

Fifth Circuit Triples Down On The Legality Of Class Action Waivers In Arbitration Agreements

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On August 10, the Fifth Circuit Court of Appeals – for the third time – rejected the National Labor Relations Board’s (NLRB) position that class action waivers in arbitration agreements are invalid under the National Labor Relations Act. In a short opinion, the Circuit said it was bound by its two previous published opinions directly addressing this issue and ruling that such waivers are valid pursuant to the Federal Arbitration Act. The ruling last Wednesday was the first time the Fifth Circuit has spoken on the issue since the Seventh Circuit recently held that employers cannot lawfully include class action waivers in arbitration agreements (adopting the NLRB’s rationale). If you’re keeping track at home, the Second, Fifth, and Eighth Circuits have all upheld class action waivers in arbitration agreements, while the Seventh Circuit struck them down. This disagreement among the federal appellate court sets up a classic circuit split that will surely need to be decided by the Supreme Court. While the NLRB could petition the Supremes to take up the case, the guess here is that the Board will want to wait until a ninth judge is seated on the High Court (taking the late Justice Scalia’s position), hoping to get the most favorable bench possible, as that final Justice may very well decide the fate of this powerful tool favored by employers. Tune in next week (or next year) for the exciting conclusion.

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