



# Epic Win: Supreme Court Saves Employment Arbitration As We Know It

Insights

5.21.18

To the relief of employers across the country, the Supreme Court today ruled in a 5-to-4 decision that class action waivers in employment arbitration agreements do not violate the National Labor Relations Act (NLRA) and are, in fact, enforceable under the Federal Arbitration Act (FAA). The decision in the three consolidated cases—*Epic Systems Corporation v. Lewis*; *Ernst & Young, LLP v. Morris*; and *NLRB v. Murphy Oil USA, Inc.*—maintains what had long been the status quo and halts the National Labor Relations Board’s (NLRB’s) crusade to invalidate mandatory class waivers. What do employers need to know about today’s monumental decision, and what adjustments can you make to capitalize on the Court’s ruling?

## How We Got Here

The FAA (1925) and the NLRA (1935) are decades-old statutes, each playing a major role in the relationship between employers and employees. The FAA broadly encourages private dispute resolution through arbitration, while the NLRA protects employees (not just union members) who engage in “concerted activities” for “mutual aid or protection” in the workplace. For 77 years, the FAA and the NLRA peacefully coexisted, and nobody—including the NLRB—found anything incompatible about the NLRA and bilateral arbitration agreements.

In January 2012, however, the NLRB took a radical step when it ruled 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 (*D.R. Horton*). Although agreements requiring employees to submit class or collective claims on an individual basis to an arbitrator instead of a court have become increasingly commonplace in today’s workplaces, the NLRB reasoned that “the collective pursuit of workplace grievances through litigation or arbitration is conduct protected by Section 7” of the NLRA. Therefore, according to the Labor Board, any restriction on that right – such as through a mandatory class waiver agreement – would violate the NLRA.

That decision was overturned by the 5th Circuit Court of Appeals in 2013, and employers once again felt comfortable requiring employees to agree to class waiver agreements. But that all changed in 2016, when the 7th Circuit Court of Appeals overturned established precedent with its decision in the *Epic* case. The court essentially 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. Several months later, the 9th Circuit Court of Appeals followed suit with its own ruling in the *Morris* case and became the second court to adopt the NLRB's position.

Meanwhile, a number of other circuit courts maintained the position that the FAA and the NLRA did not conflict with each other, permitting mandatory class waivers. These included the 5th Circuit Court of Appeals (in the *Murphy Oil* case), the 2nd Circuit, and the 11th Circuit. That led to a classic circuit split, creating a patchwork of differing standards on the same issue across the country. This caught the attention of the Supreme Court, which accepted the *Epic*, *Morris*, and *Murphy Oil* cases and agreed to wade in to resolve the debate once and for all.

### **Supreme Court: The NLRB Doesn't Prevent Mandatory Class Waivers**

All three cases essentially asked the same question: does an employment arbitration agreement containing a class and collective action waiver violate the NLRA, or are they permitted by virtue of the FAA? Today, the Court 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.

While the NLRA declares unenforceable contracts in conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection," the Court's majority opinion (written by Justice Gorsuch) held that this does not conflict with Congress's directions favoring arbitration. Specifically, the Court ruled that the right to bring a claim, whether jointly—such as two individuals together in one action—or in a class action is not the kind of "concerted activity" protected under the NLRA's detailed regulatory scheme. Although the workers challenging the agreements argued that such activity is a quintessential example of banding together to gain strength in numbers, which is exactly the type of concerted activity that should be protected by the NLRA, the Court disagreed.

Further, the Court rejected the employees' argument that the FAA's "saving clause" (which allows contract defenses to defeat arbitration agreements) allows the NLRA to invalidate arbitration agreements. "The saving clause recognizes only defenses that apply to 'any' contract. In this way the clause establishes a sort of 'equal-treatment' rule for arbitration contracts." In other words, the only arguments available to employees to defeat the enforcement of arbitration agreements are those arguments that could defeat the enforcement of other types of contracts outside the world of arbitration.

In short, the Supreme Court held that Congress meant what it is said in the FAA: "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." Thus, the majority found no conflict but instead harmony between the two federal statutes: "The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum."

The employers defending the agreements argued that bringing litigation as a class “is not a substantive right” under Section 7, and thus it should not be a violation of the NLRA when an employer requires employment disputes be resolved through individual arbitration. Today, the Court agreed, finding Section 7 focuses on the right to organize unions and bargain collectively. The statute’s silence on the issue of arbitration, especially when examined together with federal policy favoring arbitration and the Court’s long-line of precedent repeatedly upholding the parties’ election to proceed in the arbitral forum, means that today’s decision comes as both no surprise and relief.

### **What This Means For Employers: You Can Feel Secure Requiring Class Waivers**

This ruling should provide you comfort knowing you may continue to incorporate and enforce mandatory class action waivers in your employment arbitration agreements. If you have developed arbitration agreements with “opt-out” provisions, fearing that a blanket mandatory requirement might be one day held unenforceable, you may want to revisit your agreements with your employment counsel with this decision in mind. Although traditional contract defenses (such as unconscionability) can still make your agreement unenforceable, and state laws may provide for varying standards, today’s decision should provide a level of comfort when it comes to drafting, enforcing, and defending your arbitration agreements.

If you need assistance reviewing your arbitration agreements to ensure they meet the new standards set by the Supreme Court, or crafting new agreements to address the viability or wisdom of an “opt-out” route, please contact your Fisher Phillips attorney.

---

*This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

### **Service Focus**

Class and Collective Actions

Labor Relations

Litigation and Trials