

A Growing Divide: Sixth Circuit Decision To Invalidate Class/Collective Action Waiver Widens Appellate Court Split

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On May 26, the U.S. Court of Appeals for the Sixth Circuit sided with the National Labor Relations Board (NLRB) in finding that an employer unlawfully included a “class action waiver” within a mandatory arbitration program applicable to its employees. In [NLRB v. Alternative Entertainment, Inc.](#), the Sixth Circuit specifically found that the company’s arbitration pact barring employees from pursuing class-action litigation or collective arbitration of work-related claims violated Section 7 of the National Labor Relations Act (NLRA) – a stance the NLRB has taken for years. The Sixth Circuit’s decision follows similar decisions by the Seventh and Ninth Circuit Courts of Appeal on this issue, but it conflicts with Fifth and Eighth Circuit decisions that have held class action waivers in arbitration agreements are enforceable under the Federal Arbitration Act. Thus, the divide among the federal appellate courts with respect to the enforceability of such provisions has widened. Thankfully, the U.S. Supreme Court announced in January that it will be taking up this issue for review. While the Supreme Court has upheld class action waivers in the consumer context, it has not yet specifically evaluated such clauses in the employment setting under the NLRA. The Supreme Court’s ruling on this issue will bring clarity to the situation and provide invaluable guidance to companies utilizing mandatory arbitration programs as to whether class action waivers can lawfully be included in their agreements.

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