CLIENT ALERT

October 2017

UNDER FIRE:
Supreme Court to Review Mandatory Employee Class Action Waivers

On October 2, the United States Supreme Court heard oral argument in a group of consolidated cases[1] to determine whether employees may be required to sign mandatory arbitration agreements that bar them from pursuing work-related claims on a collective or class basis.[2]

Mandatory employment arbitration agreements have been legally enforceable for almost 30 years.[3] Generally, these agreements bar employees from bringing employment-related claims against employers in court. Instead, the claims must be arbitrated according to procedures outlined in the agreements. Employment is typically conditioned upon an employee's willingness to sign the agreement.

Mandatory employment arbitration agreements have increasingly become the norm across the United States. A recent study from the *Economic Policy Institute* found that over 55% of employees are now subject to such agreements.[4]

Currently, about 30% of those arbitration agreements include a provision that prevents employees from arbitrating claims against employers collectively or as a class ("class action waivers").[5] Two relatively recent Supreme Court decisions have made class action waivers generally enforceable,[6] though the challenges in those cases were based on different legal grounds than the current consolidated cases.[7]

However, the Supreme Court will now decide if class action waivers included in

[1] NLRB v. Murphy Oil USA, Inc. (No. 16-307); Epic Systems Corporation v. Lewis (No. 16-285); Ernst and Young LLP v. Morris (No. 16-300).
[2] In a collective action, claimants are required to opt in to the lawsuit. In class actions, claims are included unless they opt out.
[3] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[4] Alexander J.S. Colvin, The Growing Use of Mandatory Arbitration, ECON. POL'Y J., September 27, 2017, at 1.
[5] *See* Colvin at 2.
[6] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).
[7] Concepcion was based on a challenge under California state law, which the Supreme Court determined was preempted by the Federal Arbitration Act. American Express addressed (i) whether the Federal Arbitration Act permits courts to invalidate class action waivers based on the litigation cost to individual plaintiffs; and (ii) whether federal antitrust law demonstrates a Congressional intent to preclude class action waivers. In both cases, the Supreme Court upheld the waivers. Now, the Court is considering a challenge based on federal labor law, a novel issue.

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mandatory *employment* arbitration agreements are legally enforceable under *federal labor law*.

Claimants[8] argue that the interplay between two federal laws, the National Labor Relations Act[9] ("NLRA") and the Federal Arbitration Act[10] ("FAA"), precludes enforcement of class action waivers. Section 157 of the NLRA provides employees with the right to organize and assemble for the purpose of collective bargaining or other "mutual aid or protection," while Section 158(a) makes it unlawful for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under Section 157. At the same time, Section 2 of the FAA bans any arbitration agreement that violates federal law, whether it be the FAA itself or other laws (*i.e.* the NLRA).

Meanwhile, Defendants[11] argue that the NLRA and the FAA support class action waivers. Defendants first point to judicial precedent stating that the FAA "embodies a liberal federal policy favoring arbitration agreements" such that the agreements should be enforced *according to their terms*, absent a showing that "Congress intended to preclude a waiver of the judicial forum."[12] Defendants then argue that nothing exists in the plain text, legislative history, or statutory purpose of the NLRA indicating Congressional intent to preclude either (i) mandates that arbitration be used as a forum for litigating employment-related claims;[13] or (ii) more specifically to this case, bans on collective/class action as a means to resolve disputes in accordance with arbitration agreements.[14]

The Supreme Court's decision will have important implications for employers and employees alike. The sheer number of *amicus curiae* briefs[15] – 17 supporting Claimants and 11 supporting Defendants – highlights the stakes. The transcript of the October 2 oral argument indicates a relatively even divide among the Justices. Some focused on protecting the rights of employees pitted against the resources of large companies, while others concentrated on both freedom of contract and judicial efficiency. Complicating predictions is the inclusion of newly appointed Justice Neil M. Gorsuch, who, along with Justice Clarence Thomas, was silent during oral argument, offering no hints as to where he stands on the issue.

Another complicating factor is the rather contradictory circumstances surrounding the appeal of the Murphy Oil case. When the NLRB filed its petition for certiorari with the Supreme Court in September 2016, it

[8] The Claimants are employees who, despite having agreed to class action waivers, nonetheless brought class action suits in federal court. The National Labor Relations Board ("NLRB") became a party in only one of the consolidated cases (Murphy Oil) because employees in that case went to the NLRB instead of filing a claim in federal court. The employer then challenged the decision of the NLRB in federal court.
[9] 29 U.S.C. §§ 151-169.
[10] 9 U.S.C. §§ 1-16.
[11] Defendants are employers requiring employees to enter into mandatory arbitration agreements containing class action waivers.
[12] Ernst and Young LLP v. Morris (No. 16-300) at 15-18; Epic Systems Corporation v. Lewis (No. 16-285) at 15-18.
[13] However, this issue has already been addressed by the Supreme Court in Gilmer, which held that mandatory arbitration agreements are legally enforceable.
[14] Epic Systems at 15-18.
[15] "Friend of the court" briefs filed by interested non-parties, meant to influence the Court's decision.

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was represented by the United States Solicitor General's Office, which argued that the Supreme Court should overrule the Fifth Circuit's decision to outlaw class action waivers.[16] Yet, this past summer, after the Supreme Court had agreed to hear the petition, the Solicitor General's Office filed an *amicus curiae* brief requesting that the Supreme Court rule *in favor of the employers*.[17] Acting Solicitor General Jeffrey Wall stated that, despite his office's original position, in the wake of the change in administrations, his office had "reconsidered the issue and reached the opposite conclusion."[18]

A ruling in favor of Claimants could jeopardize millions of arbitration agreements, while a ruling for Defendants would cement the right to contract with employees to litigate in a certain manner. Either way, parties currently bound by class action waivers need to pay close attention to the Supreme Court's impending decision, which will likely be announced in early 2018.

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[16] NLRB v. Murphy Oil USA, Inc. (No. 16-307).

[17] Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307, NLRB v. Murphy Oil USA, Inc. (No. 16-307); Epic Systems Corporation v. Lewis (No. 16-285); Ernst and Young LLP v. Morris (No. 16-300).

[18] Amy Howe, Argument Preview: Reconciling Class Waivers and the National Labor Relations Act (UPDATED), SCOTUSblog (Sep. 25, 2017, 10:56 AM), http://www.scotusblog.com/2017/09/argument-preview-reconciling-class-waivers-national-labor-relations-act/.

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