

Insights, News & Events

## WEB EXCLUSIVE - HIGH COURT'S ARBITRATION RULING PROVIDES SIGH OF RELIEF FOR HEALTHCARE EMPLOYERS

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A few months ago, the Supreme Court ruled in a 5-to-4 decision that class action waivers in employment arbitration agreements do not violate the National Labor Relations Act and are, in fact, fully enforceable. The decision solidifies a practice that has long been utilized by employers—including many of those in the healthcare sector—and effectively blocks the National Labor Relations Board's initiative to invalidate such waivers. What do healthcare employers need to know about the decision in order to best capitalize on the current situation?

### HOW THINGS GOT STARTED: *D.R. HORTON*

The issue in the Supreme Court case centered on whether a provision in the National Labor Relations Act (NLRA) that restricts employers from interfering with workplace rights conflicts with a provision in the Federal Arbitration Act (FAA) that mandates the liberal enforcement of arbitration clauses in employee contracts. In brief, the FAA encourages employers to engage in private dispute resolution through arbitration; the NLRA protects all employees (not only union members) who engage in "concerted activities" for their "mutual aid or protection."

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The discord surfaced in 2012 with the NLRB's decision in *D.R. Horton, Inc.* when the Board held that an employer violated Section 7 of the NLRA by requiring employees to sign arbitration agreements waiving their rights to pursue class and collective claims in all forums. The next year, a federal appeals court overturned *D.R. Horton* and freed up employers to return to the common practice of including class waivers in employment arbitration provisions. But other courts took notice, and it wasn't long before further trouble developed.

## **FEDERAL COURTS OF APPEAL WEIGH IN AND CREATE HAVOC**

In 2016, the 7th Circuit Court of Appeals (which hears cases arising out of Illinois, Indiana, and Wisconsin), disregarded that earlier precedent and struck down mandatory class waivers. The case involved a class action lawsuit in Wisconsin against Epic Systems Corporation, a private healthcare software company. An employee alleged Epic violated federal and state wage and hour law by failing to compensate him and other employees for overtime pay after the company allegedly misclassified their employment status. The employee also claimed that the company's employment arbitration agreement violated the NLRA by depriving the employees of the chance to pursue a collective action.

Epic—like many other employers—required its employees to sign an arbitration agreement that mandated resolution of wage and hour claims on an individual basis, as opposed to pursuing those claims in a class or collective action. The company moved to dismiss the lawsuit and compel arbitration, but the federal court of appeals sided with the NLRB's same decision-making. It held that class and collective action waivers violate Section 7 of the NLRA, ruling that collective or class legal proceedings fit well within the ordinary understanding of "concerted activities."

However, other federal courts of appeal maintained the position that the FAA and NLRA did not conflict with

each other and permitted mandatory class waivers, including the 5th Circuit (hearing cases from Texas, Louisiana, and Mississippi), the 2nd Circuit (New York, Connecticut, and Vermont), and the 11th Circuit (Alabama, Georgia, and Florida). Meanwhile, the 9th Circuit Court of Appeals (California, Washington, Arizona, Nevada, Oregon, Hawaii, Idaho, Montana, and Alaska) sided with the NLRB's position and ruled that class waivers were unenforceable, creating a massive circuit split in the country.

Epic petitioned the Supreme Court to take the case in September 2016, arguing that its arbitration waiver was consistent with the NLRA and that the Court should resolve the split. As things stood, employers with multi-state operations often could not maintain consistent policies and practices, and many employers didn't know whether they could legally require class waivers to be signed. The Supreme Court agreed to hear the case and combined it with several of the cases mentioned above.

## **SUPREME COURT: FAA AND NLRA ARE HARMONIOUS, MANDATORY CLASS WAIVERS STAND**

The issue for the Supreme Court to consider boiled down to one question: did employment arbitration agreements containing class and collective action waivers violate the NLRA, or are they permitted by virtue of the FAA?

The Court's May 21 decision ruled that the right to bring a joint, collective, representative, or class-based claim is not considered a "concerted action" as understood and protected by the NLRA, and therefore the labor statute does not bar any agreement requiring arbitration instead of any such claims. The Court opined that the FAA and NLRA do not conflict with each other, and Congress's directions favoring arbitration via the FAA do not conflict with the NLRA's policy of protecting workers' concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In the Court's majority opinion, Justice Neil Gorsuch wrote that "the policy may be debatable, but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written." He continued: "While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the FAA. Because we can easily read Congress' statutes to work in harmony, that is where our duty lies."

## **WHAT DOES THIS RULING MEAN FOR HEALTHCARE EMPLOYERS?**

The healthcare industry is particularly susceptible to class and collective actions because there are commonly large groups of workers in the same position who could potentially bring such claims. In fact, the U.S. Department of Labor (USDOL) recently identified healthcare as an industry as having a high average volume of wage and hour violations. Just last fiscal year, the USDOL reported that it investigated 1,288 wage and hour violations in the healthcare industry alone, covering over 15,000 employees, with over \$12 million paid by healthcare entities in back wages.

For example, in December 2017, the University of Missouri Health Care was ordered to pay \$3.6 million to settle a wage and hour lawsuit over a timekeeping dispute filed by employees. Additionally, a national healthcare services company settled an overtime case for \$12 million in a wage and hour lawsuit earlier this year where employees alleged improper overtime pay and meal breaks. These few examples (out of many) reinforce the fact that the healthcare industry is an extremely heavily litigated industry, specifically when it comes to wage and hour collective actions. So what adjustments should you make as a result of this ruling to ensure you are not the next employer swept up in a costly class or collective action?

At a minimum, the Supreme Court's decision should provide you comfort knowing that you may continue to incorporate and enforce mandatory class action

waivers in arbitration agreements. Additionally, after the back-and-forth court rulings outlined above, many employers were concerned that a blanket prohibition on class claims may be held enforceable, and, as a result, implemented arbitration agreements that included provisions allowing employees to “opt out.” Since this issue has been decided, you can now revisit and revise your agreements accordingly, not necessarily having to rely on such an escape hatch.

## CONCLUSION

Wage and hour collective litigation matters are quite costly for employers, even in situations where the company prevails. The Supreme Court decision has now given healthcare employers the green light to mitigate this risk with a simple revision to their arbitration agreements. If you have questions about how best to incorporate such agreements into your policies, contact your Fisher Phillips attorney or any member of our [Healthcare Practice Group](#).

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