BURR ALERT 2018

Employers May Include Class Waivers in Arbitration Agreements

By E. Travis Ramey May 21, 2018

Since January 2012, employers nationwide have had to grapple with uncertainty about whether they can include class-action or collective-action waivers in their employment-arbitration agreements. Today, the U.S. Supreme Court resolved that uncertainty—they can. In a 5–4 decision, the Court held that including those waivers is not a violation of the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA) requires courts to enforce those waivers in arbitration agreements according to their terms.

In January 2012, the National Labor Relations Board (NLRB) issued the *In re D. R. Horton, Inc.* decision, holding that agreements requiring only individual arbitration—that is, barring class or collective arbitration—violated the NLRA and were an unfair labor practice. Since then, the NLRB has continued to hold that employers commit unfair labor practices by requiring their employees to sign arbitration agreements that include class-action or collective-action waivers. And the courts have divided over whether to uphold the NLRB's conclusions and whether to enforce the agreements.

Eventually, three cases made their way to the U.S. Supreme Court. The Court consolidated them, with *Epic Systems Corp. v. Lewis* from the Seventh Circuit as the lead case. In a decision issued today, the Court held that employers can include class-action and collective-action waivers in arbitration agreement with their employees. Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan dissented.

The majority opinion (written by Justice Gorsuch and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito) reasoned that the FAA required courts to "enforce arbitration agreements according to their terms." The Court also reasoned that the relevant portion of the NLRA—Section 7—focuses on the right to organize unions and collectively bargain. That section neither approves nor disapproves of arbitration, never mentions class-action or collective-action procedures, and does not "even hint at a wish to displace" the FAA. The Court also found it unlikely that Section 7 "confers a right to class or collective actions" because those procedures were "hardly known" when Congress enacted the NLRA in 1935. Thus, the Court rejected the theory that the NLRA overrode the FAA and held that the class-action and collective action waivers are enforceable.

The important takeaway here is that the Court has resolved the now six-year-old dispute about class-action and collective-action waivers in favor of employers. Under *Epic Systems*, employers may, if they wish, include class-action and collective-action waivers in their employee arbitration agreements without violating the NLRA. Doing so is not an unfair labor practice, and courts must enforce those waivers just as they would any other arbitration agreement.

If you would like more information, please contact:

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