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ALERTS

Finality At Last: Supreme Court Overrules NLRB's Controversial Policy Against Employee Class Action Waivers In Arbitration Agreements

May 21, 2018 | Atlanta | Chicago | Columbus | Dallas | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | New York | San Diego | South Bend

The U.S. Supreme Court has officially put the kibosh on the National Labor Relations Board's (NLRB) policy of declaring as unlawful employee-signed arbitration agreements that include class action waivers. In its 5-4 decision on May 21, the court held that the Arbitration Act's strong policy that favors arbitration requires the enforcement of valid arbitration agreements. This puts an end to a six-year period of uncertainty regarding the legality of employee class action waivers that started with the 2012 *D.R. Horton* decision in which the board first announced its policy of finding class action waivers unlawful.

Subsequently, a number of the federal appeals courts ruled on the issue, with differing results. The Second, Fifth, and Eighth Circuits all disagreed with the NLRB and held class action waivers to be lawful. On the other hand, the Sixth, Seventh, and Ninth Circuits either agreed with the NLRB that class action waivers are unlawful, or felt themselves constrained to defer to the board's view of the matter.

Monday's decision finally provides the long-awaited answer to this jungle of differing views. Justice Gorsuch, writing for the majority noted that the Arbitration Act recognizes that an arbitration agreement may only be invalidated "by generally applicable contract defenses, such as fraud, duress, or unconscionability." In the cases that had been decided by the board and the federal appeals courts,

> "[The employees] don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render any contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones."

The majority held that by the clear terms of the Arbitration Act, such an argument is insufficient to invalidate an arbitration agreement.

The majority also shot down the argument that there is a conflict between the Arbitration Act and the NLRA, and that the board's interpretation of the NLRA should stand, even in the face of the Arbitration Act's clear language. Justice Gorsuch swiftly dealt with that argument, noting that "Section 7…does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act…" In other words, the NLRB had gone beyond the reach of its legitimate authority of interpreting the

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NLRA in *D.R. Horton* and subsequent decisions following it.

Further highlighting the board's overreaching, the majority noted the oddity of "one statute (the NLRA) step[ping] in to dictate the procedures for claims under a different statute (the FLSA), and thereby overrid[ing] the commands of yet a third statute (the Arbitration Act)." Yet this is exactly the result the board achieved with its *D.R. Horton* ruling and its progeny. Justice Gorsuch called it "a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow."

With this decision, we can put to rest this six-year span of history in which employers and labor lawyers had to wade through the thicket of competing and inconsistent authority to determine whether class action waivers in arbitration agreements would be upheld. We now know they will be and we'll be watchful for similar clarity in other areas of the NLRA.

Clients may want to consider whether they need to review their arbitration agreements and assess whether or not they wish to adopt class action waivers.

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