U.S. SUPREME COURT: CLASS ACTION WAIVERS SURVIVE THE NATIONAL LABOR RELATIONS BOARD

By David B. Walston, Partner

In a long-awaited decision, the U.S. Supreme Court ruled yesterday that class action waivers do not violate the National Labor Relations Act ("NLRA"). This decision reinstates years of legal interpretations and establishes that employers can have mandatory written agreements which, in most circumstances, would require employees to proceed with claims against the company in an individualized capacity. Properly utilized, such agreements could limit an employer's exposure for employment-related claims.

Some background may help in understanding the significance of this decision. A class action is a type of lawsuit in which an individual (or a group of individuals) files a lawsuit asserting a legal claim on behalf of him- or herself and "other similarly-situated" individuals. Class actions are most common when the allegations involve a large number of people who claim to have been injured by the same defendant in the same way. Instead of each damaged person bringing his or her own lawsuit, the class action allows all the claims of all class members — whether they know they have been damaged or not — to be resolved in a single proceeding. The vast majority of class members are passive observers. In other words, a few individuals can file a lawsuit on behalf of many individuals who had no intention to sue. The greater the size of the class, the greater the potential liability.

In a class action, once the named plaintiffs demonstrate to the court that a class action is appropriate, notice of the action is sent to all members of the class who can be identified. A person has the right to "opt-out" or decline participation in the class action by filing a notice with the court. If the person does not opt-out, he remains a party in the action and is bound by the orders and judgments entered by the court. These procedures can be used when asserting discrimination and other employment claims.[1]

In 1991, the U.S. Supreme Court recognized that arbitration agreements outside the union collective bargaining context were enforceable under the Federal Arbitration Act. Agreements requiring the arbitration of employment claims became commonplace with many employers implementing mandatory arbitration agreements as a condition of employment. Employers soon added mandatory class action waivers to arbitration agreements. These mandatory agreements precluded employees from filing or participating in class actions in court or in arbitration proceedings. Each employee had to present his or her own claim in arbitration.

[1] In lawsuits asserting claims of age discrimination or minimum wage or overtime violations, if the court approves a class and orders notice be sent to potential class members, an individual must affirmatively "opt-in" to participate in the litigation by filing a notice of consent with the Court.

Enter the National Labor Relations Act (NLRA"). The NLRA protects employees (not just union members) who engage in "concerted activities" for "mutual aid and protection." In 2010, the General Counsel of the National Labor Relations Board, agreeing with years of court decisions, stated the validity of arbitration agreements "does not involve consideration of the policies of the National Labor Relations Act." In 2012, just two years later, the National Labor Relations Board jettisoned the position announced by its General Counsel and ruled that mandatory class action waivers in the arbitration agreements violated the National Labor Relations Act and were unenforceable.[2] The Board held that filing and/or participating in a class action proceeding in court or in arbitration was a protected "concerted activity" which an employer could not compel an employee to waive. Essentially, the Board ruled that the policies of the National Labor Relations Act take precedence over the Federal Arbitration Act with respect to the enforceability of class action waivers.

Subsequent court challenges to this ruling resulted in conflicting decisions. An agreement valid for employees in Alabama and Texas was invalid for employees in Tennessee and Indiana. Employers tinkered and weakened class waiver provisions to modify or eliminate elements cited by the Board to be in violation of the NLRA, but the Board refused to let modified policies stand. Many employers unwilling to face the uncertainty and challenges to enforcement abandoned class action waiver agreements entirely. Some employers chose to fight on.

The fight landed before the U.S. Supreme Court, which issued its decision yesterday. With its decision, the Supreme Court re-established the long-existing principle that class action waivers are enforceable under federal law and do not conflict with the National Labor Relations Act. The decision is significant for employers in two aspects:

> First, an arbitration agreement containing a class action waiver is enforceable under the Federal Arbitration Act. If the arbitration agreement is enforceable, the class action waiver provision in the agreement is enforceable and precludes class actions in arbitration.
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> Second, and more significant, participation in a class action proceeding, whether in court or in arbitration, is not a "concerted activity" protected by the National Labor Relations Act. In other words, a class action waiver agreement standing on its own apart from an arbitration agreement does not violate the National Labor Relations Act. Taken to its logical conclusion, an employer does not have to have an arbitration agreement to have an enforceable class action waiver.

Simply put, precluding class actions restricts the number of plaintiffs to an action. In a traditional class action, individuals within the described class are automatically considered parties to the lawsuit unless they affirmatively opt-out after receiving court-approved

[2] Courts have rejected the arguments that class action waivers violate federal discrimination statutes such as Title VII.

notice. Preventing class certification eliminates the automatic inclusion of individuals not specifically named in the action (and who more likely than not would never become aware of the lawsuit absent court-approved notice). In a FLSA collective action, a court can conditionally approve a class and require that notice be sent to all potential class members, who can then choose to opt-in and become a party to the lawsuit. Preventing a FLSA lawsuit from proceeding as a collective action prevents court-approved notice to current and former employees, thereby limiting the number of potential individuals who learn of the lawsuit and choose to join.

Class action waivers are not without a down-side. While many employees can participate on an individualized basis in a single lawsuit, a class action waiver could result in several (or many) separate lawsuits. Separate lawsuits would increase the cost of defense and possibly lead to inconsistent rulings.

The other pros and cons of multiple individual actions as opposed to a single class action is a more in-depth discussion for another time. However, the Supreme Court's decision provides employers with another means to lessen potential exposure from employment claims. Talk to your labor and employment counsel to determine if a class action waiver would be beneficial to your business.

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