

CLIENT ALERT: U.S. Supreme Court to Decide Legality of Class Action Waivers in Employment Arbitration Agreements - By Ryan Jaziri

The U.S. Supreme Court has agreed to decide the legality of class action waivers in employment arbitration agreements. On January 13, 2017, the Supreme Court granted review in three consolidated cases to resolve a split among the U.S. Circuit Courts of Appeal that has left the state of the law unclear.

Employers often maintain arbitration agreements with their employees in response to the ever-increasing costs and burdens of employment-related litigation. Employers generally find that arbitration, as opposed to court litigation, results in faster and less expensive dispute resolution. But many employers use arbitration agreements requiring employees to waive the ability to bring class action claims.

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 National Labor Relations Act ("NLRA") by making a class action waiver a condition of employment. The NLRB held in *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), that the NLRA prohibits class action waivers because they illegally interfere with employees' right to engage in protected concerted activity for mutual aid or protection.

The Second, Fifth and Eighth Circuits have disagreed with the NLRB, holding generally that class and collective action waivers are enforceable and do not violate the NLRA. The Seventh and Ninth Circuits have agreed with the NLRB, holding that arbitration agreements prohibiting employees from bringing or participating in class or collective actions violate the NLRA.

The NLRB asked the Supreme Court to review a Fifth Circuit decision, while two employers have asked the Supreme Court to review decisions by the Seventh and Ninth Circuits. The three cases – *National Labor Relations Board v. Murphy Oil USA* (No. 16-307), *Epic Systems Corp. v. Lewis* (No. 16-285) and *Ernst & Young LLP v. Morris* (No. 16-300) – have been consolidated for oral argument. The Supreme Court will hear the cases in the 2017 term, which begins in October.

Until the Supreme Court resolves the issue, identical contractual provisions may be considered lawful and enforceable within some circuits, while being illegal and unenforceable in others. This is particularly vexing to large, multi-state employers with uniform arbitration agreements nation-wide.

MBJ will continue to monitor any significant developments as they occur. In the meantime, please contact your MBJ attorney with questions about drafting or enforcing employment arbitration agreements.

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