CLIENT ALERT: U.S. Supreme Court Upholds Legality of Class Action Waivers in Employment Arbitration Agreements – By Ryan W. Jaziri

In a highly anticipated decision, the U.S. Supreme Court has held that class action waivers in employment arbitration agreements are legal and enforceable under the Federal Arbitration Act ("FAA"). The Court's decision issued on May 21, 2018 in three consolidated cases – *Epic Systems Corp. v. Lewis* (No. 16-285) ("*Epic Systems*"), *National Labor Relations Board v. Murphy Oil USA, Inc., et al.* (No. 16-307) ("*Murphy Oil*"), and *Ernst & Young LLP et al. v. Morris et al.* (No. 16-300) ("*Ernst & Young*") – resolves a split among the U.S. Circuit Courts of Appeal on whether class action waivers in employment arbitration agreements violate the National Labor Relations Act ("NLRA"). In a 5-4 decision authored by Justice Gorsuch, the Court held that the FAA requires arbitration agreements to be enforced in the same manner as other contracts, and that the NLRA contains no conflicting congressional command excluding class action waivers from the FAA's mandate.

By way of background, in recent years many employers have utilized employment arbitration agreements in response to an increase in employment-related litigation. Employers generally find that arbitrating a case, as opposed to litigating the case in court, results in faster and less expensive resolution of the case. Additionally, many arbitration agreements contain language waiving the ability of employees to bring class actions against their employer.

The Supreme Court has long held that the Federal Arbitration Act ("FAA") strongly favors private resolution of disputes, and arbitration agreements including class action waivers are enforceable. The National Labor Relations Board ("NLRB"), however, has taken the position that employers violate the NLRA when they make such waivers in arbitration agreements a condition of employment. In 2012, the NLRB concluded in D.R. Horton, Inc., 357 NLRB 2277 (2012), that class action waivers illegally interfere with the right of employees under the NLRA to engage in protected concerted activity for their mutual aid or protection if the waiver precludes them from pursuing class or collective actions in court.

The Second, Fifth, and Eighth Circuits disagreed with the NLRB, holding generally that class and collective action waivers did not violate the NLRA and were enforceable. The Seventh and Ninth Circuits sided with the NLRB, finding that arbitration agreements do violate the NLRA. The Seventh Circuit in *Epic Systems* and the Ninth Circuit in *Ernst & Young* held that there was no conflict between the NLRA and the FAA. Those courts pointed to the FAA's "savings clause," which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." The courts reasoned that since class action waivers are unlawful under the NLRA, they are not enforceable under the FAA pursuant to the language contained in the savings clause.

The Supreme Court disagreed with this rationale. The Court explained that the FAA's savings clause only recognizes generally applicable contract defenses, such as fraud, duress, or unconscionability.

The savings clause does not permit defenses that only apply specifically to arbitration agreements as opposed to contracts generally. By attacking the individualized nature of arbitration proceedings and not asserting a generally applicable contract defense, the employees' argument failed because the savings clause was not implicated.

The Supreme Court also rejected the argument that to the extent the statutory provisions contained in the NLRA (enacted in 1935) and the FAA (enacted in 1925) conflict, the NLRA should control. No provision of the NLRA expresses approval or disapproval of arbitration, and there is no mention of class or collective action procedures in the NLRA. The absence of any such language confirmed that in enacting the NLRA, Congress did not intend to displace the FAA's central purpose of enforcing arbitration agreements in accordance with their terms. Additionally, the Supreme Court declined to give the NLRB deference for its position on class action waivers, as the NLRB was interpreting the NLRA along with the FAA—a statute that the NLRB does not administer. The Court held that it is up to courts to engage in the analysis of interpreting supposed conflicts in different statutory schemes, not administrative agencies.

Justice Gorsuch was joined in the majority opinion by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Justice Thomas wrote a concurrence to state that the employees' argument that class action waivers in arbitration agreements are illegal because the NLRA makes them illegal is a public policy defense, not a contract formation defense; thus, the savings clause did not apply for that reason. Justice Ginsberg, joined by Justices Breyer, Sotomayor, and Kagan, dissented.

Shortly after the Supreme Court's decision was announced, the NLRB issued a statement expressing that it "respects the Court's decision, which clearly establishes that arbitration agreements providing for individualized proceedings, and waiving the right to participate in class or collective actions, are lawful and enforceable." The NLRB stated that it currently has 55 pending cases with allegations that employers violated the NLRA by maintaining or enforcing individual arbitration agreements or policies containing class or collective action waivers. The NLRB indicated that it is "committed to expeditiously resolving these cases in accordance with the Supreme Court's decision."

The Court's decision is a significant victory for employers, as it ends several years of uncertainty regarding the enforceability of class action waivers in arbitration agreements. Employers can now be assured that class action waivers in arbitration agreements do not violate the NLRA.

Please contact your MBJ attorney with questions about the Supreme Court's decision or for guidance in drafting or enforcing employment arbitration agreements.

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