not violate the NLRA); *Lewis v. Epic Systems Corp*., 823 F.3d 1147 (7th Cir. 2016) (holding that arbitration agreements that prohibit employees from bringing or participating in class or collective actions violated the NLRA).

Authors



Elizabeth J. Sher
Partner and General Counsel

Parsippany, NJ | (973) 966-8214

esher@daypitney.com



Glenn W. Dowd
Partner

Hartford, CT | (860) 275-0570

gwdowd@daypitney.com



Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



James M. Leva
Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com