Supreme Court OKs Arbitration Agreements Waiving Employees' Right to Join a Class Action

Employers' victory doesn't have to be loss for employees if arbitrator is neutral

By Allen Smith, J.D.
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Employers won a major victory May 21 when the Supreme Court upheld class-action waivers in arbitration agreements. The ruling gives businesses the power to stop employees from banding together to file claims for work-related issues. Instead, each employee must file an individual arbitration claim when a suspected violation arises.

Employers establishing class-action waivers in light of the decision should frame their arbitration programs in a way that points out the benefits to employees, said Noah Hanft, president and CEO of alternative dispute resolution think tank The International Institute for Conflict Prevention & Resolution, in New York City.

However, dissenting in the 5-4 decision, Justice Ruth Bader Ginsburg called on Congress to legislatively overturn the Supreme Court's ruling. She predicted, "The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."

Decision

In *Epic Systems Corp. v. Lewis*, the high court "eliminated the single biggest employment-law risk," class actions, said Ron Chapman, an attorney with Ogletree Deakins in Dallas.

The court addressed three cases in this decision:

- A collective action against Murphy Oil USA Inc., which operates retail gas stations, alleging that the company violated the Fair Labor Standards Act (FLSA). The 5th U.S. Circuit Court of Appeals granted the company's motion to dismiss the collective action and compel arbitration, rejecting the National Labor Relations Board's (NLRB's) argument that the National Labor Relations Act (NLRA) bans class-action waivers in arbitration agreements (*NLRB v. Murphy Oil USA Inc.*).
- A wage and hour collective action against Epic Systems, a health care software company, alleging that it violated the FLSA by misclassifying technical writers as exempt. The 7th U.S. Circuit Court of Appeals denied Epic's motion to compel arbitration (*Epic Systems Corp. v. Lewis*).
- A collective action claiming that Ernst & Young violated the FLSA and California labor laws by misclassifying employees to deny them overtime wages. The 9th U.S. Circuit Court of Appeals held that the employer violated the NLRA by

requiring employees to sign an arbitration agreement precluding them from bringing a wage and hour class action (*Ernst & Young LLP v. Morris*).

Writing for the Supreme Court's majority, Justice Neil Gorsuch wrote that neither the Federal Arbitration Act (FAA) nor the NLRA made arbitration agreements' class-action waivers unlawful. By attacking the individualized nature of the arbitration proceedings, the plaintiffs sought to interfere with one of arbitration's fundamental attributes—speed.

Moreover, Section 7 of the NLRA does not expressly approve or disapprove arbitration. It does not hint at displacing the FAA, which strongly favors arbitration. The notion that Section 7 confers a right to class or collective actions seems unlikely when those procedures were hardly known when the NLRA was adopted in 1935, the court observed. The modern class action didn't exist until 1966. Class arbitration didn't emerge until later, and the FLSA's collective-action provision was enacted after Section 7.

While some forms of group litigation existed even in 1935, Section 7's failure to mention them only reinforces that the statute doesn't address such procedures, according to the court.

In many cases over many years, this court has heard and rejected efforts to conjure conflicts between the FAA and other federal statutes, the court observed.

The Supreme Court also declined to defer to the NLRB's view that class-action waivers violated the NLRA, deciding that the NLRB was not an expert in arbitration, Michelle Haydel Gehrke, an attorney with Polsinelli in San Francisco, told *SHRM Online*.

Congressional Action Urged

In a vigorous dissent, Ginsburg wrote, "Congressional correction of the court's elevation of the FAA over workers' rights to act in concert is urgently in order."

She said that the court wrongly subordinates employee-protective labor legislation to the FAA and "ignores the destructive consequences of diminishing the right of employees to band together in confronting an employer."

In addition, she said, "employees' right to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights."

She predicted that more employers will use arbitration agreements as a result of the court's decision. She noted that the percentage of companies imposing mandatory arbitration agreements on employees had increased from 2.1 percent of nonunionized in 1992 to 53.9 percent in 2018 following other Supreme Court decisions upholding employers' arbitration provisions (*Gilmer* and *Circuit City*).

Notably, Ginsburg did not interpret the court's latest ruling as placing in jeopardy discrimination complaints asserting disparate impact and pattern-or-practice claims that call for proof on a groupwide basis. Some courts have ruled that these claims cannot be maintained by individual complainants.

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Arbitration's Advantages for Employees

While the Supreme Court's ruling shields employers from many class actions, most notably wage and hour class actions,

employers that choose to adopt arbitration programs aren't necessarily doing this at employees' expense, according to Hanft.

He said that the benefits of arbitration programs for employers and employees include confidentiality. In a court case, virtually everything is public.

Plus, if an arbitration program includes mediation, an employee may be able to raise any concerns, even if there's no legal basis for them, and have them resolved to the employee's and the employer's satisfaction.

Employees generally keep in arbitration all the same rights and available remedies that they have in court, noted Eddie Berbarie, an attorney with Littler in Dallas.

Arbitration can be in employees' interests, but arbitrators must be neutral, Hanft emphasized.

Additional Considerations

Employers' arbitration programs also must comply with state and federal requirements, and must not be "unconscionable," or too one-sidedly benefit the party with greater bargaining power, said Wendy Coats, an attorney with Fisher Phillips in San Francisco.

Pablo Orozco, an attorney with Nilan Johnson Lewis in Minneapolis, said he expects the Supreme Court ultimately will address the procedural and substantive unconscionability of contracts, which looks at the context in which contracts are signed, including bargaining power.

In addition, employers should consider the impact of state law, particularly in states like New York that, effective July 11, limit the use of arbitration for sexual harassment claims, said Gregory Mersol, an attorney with BakerHostetler in Cleveland.