THE
NATIONAL LAW REVIEW

The U.S. Supreme Court May Review the Enforceability of Class Action Waivers

Monday, October 17, 2016

One of the most controversial issues in employment law these days involves the position of the National Labor Relations Board ("NLRB" or "Board") that an employer violates the National Labor Relations Act ("NLRA") when it requires employees to pursue any dispute they have with their employer on an individual, rather than on a class or collective action, basis with other employees. It is a position that has been adopted by two circuit courts and rejected by three—a conflict that suggests that the issue is ripe for U.S. Supreme Court review.

Article By
Evan J. Spelfogel
Epstein Becker & Green, P.C.
Take 5 Newsletter

Labor & Employment
Litigation / Trial Practice
All Federal

The NLRB has contended that when an employer requires employees to sign an agreement precluding them from bringing or joining a concerted legal claim regarding wages, hours, and other terms and conditions of employment, the employer deprives them of rights guaranteed under Section 7 of the NLRA to engage in concerted activities for employees' mutual aid or protection. That right, the proponents argue, includes the right to join together in class and collective litigation to pursue workplace grievances in court or in arbitration.

In making that argument, the NLRB appears to be neglecting the second part of Section 7 (added to the NLRA by the 1947 Taft-Hartley Amendments), which guarantees to employees an equal right to *refrain* from engaging in concerted activities for their mutual aid and protection. It would seem to follow that, if they have the right to refrain from engaging in concerted activities, employees could waive their right to participate in class and collective actions.

While the NLRB's argument appears flawed, the Seventh and Ninth Circuits have agreed with the NLRB that where such agreements are a condition of employment, they deprived employees of their rights to engage in "concerted activities" for their mutual aid and benefit guaranteed to them under Section 7 of the NLRA. These decisions conflict with earlier decisions of the Fifth, Eighth, and, most recently, Second Circuits rejecting the Board's position.

At least one dissenting judge, Sandra Ikuta of the Ninth Circuit, stated that the majority decision was "breathtaking in its scope and in its error." She noted that the majority decision was directly contrary to Supreme Court Federal Arbitration Act ("FAA") precedent and that the individual arbitration mandate should have been enforced according to its terms under the FAA. The Ninth Circuit, it should be noted, previously held that an arbitration agreement with a class and collective action waiver did not violate the NLRA when the employee could opt out of the individual arbitration agreement but chose not to do so.

In those jurisdictions covered by the Seventh and Ninth Circuits, class and collective action waivers are likely unenforceable to the extent they are a condition of employment. In jurisdictions covered by the Second, Fifth, and Eighth Circuits, class and collective action waivers would appear to be enforceable. Other circuits have yet to rule on the issue, leaving district courts within those circuits to weigh conflicting arguments on both sides.

The Supreme Court may well step in to resolve the conflict between the circuits on this important issue. Petitions

for certiorari have been filed recently in four different cases. The issue before the Supreme Court in all four of these cases is whether the NLRA prohibits an employer from requiring employees to agree to waive their rights to arbitrate class and collective disputes or whether the FAA, which favors arbitration, controls; in short, whether class and collective waivers in arbitration agreements are enforceable. As there is clearly a conflict among the circuits, it would appear that there is a significant chance that the Supreme Court will grant certiorari and resolve this conflict.

As a practical matter, U.S. Supreme Court Justice Anthony Scalia's death earlier this year, his still-unfilled seat, and the upcoming presidential election may play significant roles in resolving this issue if the Supreme Court grants certiorari. As many will recall, it was Justice Scalia who wrote the majority opinions in *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors*. In those cases, the Supreme Court upheld class action waivers, albeit in the commercial setting, not in an employment, setting. With Justice Scalia's seat unfilled and only eight current justices, a four-to-four split at the Supreme Court would leave all of the circuit decisions standing, including both the Seventh and Ninth Circuit decisions in favor of the NLRB's position, as well as the Second, Fifth, and Eighth Circuit decisions rejecting the NLRB's position. Depending upon which party wins the upcoming presidential elections, the makeup of the Supreme Court justices (and of the five-member NLRB) may play a significant role in the outcome of this issue.