U.S. Supreme Court Holds That Class Action Waivers Do Not Violate The NLRA

by Diane Marie O'Malley

On May 21, 2018, the United States Supreme Court issued its 5-4 decision in *Epic Systems Corp. v. Lewis,* No. 16-285; *Ernst & Young LLP v. Morris*, No. 16-300; and *NLRB v. Murphy Oil USA, Inc*., No. 16-307 holding that an employer may require its employees to sign a dispute resolution arbitration agreement that includes an employee's waiving the right to bring a claim on a class or collective action basis.

To recap briefly, the question before the Court was whether, by requiring an employee to arbitrate any disputes on an individual basis, an employer violated Section 7 of the National Labor Relations Act ("NLRA"), which provides 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. In arriving at its decision, the Court specifically held that the right to bring disputes on a class or collective action basis is not "concerted activity" within the meaning of the NLRA, and thus, employers do not violate the NLRA if they require employees to waive class and collective rights.

In so holding, the Court relied heavily on its earlier *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333 decision, on the purpose of the Federal Arbitration Act, which requires courts generally to enforce arbitration agreements, and specifically on the Act's savings clause, which permits courts to decline to enforce an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of **any** contract." The Court noted that the savings clause must be interpreted to rely upon "generally applicable contract defenses, such as fraud, duress or unconsionability." The Court found that the mere fact that an arbitration agreement requires individualized rather than class or collective resolution of disputes is not a viable defense to an otherwise enforceable agreement. In other words, such an agreement is not unconscionable.

The employees' efforts to distinguish Concepcion fall short. They note that their putative NLRA defense would render an agreement "illegal" as a matter of federal statutory law rather than "unconscionable" as a matter of state common law. But we don't see how that distinction makes any difference in light of Concepcion's rationale and rule. Illegality, like unconscionability,

may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, Concepcion tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. (Slip Op. at 9)

The 5-4 decision contains a 25 page Justice Gorsuch majority opinion with a 30 page Justice Ginsburg dissent.

This decision is good news for employers who want to implement, or continue, arbitration programs. Indeed, some California employers have been waiting for the Court's decision to decide whether to implement disputed resolution procedures that include arbitration agreements and how to revise those already in place. However, implementation of the Court's decision is a bit complicated for California employers due to Private Attorney Generals Act ("PAGA") representative actions and the body of case law that has evolved with enforcing arbitration clauses in PAGA actions. Given this rather complex framework, California employers should consult their labor counsel to determine the next steps.

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