2017 BURR Alert

Supreme Court Set To Weigh In On Class Action Waivers

By Amy Jordan Wilkes and Miya Moore September 2017

In late 2017 or early 2018, employers should anticipate clarity from the U.S. Supreme Court as to whether arbitration agreements requiring workers to waive their right to file class or collective actions violates the National Labor Relations Act ("NLRA"). Stemming from a series of rulings by the National Labor Relations Board ("NLRB") that it is unlawful to condition employment on the waiver of the right to engage in class litigation, the U.S. Supreme Court is set to hear oral argument at the beginning of October.

Since the NLRB's *D.R. Horton* decision in 2012 there has been a split among the Circuit Courts of Appeal on the legality of class action waivers. For example, *Epic Systems Corp. v. Lewis* the Seventh Circuit rendered a class action waiver unenforceable in agreement with *D.R. Horton*. Subsequently, the Seventh Circuit was joined by the Sixth and Ninth Circuits who took a similar position in *Ernst & Young LLP v. Morris*. In contrast, the Second, Eighth, and Fifth Circuits have disagreed with the *D.R. Horton* decision. Due to this disagreement in the lower courts, in January 2017 the Supreme Court granted three petitions for certiorari and agreed to hear the *Lewis, Morris,* and Fifth Circuit case *NLRB v. Murphy Oil* in one consolidated case on October 2, 2017.

Because the NLRA protects the "concerted activities" of employees irrespective of union participation, the Supreme Court's decision will affect many different types of industries across the country. As shown in a recent class action survey, more than 50% of U.S. companies faced employment class actions in 2016. Thus, the Supreme Court's decision could significantly increase or reduce the scope of class or collective action litigation tactics.

A Republican majority may also influence the Supreme Court's decision. In both 2011 and 2013, eight of the Supreme Court justices then sitting split 4-4 on the enforceability of commercial class action waivers. Newly appointed Justice Neil Gorsuch will play a critical role in the Supreme Court's decision as to the validity of class action waivers in the employment context. Although his position is unknown, Gorsuch's history as a Tenth Circuit judge shows him to be employer friendly. Hence, however the Supreme Court rules, employers may soon receive much needed clarity on the contentious issue of class and collective action waivers.

In light of split of authority in the federal appellate courts, employers should be aware that employees are increasingly filing suit in federal court despite mandatory arbitration agreements that include class or collective action waivers to avoid enforcement. Notably, the Ninth Circuit Court of Appeals in *Ernst & Young* explicitly acknowledged that an arbitration agreement with an opt-out policy does not violate the NLRA. Accordingly, until the Supreme Court provides additional guidance, employers should consider including an opt-out policy in arbitration agreements that allows employees to rescind the agreement within thirty days of signing.

To discuss this further, please contact:

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