

MAY 21, 2018 | DISCRIMINATION, HARASSMENT & RETALIATION

SCOTUS Approves Class Action Waivers in Employment Arbitration Agreements

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The U.S. Supreme Court [ruled](#) on Monday that class/collective action waiver clauses in employment agreements that compel employees to settle disputes individually with a third-party arbitrator are enforceable. In a landmark 5-4 ruling, the Justices in the majority rejected the National Labor Relations Board's position and held that a class/collective action waiver in an arbitration agreement – which effectively prohibit employees from joining together in a class or collective action lawsuit to settle disputes – do not violate the Federal Arbitration Act ("FAA") or the National Labor Relations Act ("NLRA").

Background

Arbitration agreements – requiring employees to submit claims to an arbitrator instead of filing in court – are relatively common in the workplace. Many employers favor arbitration because it tends to lower the cost of litigation and streamlines a resolution.

The legal issue that percolated through the federal Courts of Appeals over the past several years was whether a class/collective action waiver in an arbitration agreement is enforceable. An arbitration agreement that includes a class/collective action waiver benefits an employer because it prevents employees from banding together to file costly class or collective actions and it forces employees to utilize the arbitration process rather than filing a lawsuit. Thus, the only form of redress for an employee is a single action that must be worked out before a neutral, third-party arbitrator.

Over the past five years, the Courts of Appeals issued conflicting opinions on whether class action waivers are enforceable. Notably, between 2013 and 2014, employers were provided favorable opinions from the U.S. Courts of Appeals for the Fifth, Second, and Eleventh Circuit which concluded that the NLRA does not invalidate class action waivers in arbitration agreements. In contrast, in 2016, the U.S. Courts of Appeals for the Ninth and Seventh Circuit adopted the NLRB's position that class and collective action waivers violate Section 7 of the NLRA.

The Supreme Court's Decision

The Supreme Court's ruling brings finality to an issue that sparked years of debate and caused significant

uncertainty for employers. Oral arguments took place in October 2017 with the justices appearing split along ideological lines – except for Justices Clarence Thomas and Neil Gorsuch who did not speak at all during the session. Interestingly, however, it was Justice Gorsuch who wrote the opinion – which was his first major opinion since joining the Court last spring.

As alluded to in our [prior blog post](#), President Trump's ability to fill Justice Scalia's vacancy was ultimately a deciding factor in what appears to have been a partisan showdown. Speaking for the conservative wing on the bench, Justice Gorsuch explained that the law is clear that Congress in enacting the FAA instructed federal courts to enforce arbitration as written, including those terms calling for individualized proceedings, and that the "decision does nothing to override" what Congress has done. In a lengthy dissent, Justice Ginsburg criticized the majority for overturning 80 years of NLRB precedent. Justice Ginsburg commented that the majority's decision is "egregiously wrong" and expressed concerns that many employees with small claims, such as minimum wage and overtime violations, will be disinclined to pursue potential claims individually.

The expected fall-out and the future of this ruling now rests with Congress. Congress certainly has the ability to revise the FAA and the NLRA through legislation. Given the deep split amongst party lines, however, it is unlikely that Congress will act any time soon.

Take Aways for Employers

In light of the Court's decision, employers should immediately review their practices and policies governing employment agreements with arbitration clauses. For those employers who do not require arbitration of disputes, now may be the time to reconsider whether to implement such an agreement with current employees. For those employers who have arbitration agreements in place already, now is the time to ensure the agreement contains an enforceable class/collective action waiver, especially for wage and hour disputes. Employers may want to evaluate whether to restrict class/collection actions for other types of disputes, such as discrimination or harassment cases. Importantly, any arbitration agreement must be drafted with the company culture in mind.

In short, employers now have the ability to utilize a new forum to resolve legal disputes on an individual basis. In some circumstances, especially for class/collection claims, an arbitration may be less expensive than lawsuits, take less time, and do not typically result in years of appeals. Ultimately, the Supreme Court's decision is welcome news for employers. Employers can proactively mitigate litigation risk through carefully drafted employment agreements and more effectively manage legal disputes.