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IN-HOUSE COUNSEL

Enforceability of Class Action Waivers in Employment Contracts

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Special to the Legal

The U.S. Supreme Court has agreed to consider whether employers can require their employees to waive the right to join with fellow workers to litigate workplace issues as a condition of employment. The enforceability of "concerted activity" waivers has divided federal circuit courts and will likely divide the justices of the Supreme Court along ideological lines.

Specifically, the court has agreed to review three cases from the U.S. Courts of Appeals for the Fifth, Seventh and Ninth circuits. The Fifth Circuit has held that the use of class action procedures by employees is not a substantive right under the National Labor Relations Act (NLRA) and that concerted activity waivers in employment agreements are enforceable under the Federal Arbitration Act. More recently, however, the Seventh and Ninth circuits have held that concerted activity waivers imposed by employers are directly at odds with the substantive provisions of the NLRA and, accordingly, unenforceable.

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In *Murphy Oil USA v. National Labor Relations Board,* 808 F.3d 1013 (5th Cir. 2015), Murphy Oil required its employees to agree to arbitrate any work-related claims against the company and to waive the right to pursue class or collective claims in arbitration or court. The NLRB ruled that the concerted activity waiver was illegal and Murphy Oil appealed the decision to the court of appeals, which set aside the ruling of the NLRB. The court noted that it had previously rejected the NLRB's reasoning in *D.R. Horton v. National Labor Relations Board*, 737 F.3d 344 (5th Cir. 2013). In that case, the court held that the NLRA does not contain a "congressional command overriding" the FAA and that the use of class action procedures is a procedural rather than a substantive right under Section 7 of the NLRA.

In *Morris v. Ernst & Young,* 834 F.3d 975 (9th Cir. 2016), Stephen Morris and Kelly McDaniel worked for the accounting firm Ernst & Young. As a condition of employment, they were required to sign agreements not to join with other employees in bringing legal claims against the company. This concerted activity waiver required employees to pursue claims against the company exclusively through arbitration and arbitrate only as individuals in separate proceedings. Although Morris and McDaniel signed the agreements, they later brought a class action against the company in federal court in New York alleging violations of the Fair Labor Standards Act.

The class action was transferred to the district court in the Northern District of California and Ernst & Young moved to compel arbitration. The trial court granted the motion and dismissed the class action. On appeal, the Ninth Circuit reversed and reinstated the class action. Specifically, the court found that the collective action waiver in the Ernst & Young employment agreement was directly at odds with the provisions of the NLRA, which expressly permit workers to join together to pursue work-related claims.

Section 7 of the NLRA provides that employees shall have the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8 of the NLRA makes it "an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." The court found that Section 7 of the NLRA has been liberally interpreted to allow employees to act in concert to improve working conditions by resorting to administrative and judicial forums. The court held that the "separate proceedings" provision in the Ernst & Young agreement violated Section 8 of the NLRA by preventing employees from action in concert to raise workplace issues as permitted under Section 7.

The court rejected Ernst & Young's argument that declining to enforce the provisions of its agreement was inconsistent with the requirements of the Federal Arbitration Act (FAA). The court noted that the FAA does not mandate the enforcement of contract terms that waive substantive federal rights. Because it determined that the rights of workers to pursue legal claims together are substantive rights, it held that the FAA does not mandate the enforcement of a contract that requires their waiver. Accordingly, the court refused to enforce the "separate proceedings" provision of the agreement and remanded the case to the trial court for further proceedings.

It appears highly likely the four dissenting justices will move to strike down collective action waivers in the employment agreements at issue on appeal.

The Seventh Circuit in *Lewis v. Epic Systems,* 823 F.3d 1147 (7th Cir. 2016), likewise refused to enforce a collective action limitation under similar circumstances. Epic Systems, a health care software company, required certain employees to sign agreements providing that wage-and-hour claims could only be brought through individual arbitrations and further providing that the employees waived "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." Employee Jacob Lewis signed the agreement but later brought an action in a district court alleging that Epic had unlawfully deprived him and other employees of overtime pay under the FLSA. The district court denied Epic's motion to compel arbitration.

The court of appeals agreed that the concerted action waiver was invalid under Sections 7 and 8 of the NLRA. Although the court noted that the term "concerted activities" was not defined in the act, it found that collective or class action legal proceedings "fit well within the ordinary understanding of 'concerted activities.'" The court rejected Epic's argument that because Rule 23 class action procedures did not exist in 1935 when the NLRA was passed, the act could not have been meant to protect employees' right to pursue class remedies. Finding that Section 7 of the NLRA should be liberally construed, the court found no evidence that Congress intended the NLRA to protect only those concerted activities that were available at the time of the NLRA's enactment.

How will the Supreme Court rule on the waiver issue? The court last addressed a similar issue in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011). The case involved a customer agreement between AT&T and the Concepcions

which not only required the arbitration of disputes between the parties but further mandated that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Nonetheless, the Concepcions later brought an action in federal court alleging various unfair sales practices which was consolidated with a class action raising similar claims. The district court denied AT&T's motion to compel arbitration and the Ninth Circuit affirmed in light of California state court decisions invalidating certain concerted activity waivers.

In a decision authored by Justice Antonin Scalia and joined in by four other justices, the court reversed, holding that earlier California state court decisions invalidating class action waivers are inconsistent with the long-established federal policy in favor of arbitration. "When state law prohibits outright the arbitration of a particular type of claim," the court held, "the analysis is straightforward: The conflicting rule is displaced by the FAA." Although the court acknowledged that Section 2 of the FAA preserves generally applicable contract defenses, it cautioned that "nothing in the FAA suggests an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA's objectives."

Does the majority's willingness to enforce a concerted activity waiver in a consumer contract portend a similar decision with respect to employment contracts? Not necessarily. Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan all dissented from the majority's decision in *AT&T Mobility*. The dissenters argued that the California Supreme Court's ruling that certain class action waivers are exculpatory and unconscionable under California law was precisely the type of "grounds as exist in law or in equity for the revocation of any contract" under Section 2 of the FAA.

It appears highly likely the four dissenting justices will move to strike down collective action waivers in the employment agreements at issue on appeal. *AT&T Mobility* involved a clash between the FAA and California state law. These appeals, by contrast, involve striking a balance between two long-standing federal statutes. In all likelihood, the dissenting justices will find that Sections 7 and 8 of the NLRA provides an even more compelling basis to strike down the collective action waivers than the circumstances presented in *AT&T Mobility*. If this is the case, only one additional justice will be required to secure a majority decision against concerted activity waivers in employment agreements.

The death of Scalia who authored the majority decision in *AT&T Mobility* leaves the court with eight justices. If the remaining four justices in the majority in *AT&T Mobility* vote to uphold concerted activity waivers, the result will be a deadlocked court which all sides in this dispute will likely deem an unsatisfactory result. Once again, the key may be Justice Anthony Kennedy who voted with the majority in *AT&T Mobility*. If he agrees that the right of employees to engage in collective or class actions is a substantive right under the NLRA, it would seem likely he will join in a decision invalidating collective action waivers in employment contracts. If this is the case, even the addition of a conservative justice to the court in the coming months will not alter the result. Conversely, should Kennedy find that the right to pursue collective or class actions is a mere procedural right under federal law, the result will likely be an evenly split court or a court that upholds concerted activity waivers if a newly appointed justice sides with the four justices who constituted the majority in *AT&T Mobility*. •