



Supreme Court to Decide Legality of Class Action and Collective Action Waivers

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On January 13, 2017, the Supreme Court agreed to consider whether employee arbitration agreements containing class/collective action waivers are unlawful and unenforceable. The Court's decision to consider this issue portends one of the more important rulings for employers in recent memory. The Court is likely to determine once and for all whether employers nationwide may use and enforce waivers to bar class/collective actions.

Currently, an employer's ability to use and enforce class/collective action waivers in employee arbitration agreements is dependent on location. For example, in *Murphy Oil USA v. NLRB*, the U.S. Court of Appeals for the Fifth Circuit held that employee arbitration agreements containing class/collective action waivers are valid and enforceable. However, in *Epic Systems v. Lewis and Ernst & Young, LLP v. Morris*, the U.S. Courts of Appeals for the Seventh and Ninth Circuits respectively held that such arbitration agreements are unlawful and unenforceable. The Supreme Court consolidated these three cases to resolve the circuit split and to decide whether employee arbitration agreements containing class/collective action waivers are unlawful under the National Labor Relations Act ("NLRA") and whether they are unenforceable under the Federal Arbitration Act ("FAA").

The Court apparently has taken this opportunity to clarify the uncertainty caused by the circuit split and the National Labor Relations Board's ("NLRB") insistence that such arbitration agreements are unlawful and unenforceable. Since 2012, the NLRB has held that such waivers violate employees' rights under the NLRA and are unenforceable, despite several circuit courts holding to the contrary. Should the Supreme Court find class/collective action waivers are lawful and enforceable, employers nationwide will have a powerful tool to minimize exposure from class/collective action litigation. Specifically, the waivers would allow employers to restrict, if not eliminate, plaintiffs' ability to aggregate their claims via passive plaintiffs, thereby decreasing potential liability, litigation costs, and risk. Conversely, should the Court find such waivers unlawful and unenforceable, it would increase plaintiffs' ability to band claims together and thereby increase employers' potential liability, litigation costs, and risk.

The widespread impact the Supreme Court's decision likely will have on class/collective action litigation underscores the importance for employers to watch for the Court's decision later this year.

For more information on the matters discussed in this Locke Lord QuickStudy, please contact the authors.

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