Lowenstein Sandler

Client Alert

Employment Counseling & Litigation

May 24, 2018

Class Action Arbitration Waivers: U.S. Supreme Court Rules For the Employer

By Julie L. Werner

What You Need To Know:

- **The United States Supreme Court held that mandatory class action waivers in arbitration agreements are enforceable.**
- **Employers should be reexamining their employee arbitration agreements and consider adding this language if it's not already there.**
- **Employers who do not currently have arbitration agreements with their employees should consult with counsel to discuss the pros and cons of such agreements.**

In a decidedly pro-employer ruling, the Supreme Court ruled on May 21, 2018, in the consolidated cases of *Epic Systems Corp. v. Lewis*, *Ernst & Young v. Morris*, and *National Labor Relations Board v. Murphy Oil USA, Inc.*, that a company and its employees may contractually agree to resolve their employment disputes through individualized arbitration proceedings, and that employees may be compelled to waive their right to resolution through a class or collective action. Employee-side lawyers had sought to present the issue as a conflict between the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA), but the Court did not agree. Instead, the Court ruled that both laws can be harmonized and read in a manner in which one law does not prevail or contradict the other.

The heart of the issue for the Court was whether class action arbitration constitutes "concerted activity" under the NLRA. Writing for the majority, Justice Gorsuch held that while Section 7 of the NLRA grants employees the right to organize unions and to bargain collectively (including by bargaining to prohibit arbitration), Section 7 does not, in and of itself, confer a legal right to class or collective action of legal disputes in the first place. In other words, an agreement restricting employees from engaging in a collective or class action and mandating individualized arbitration does not violate the NLRA. As Justice Gorsuch aptly explained, "A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all."

According to published reports, about 55 percent of nonunion private employees have contracts with mandatory arbitration agreements, covering 60 million workers, with about 25 million people covered by the

equivalent of class waivers. The question now for remaining employers is whether to enter into these types of agreements with their employees.

A tension exists, however, between the Court's ruling permitting class action waivers of arbitration and the surge of new laws that seek to prohibit the arbitration of sexual harassment claims. In New York, for example, Gov. Cuomo recently signed into law various measures aimed at addressing sexual harassment, including the prohibition of the mandatory arbitration of sexual harassment claims, "except where inconsistent with federal law." Similar bills are pending at the state level around the country and before Congress, too. While the *Epic Systems* trilogy of cases related to wage and hour collective action waivers, it remains to be seen what impact, if any, the Court's decision will have on an employer's ability to impose class action waivers in the arbitration of sexual harassment claims. The degree to which an arbitration agreement expressly relies upon and cites the FAA as a means to preempt state law as well as other strategic drafting may make a difference in enforceability.

Employers should consider the advantages and disadvantages of entering into arbitration agreements with their employees. Lowenstein Sandler's Employment Counseling & Litigation Practice would be pleased to answer any questions you may have about this important topic.

Contact

Please contact the listed attorney for further information on the matters discussed herein.

JULIE L. WERNER
Senior Counsel
T: 212.419.5864 (NY) / 973.597.2550 (NJ)
jwerner@lowenstein.com