Good Things Come To Those Who Wait? Supreme Court Delays Class Waiver Decision Until Next Term

A FULL COMPLEMENT OF SCOTUS JUSTICES BODES WELL FOR EMPLOYERS

Insights
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When the U.S. Supreme Court announced several weeks ago it would settle a dispute about whether employers can use mandatory class action waivers with their workers, most expected a final decision by June 2017. Employers were prepared to spend the next several months with their fingers crossed hoping the decision would fall in their favor, seeking clarity to a topic that has become increasingly muddled over the past year.

Late today, however, the Supreme Court announced that the issue would be scheduled for oral argument in the 2017-2018 term, meaning that a decision will not be reached until late this year or early 2018. The good news for employers is that the Court should be fully stocked with a full complement of nine justices by then, including at least five who could be expected to be receptive to employers' position on the matter. Hopefully, for employers, good things will come to those who wait.

Background: What Are Mandatory Class Waivers?

Agreements requiring employees to submit workplace claims to an arbitrator instead of a court have become increasingly commonplace in today's workplaces. These agreements are a favored tactic of the modern employer, lowering the cost of litigation and introducing some much-welcomed efficiency to the resolution of workplace disputes. Due to a recent series of victories at the Supreme Court over the past six years heralding the "liberal federal policy favoring arbitration agreements," the use of mandatory arbitration agreements has become safer and less apt to be challenged in court.

But mandatory arbitration agreements in and of themselves do not protect employers from their biggest fear – a class or collective action. Consequently, rather than simply requiring employees to bring workplace claims through arbitration instead of court, employers have regularly incorporated into their agreements class and collective action waivers. Pursuant to these waivers, employees agree not to pursue claims against their employer on a class or collective basis. The result of a mandatory arbitration agreement with a class and collective action waiver is that a worker's only avenue for redress is limited to single-plaintiff arbitration hearings.

NLRB Disfavors Class Waivers

The National Labor Relations Board (NLRB), however, has issued several rulings striking down

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The National Labor Relations Board (NLRB), however, has issued several rulings striking down class and collective action waivers as violating the National Labor Relations Act (NLRA). In 2012, in the infamous *D.R. Horton* case, the NLRB held that arbitration agreements are unlawful if they prevent employees from filing class or collective action claims in court or arbitration. The NLRB reasoned that class and collective action waivers violate Section 7 of the NLRA because they interfere with workers' rights to engage in concerted activity for their mutual benefit and protection (in this case, class or collective action litigation).

Although that decision, and the NLRB's reasoning, was rejected by a federal court and is therefore not considered "good law," that has not stopped the NLRB from continuing to attack class and collective action waivers whenever possible. In the intervening years, the Board has issued several additional rulings striking down class and collective action waivers, without regard for whether reviewing circuit courts upheld those decisions. Until recently, the NLRB's position had not found much traction in the courts.

Courts Had Consistently Upheld Class Waivers

Between 2013 and May 2016, three circuit courts ruled on this exact issue and determined that the NLRA does not prohibit class and collective action waivers:

- As discussed above, in 2013, the 5th Circuit (Texas, Louisiana, and Mississippi) overturned the NLRB's seminal *R. Horton* decision. The 5th Circuit revisited the topic and once again upheld the use of mandatory class action waivers in the October 2015 *Murphy Oil USA v. NLRB* decision.

- Later that year, the 2nd Circuit, in *Sutherland v. Ernst & Young LLP*, and the 8th Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota), in *Owen v. Bristol Care, Inc.*, similarly rejected the argument that the NLRA prohibits class and collective action waivers.

- In 2014, the 11th Circuit (covering Georgia, Florida, and Alabama) upheld a class and collective action waiver in *Walthour v. Chipio Windshield Repair*, *LLC*, although the decision did not directly involve an interplay between class waivers and the NLRA.

Employers Sustain Two Big Losses In 2016

But the level of comfort that employers enjoyed on the subject was shaken in 2016 by a pair of federal appeals courts decisions. On May 26, 2016, the 7th Circuit (covering Illinois, Indiana, and Wisconsin), in *Lewis v. Epic Systems Corp.*, became the first appeals court to strike down class and collective action waivers. The 7th Circuit adopted the NLRB's position that class and collective action waivers violate Section 7 of the NLRA, opining that there is nothing quite so "concerted" as a piece of class or collective action litigation, where employees band together to collectively assert a legal challenge to a workplace practice.

Then, on August 22, 2016, the 9th Circuit (covering California, Washington, Arizona, Nevada, Oregon, Hawaii, Idaho, Montana, and Alaska), in *Morris v. Ernst & Young, LLP*, joined the 7th Circuit and became the second circuit court to strike down class and collective action waivers. This was

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became the second circuit court to strike down class and collective action waivers. This was perhaps the most bruising loss for employers to date, not only because the 9th Circuit covers such a large area of the country, but because the ruling demonstrated that the 7th Circuit's *Epic Systems* decision was not an anomaly.

SCOTUS Steps In To Resolve Conflict

On Friday, January 13, the Supreme Court (SCOTUS) agreed to resolve the conflict between the circuits. It accepted three of the cases for review: the 5th Circuit's *Murphy Oil* case, the 7th Circuit's *Epic Systems* case, and the 9th Circuit's *Ernst & Young* case. The cases will be consolidated for purposes of oral argument and final written opinion. As announced today, on February 8, that argument will not take place until October 2017 at the earliest, which means we can expect a final decision by late 2017 or early 2018.

What's Next For Employers?

Given the clear circuit split among the federal appeals courts and the significance of the topic, most Court observers were not surprised that the Supreme Court took up this dispute. And although there had been some uncertainty as to how an evenly split Court would decide the matter, the expected confirmation of Judge Neil Gorsuch to occupy the critical ninth seat on the bench bodes very well for employers. Judge Gorsuch has proven himself to be receptive to the arguments of businesses, and is not fond of expanding statutes beyond their plain meaning. Unless an unforeseen development occurs, Judge Gorsuch should be on the Supreme Court bench by the beginning of the 2017-2018 term and ready to cast a crucial vote on this matter.

The case is not a slam dunk for employers, however. Although Judge Gorsuch is largely employer-friendly and has shown he is generally skeptical of the power of administrative agencies, he has consistently upheld decisions issued by the NLRB. Some of these decisions have aided unions and some have aided employers, so this pattern does not necessarily reveal any anti-employer (or anti-union) animus.

For example, in the 2010 decision of *Laborers' Intern. Union of North America, Local 578 v. NLRB*, Judge Gorsuch agreed with the NLRB that the union committed unfair labor practices when it persuaded an employer to terminate a worker for failing to pay his union dues. In 2012's *Public Service Co. of New Mexico v. NLRB*, he sided with the NLRB and concluded that the employer engaged in unfair labor practices by not timely producing requested information to the union during a grievance proceeding. And in 2014, he issued a decision in *Teamsters Local Union No. 455 v. NLRB*, again lining up with the Board – this time denying a union's request to hold an employer's lockout unlawful after the company threatened to hire permanent replacement workers. Employers will spend the next six months on pins and needles, hoping that Judge Gorsuch does not agree with the NLRB on the issue of class waivers and concerted protected activity.

Until then, it could be a crucial distinction that the arbitration agreement in the *Ernst & Young* case was mandatory, required to be signed by employees as a condition of their employment. The 9th Circuit's conclusion states that "an employer may not condition employment on the requirement

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sign such a contract." The court also cited favorably to a 2014 9th Circuit ruling (*Johnmohammadi v. Bloomingdale's, Inc.*) where no NLRA violation was found given the fact that the employee had the right to opt out of the arbitration agreement and pursue class action litigation in court. Therefore, it appears that implementing non-mandatory agreements, or ones that include opt-out provisions, could be a way to avoid the same fate as the employer in that case.

It is possible that the Supreme Court could "punt" these cases and send them back to lower courts for further proceedings. If this outcome comes to fruition, multistate employers operating across different judicial jurisdictions might be required to continue using specific policies and practices for each location given the patchwork of differing standards across the country. However, there stands a very good chance that we will have finality on this subject before the end of the year – which could very well lend truth to the adage about good things coming to those who wait.

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