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SUPREME COURT RULES IN FAVOR OF CLASS ACTION WAIVERS IN ARBITRATION

In a landmark decision for employers, on Monday, May 21, 2018 the U.S. Supreme Court held that class action waivers in arbitration agreements are enforceable under the Federal Arbitration Act ("Arbitration Act"). Therefore, employers may require employees to resolve employment-related claims through individual arbitration. In a 5-4 decision authored by Justice Neil Gorsuch, the court rejected the National Labor Relations Board's ("NLRB") position that class action waivers are unenforceable because such waivers violate employees' right to engage in "concerted activities" under Section 7 of the National Labor Relations Act ("NLRA").

The Underlying Facts

The court consolidated three cases (*Epic Systems Corp. v. Lewis, NLRB v. Murphy Oil USA, Inc.*, and *Ernst & Young LLP v. Morris*) where in each case the employer required individual arbitration of employment-related disputes. The employees in each case attempted to bring class actions into federal court alleging violations of federal and state wage and hour laws. The employers attempted to compel individual arbitration of the claims. As there was disagreement amongst the courts and the NLRB whether class action waivers were enforceable, the Supreme Court accepted and consolidated the cases to resolve the dispute.

The Federal Arbitration Act

The Arbitration Act was enacted in 1925 in response to a perceived disfavor of arbitration. In enacting the Arbitration Act, Congress noted that arbitration offered several benefits to court actions—it was quicker, less formal, and often less expensive. The Arbitration Act established a "liberal federal policy favoring arbitration agreements," a concept the Supreme Court has repeatedly upheld.

Section 7 of the National Labor Relations Act

Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157. Historically, the NLRB held that the use of class action waivers in arbitration agreements were enforceable. But that changed in 2012 when the NLRB ruled in *D.R. Horton*, 357 NLRB 2277 (January 3, 2012) that mandatory arbitration agreements that bar employees from bringing class actions restrict employees' ability to engage in "concerted activities" under NLRA Section 7.

The Supreme Court's Decision

In upholding the enforceability of class action waivers, the court noted that the "law is clear" and that the Arbitration Act instructs "federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." The court rejected the NLRB's position that arbitration class waivers somehow interfere with employees' right to engage in "concerted activities" protected under NLRA Section 7, noting that Section 7 focuses on employees' right to organize unions

and bargain collectively; but it does not mention arbitration anywhere in its text. The court concluded: "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act."

Justice Ruth Bader Ginsburg issued a scathing dissent calling the decision "egregiously wrong." Justice Ginsburg expressed concern that the result of the decision "will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."

Conclusion

The enforceability of class action waivers in arbitration agreements related to the resolution of employment-related disputes has been unclear since the NLRB's *D.R. Horton* decision in 2012 and subsequent conflicting court decisions. The Supreme Court's decision in this case provides comfort to those employers with existing arbitration programs (and those wanting to implement such programs) that mandate individual arbitration of claims.

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