



U.S. Supreme Court Validates Class Action Waivers in Employee Arbitration Agreements

May 22, 2018

The U.S. Supreme Court has ruled that an employer may include a class action waiver in arbitration agreements with its employees. Thus, an employer may validly require that an employee arbitrate disputes on an individual basis, and not as part of a class or collective action.

Some employers require employees to sign arbitration agreements as a condition of employment. These agreements dictate that covered claims by the employee against the employer would be decided in private arbitration, not in court. In some cases, employers have gone further by including a waiver of class action proceedings in the arbitration agreement. This means that the employee does not give up the right to bring a claim against the employer, but may bring that claim only on behalf of himself or herself. The arbitration claim could not proceed as a class action.

The Supreme Court decision resolves a split in authority that has vexed employers for several years. Beginning in 2012, the National Labor Relations Board ("NLRB") has consistently ruled that class action waivers violate the National Labor Relations Act ("NLRA"), arguing that they deprive employees of the right to act collectively. This right applies to both union and non-union employees, so individuals seeking to avoid the class action waiver provision of an arbitration agreement would challenge the validity of that waiver in court or in unfair labor practice filings with the NLRB.

Virtually all federal courts that initially addressed this issue rejected the NLRB argument and upheld the class action waiver. (The first federal Court of Appeals decision rejecting the NLRB argument was a case in the Eighth Circuit Court of Appeals in which the employer was represented by Lathrop Gage.) This created a morass of litigation for employers where the NLRB would strike down the class waiver, requiring the employer to sue in federal court to have the NLRB order overturned. More recently, however, three federal Courts of Appeal sided with the NLRB, creating a split of authority and setting up the issue for ultimate decision by the Supreme Court. The Supreme Court decision resolved the split, finding that class action waivers are valid and enforceable.

The Supreme Court's pronouncement will bring some certainty to this issue and eliminate expensive litigation over the enforceability of a class action waiver. An employer still must carefully consider whether an arbitration agreement, with or without a class action waiver, is advisable in its circumstances, and also be



aware of other potential challenges to the agreement such as lack of consideration or unconscionability. These are issues which commonly arise when an employee attempts to avoid complying with an arbitration agreement, but are beyond the scope of the Supreme Court's decision.
