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The Seventh Circuit Rejects Class & Collective Action Waivers In Arbitration Agreements

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During the last few years, employers have taken comfort in a slew of court decisions that have held – in some form or another – that an arbitration agreement can waive the right to bring a class or collective action. For example, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the U.S. Supreme Court found that the Federal Arbitration Act (FAA) preempted state law – and specifically California law – which had expressly prohibited class action waivers. The Supreme Court recently cemented that ruling in *DIRECTV, Inc. v. Imburgia*, 2015 WL 8546242 (2015), where it again upheld a contractual class action waiver as enforceable under the FAA. Of course, most of these recent decisions involved commercial disputes – not a dispute between an employer and an employee. While the Supreme Court has been issuing rulings favorable to the commercial side of class action arbitration, the National Labor Relations Board (NLRB) has been working in the opposite direction. The board has issued multiple decisions unreservedly holding that class and collective action arbitration waivers violate an employee's rights under the National Labor Relations Act (NLRA), and particularly rights under by Section 7 of the act, which protects employees engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection. While some courts have accepted the NLRB's reasoning to strike down class action waivers, many others have not. The Seventh Circuit's recent decision in *Lewis v. Epic Systems Corp*. 2016 WL 3029464 (7th Cir. May 26, 2016), squarely sides with the NLRB's interpretation invalidating class and collective action arbitration waivers. The agreement in *Lewis* was fairly typical: employees were contractually obligated to arbitrate all employment-related disputes, and they expressly waived "the right to participate in or receive money or any other relief from any class, collective or representative proceeding." The case involved an employee who filed a lawsuit for unpaid overtime under the Fair Labor Standards Act (FLSA) and state law. The employer asked the court to compel arbitration under the parties' agreement. The employee argued the arbitration provision was unenforceable because it interfered with employee's rights to engage in protected concerted activities. The district court agreed with the employee and denied the motion to arbitrate. The employer appealed. On appeal, the Seventh Circuit sided with the employee and affirmed the underlying decision denying the motion to compel arbitration. The court agreed that the class and collective action arbitration waiver language was unenforceable, finding that it "runs straight into the teeth of Section 7." The court explained that an employee's ability to pursue claims on a class or collective basis constituted "concerted activity" under the act, and that prohibiting employees from pursuing such claims was unenforceable and illegal. The court rejected the notion that the ability to file class and collective actions was merely a

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procedural right, finding that it was substantive and "lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute." The court also rejected the claim that its conclusion was inconsistent with the FAA, noting that it was unclear whether "the FAA has anything to do with the case." In the court's view, the FAA does not protect arbitration agreements under circumstances where law or equity would revoke a contract – which is the case with a class action arbitration waiver that violates Section 7 rights. The Seventh Circuit staked out territory directly at odds with a decision from the Fifth Circuit, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), which upheld a class action waiver in the face of a Section 7 challenge by the NLRB. Aside from the Fifth Circuit, the Seventh Circuit's decision also may run counter to comparable rulings from the Second, Eighth and Ninth Circuits (although the Seventh Circuit took pains to note that there was no *direct* conflict with any of those cases). Nevertheless, it appears the Supreme Court eventually will need to address this matter and resolve the conflict among the circuit courts on the enforceability of class and collective action arbitration waivers. In the meantime, employers who rely on arbitration to resolve employment disputes should be cautious about class or collective action waivers in their arbitration agreements that would be impacted by the Seventh Circuit's decision in *Lewis.* Language barring an employee from pursuing a class or collective action could significantly impair an employer's ability to enforce arbitration.