

Class Action Waivers: The Supreme Court to Have the Last Word

Class action lawsuits against employers are most likely to arise in the wage and hour context. The federal Fair Labor Standards Act (“FLSA”) is complex and its enforcement can be unpredictable. This unpredictability is particularly evident in the different ways that President Obama’s Department of Labor interpreted the FLSA compared with how President Trump’s DOL is interpreting the FLSA now. Moreover, the FLSA does not require a showing of ill intent to establish a violation. Even “good” employers can find themselves as named defendants for a technical violation of the FLSA.

One strategy that CCM uses with its clients is the execution of a class action waiver in conjunction with an agreement to arbitrate employment disputes. For those clients that adopt arbitration agreements, CCM often includes a class action waiver. The United States Supreme Court has generally supported class action waivers in the context of arbitration agreements. [DirecTV, Inc. v. Imburgia, 136 S. Ct. 463.](#)

Meanwhile, the National Labor Relations Board is hostile to class action waivers arguing that they violate Section 7 of the National Labor Relations Act. See Wednesday Evening Word, [No. 12](#) for a more in-depth discussion of Section 7 of the NLRA. There is a split among the various circuit courts across the country about the legality of class action waivers as they relate to the NLRA. Three circuit courts: the 5th Circuit, the 2nd Circuit, and the 8th Circuit have all held that class action waivers are legal.

On the other hand, the 7th Circuit (Illinois, Indiana, and Wisconsin), along with the 9th Circuit and the 6th Circuit have struck down class action waivers as a violation of Section 7 of the NLRA because they interfere with workers’ rights to engage in concerted activity, namely, class action litigation for their mutual benefit and protection.

The United States Supreme Court will decide this issue during the coming term when it hears oral arguments with respect to three consolidated cases *National Labor Relations Board v. Murphy Oil USA, Inc.*, *Epic Systems*

Corp. v. Lewis, and *Ernst & Young LLP v. Morris*. The Court is likely to issue a ruling in January 2018.

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