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U.S. Supreme Court to Decide Validity of Class Action Waivers

Circuit Split on Class Action Waivers

The U.S. Supreme Court has agreed to review the validity of class action waiver clauses in employment arbitration agreements to resolve a conflict among the federal appellate courts. As our firm has explained in prior blog posts, the U.S. Court of Appeals for the Ninth Circuit – the federal appellate court for the Western United States – has concluded in *Morris v. Ernst & Young, LLP* that a company violates the National Labor Relations Act (NLRA) by requiring employees to sign agreements precluding them from bringing class actions or other collective actions regarding their wages, hours, or other terms and conditions of employment. The U.S. Court of Appeals for the Fifth Circuit in *NLRB v. Murphy Oil USA, Inc.* has concluded to the contrary that the NLRA does not invalidate collective action waivers in arbitration agreements, and the U.S. Court of Appeals for the Seventh Circuit in *Epic Systems Corp v. Lewis* has agreed with the Ninth Circuit's position. The Supreme Court has granted review in all three cases and consolidated the appeals because they raise an identical issue.

Given the current eight-member configuration of the Supreme Court, it is uncertain whether the Court's review will put this matter to rest. In *DIRECTV, Inc. v. Imburgia*, the Court held that class action waivers contained in commercial arbitration agreements are enforceable under the Federal Arbitration Act. The Supreme Court has not waded into the enforceability of employment class action waivers under the NLRA.

Will the Decision Hinge on President Trump Filling the Ninth Seat?

If President Trump can seat another justice to fill Justice Scalia's vacancy, the Court may very well have the majority votes to enforce class action waivers in the employment context. This matter is of critical importance to the business community given the prevalence of class action waiver clauses in employment agreements to combat costly, disruptive class action lawsuits.

President Trump has stated that his Supreme Court nominee will be announced on February 2, and the current frontrunners are reportedly Neil Gorsuch, a judge on the Denver-based U.S. Court of Appeals for the Tenth Circuit; Thomas Hardiman, who serves on the Philadelphia-based U.S. Court of Appeals for the Third Circuit; and William Pryor, a judge on the Atlanta-based U.S. Court of Appeals for the Eleventh Circuit. All three judges are solidly conservative and would be expected to shift the Court to the right.

Yet, a partisan showdown is likely to result given the Senate Republicans' refusal to hold a vote last year on

former President Obama's nominee to fill Justice Scalia's seat. Senate Minority Leader Chuck Schumer has said that Democrats will push for a "mainstream" nominee and are prepared to use the filibuster to defeat a conservative nominee, requiring 60 votes to end debate on the nomination. Republicans currently hold 52 seats in the Senate and will rely on moderate Democrats to support the nominee. If the Senate Democrats are a sufficiently united front against a conservative nominee, the Republican majority's only recourse would be corral its members into changing parliamentary rules to eliminate the use of the filibuster for Supreme Court nominees, known as the "nuclear option." We will see how this plays out in what has become an increasingly partisan political environment following President Trump's arrival to Washington.