Another One Bites The Dust: 6th Circuit Latest To Strike Down Mandatory Class Waivers

SUPREME COURT TO HAVE FINAL SAY IN UPCOMING TERM

Insights
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Employers returning from the Memorial Day weekend were on the receiving end of bad news as they learned that the 6th Circuit Court of Appeals became the third federal appeals court to strike down mandatory class action waivers. Just last year, the Courts of Appeal for the 7th and 9th Circuits became the first to join with the National Labor Relations Board (NLRB) in ruling that class waivers violate the National Labor Relations Act (NLRA). In a decision issued Friday afternoon, the 6th Circuit – which hears federal cases arising from Ohio, Kentucky, Tennessee, and Michigan – jumped on the bandwagon and agreed that mandatory class waivers interfere with workers' rights to engage in protected concerted activity (*NLRB v. Alternative Entertainment, Inc.*).

The saving grace for employers in Ohio, Kentucky, Tennessee, and Michigan is that the U.S. Supreme Court has already agreed to rule on this issue once and for all during the October 2017 term. Employers can hope that this prohibition is a short-lived one, but may have to adjust policies and practices for the immediate future.

Background: Class Waivers Gain In Popularity
Agreements requiring employees to submit workplace claims to an arbitrator instead of a judge 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 likely 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.

Labor Board Does Not Like Class Waivers

The NLRB, however, has issued several rulings striking down class action waivers as violating the NLRA. In 2012, in the infamous *D.R. Horton* case, the Board said that arbitration agreements are unlawful if they prevent employees from filing class action claims in court or arbitration.

Although that decision was rejected by a federal court and is therefore not considered settled law, that has not stopped the NLRB from continuing to attack class waivers whenever possible. In the intervening years, the Board has issued several additional opinions coming to the same conclusion. Until recently, this theory has 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 waivers. The 5th Circuit (Texas, Louisiana, and Mississippi) overturned the NLRB's *D.R. Horton* decision in 2013, followed by the 2nd Circuit (Connecticut, New York, and Vermont) in the 2013 *Sutherland v. Ernst & Young* case, and the 8th Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) in 2013's *Owen v. Bristol Care, Inc.* In 2014, the 11th Circuit (Georgia, Florida, and Alabama) came to the same conclusion in upholding class waivers in *Walthour v. Chipio Windshield Repair*, although the decision did not directly involve the NLRB question.

The First Dominoes Fell In 2016...

The tide began to turn on May 26, 2016 when the 7th Circuit (Illinois, Indiana, and Wisconsin) became the first federal appeals court to adopt the NLRB's position and strike down class waivers in the *Lewis v. Epic Systems* case. The court said that class waivers violate Section 7 of the NLRA because they interfere with workers' rights to engage in concerted activity (in this case, class action litigation) for their mutual benefit and protection. The court opined that there is nothing quite so "concerted" as a piece of class action litigation, where employees band together to collectively assert a legal challenge to a workplace practice.

The bad news got worse on August 22, 2016, when the decidedly liberal 9th Circuit Court of Appeals (California, Washington, Arizona, Nevada, Oregon, Hawaii, Idaho, Montana, and Alaska) echoed the 7th Circuit's reasoning in *Morris v. Ernst & Young, LLP* and also determined that certain class waivers violate the NLRA.

...And Now Another Domino Falls In The 6th Circuit

Exactly one year after the 7th Circuit issued its groundbreaking ruling, the 6th Circuit joined the fray and published a pro-worker decision. The May 26, 2017 ruling involved an employee named James DeCommer who worked as a field technician for Alternative Entertainment, Inc. (AEI) in Michigan. In that role he handled installation services for Dish Network. At the beginning of his employment in 2006 he signed the company's arbitration policy, which specifically stated "a claim may not be arbitrated as a class action, also called 'representative' or 'collective' actions, and...a claim may not otherwise be consolidated or joined with the claims of others."

Their employment relationship soured in 2014 when the company made several changes to its compensation structure. DeCommer repeatedly voiced his concerns to management about these changes, and soon thereafter AEI terminated his employment. When asked why he was being let go, DeCommer claims a manager told him "our relationship is not working out." That is what was written on the company's Separation Document, along with the comment that DeCommer "consistently has a bad attitude." DeCommer brought an assortment of unfair labor practice charges against his former employer, including a challenge to the mandatory class waiver provision. In 2016, the NLRB concluded that the company infringed upon the worker's NLRA rights by requiring the mandatory class waiver, and brought the case to the federal appeals court to enforce its order.

Late last week, the 6th Circuit ruled by a 2-1 margin that AEI violated the NLRA when it required its employees to sign the mandatory class waiver. It recognized there is a "robust debate" about the enforceability of arbitration provisions containing class waivers, and then chose to side with the 7th and 9th Circuits in resolving the debate for the first time in its jurisdiction. The court's reasoning did not blaze any new trails; it largely mimicked the same rationale adopted by the two prior courts of appeal in striking down class waivers. It ruled that employers violate Section 8(a)(1) of the NLRA by "compelling employees, as a condition of employment, to waive their right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial." Such a provision, it concluded, violates the NLRA's "guarantee of the right to collective action."

What's Next For Employers In The 6th Circuit?

There is a slim hope that a full panel of 6th Circuit judges could agree to hear the case on an *en banc* basis and overturn the 2-1 decision. This could be especially true given that one of the three judges on the panel wrote a blistering 11-page dissent labeling the NLRB's theory as "bizarre alchemy." However, the odds of such a review may be low given that the U.S. Supreme Court will soon wade into the conflict and could very well issue a definitive ruling on the matter by the end of this year. The full 6th Circuit may simply decide to stand back and wait for such a ruling before proceeding any further. Absent any sort of interim order putting this decision on hold while the Supreme Court case is finalized, or if an *en banc* review is ordered, this decision is now the law of the land in Ohio, Kentucky, Tennessee, and Michigan.

It could be crucial that the arbitration agreement, in this case, was mandatory, required to be signed by employees as a condition of their employment. The court's conclusion states that an employer may not compel employees, "as a condition of employment," to sign a class waiver. 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 this case.

Given this decision, employers in Ohio, Kentucky, Tennessee, and Michigan should be prepared to adjust to this new ruling. For those multistate employers operating across different judicial jurisdictions, be aware that the current patchwork of differing standards might require you to develop specific policies and practices for each location.

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