Waving Good-bye to Class-Action Waivers?

Federal courts disagree over whether employers may require workers to go to arbitration rather than join together in class actions against them. The next step? It's complicated.

By Jack Robinson

Companies that bar workers from joining class-action cases against them are in an interesting place right now. A federal appellate decision has thrown open the question of whether those rules are legal. And the final word can only come from a U.S. Supreme Court that is itself in flux, with one seat vacant and the other justices likely to split on the issue.

A lot is at stake for employers. Over the last decade an increasing number of companies have required workers to waive their rights to file class-action cases and accept mandatory arbitration of just their own grievance. Arbitration has become a key tool for companies to limit liability and resolve all kinds of disputes quickly and cheaply.

"From the business perspective, it's obviously easier -- when you're faced with employee claims -- to arbitrate them individually," says Lauren Daming, an employment attorney with Greensfelder, Hemker & Gale in St. Louis. "If you set up the system correctly, it should benefit both the employer and the employee."

But many worker advocates disagree. They argue class-action waivers are designed to discourage employees who don't have the time or resources to fight on their own -- and to limit bad publicity that a class action can generate.

As with many consumer disputes, often there's not enough money at stake for a single employee to fight the company, says Ann C. Hodges, a law professor at the University of Richmond who is critical of the practice. "Each [dispute] may not be very large in itself, and it's very costly to bring those claims" individually, she says. "If you can't aggregate them . . . a lot of people never sue."

Employers argue that class-action waivers are legal under the Federal Arbitration Act, which allows the private resolution of legal disputes. Until recently, arbitration clauses mostly applied to consumer and commercial disagreements.

But critics of the practice say another federal law prohibits the practice in employment. They argue waivers violate Section 7 of the National Labor Relations Act, which protects the employee's right to collective bargaining and other "concerted activities" as a means of influencing the terms and conditions of employment.

"That's exactly what the NLRA was designed to protect," Hodges says, contending the two laws need not conflict. "I don't think there was any intent in the FAA to take away that right to join together."

That's also the perspective of the National Labor Relations Board, which has repeatedly ruled that such class-action waivers violate the NRLA, notes employment attorney Daniel B. Pasternak, a partner with Squire Patton Boggs in Phoenix.

What followed is what Pasternak compares to a chess game. The NLRB's goal, he says: "a vehicle to seek a Supreme Court review."

That game began with a string of employer victories in federal appeals courts. The first major ruling came in 2012 when the 5th Circuit U.S. Court of Appeals concluded that class-action waivers at Texas homebuilder D.R. Horton were legal under the arbitration act. In 2015, the same court issued a similar decision in a case involving Arkansas-based Murphy Oil Corp.

A surprise setback for employers came on May 26, when another federal appeals court agreed with the NLRB's position -- ironically, in a case to which the agency is not even a party.

That case began when Jacob Lewis sued his employer, the Wisconsin-based healthcare software firm Epic Systems Corp. He claimed it improperly classified him and other technical writers as exempt from overtime.

Citing a class-action waiver that Lewis had been required to sign, the company sought to send the case to arbitration. But Lewis argued that the NLRA gave him the right to proceed with a class action.

After winning at the trial-court level, Lewis also won with the Chicago-based U.S. Court of Appeals for the 7th Circuit on May 26 -- and sent shock waves through the employment-law community. In the first such ruling at that level, a three-judge panel found that class-action waivers do violate the NRLA.

The 7th Circuit judges said their colleagues in the 5th Circuit were wrong to uphold waivers in the D.R. Horton and Murphy Oil cases because the arbitration and labor laws don't necessarily conflict. The arbitration act contains an exemption for cases where agreements violate other laws -- such as the NRLA. And the 5th Circuit didn't make an effort to "harmonize" the two laws, as it is required to do, they concluded.

"When addressing the interactions of federal statutes, courts are not supposed to go out looking for trouble," Chief Judge Diane P. Wood said in her opinion.

Already, the NLRB is citing this opinion in arguing similar cases of its own in other courts, including the circuit appeals court serving the District of Columbia. But the tide hasn't necessarily turned. Just a week after the ruling, the 8th Circuit issued another decision that favored employers in a similar case.

The result: a legal patchwork. Collective-action waivers are banned for now in the states of Illinois, Wisconsin and Indiana, where the 7th Circuit decision applies. In other parts of the country -- notably the 5th Circuit states of Texas, Mississippi and Louisiana -- appellate rulings in the other direction offer employers some security.

Only the Supreme Court can settle the issue once and for all nationwide. And that's where things get even more complicated.

The death in February of Justice Antonin Scalia has changed the calculations on both sides. For one thing, Scalia was a noted supporter of arbitration agreements, and likely would be the deciding vote were he still alive, experts say.

For another: The intense politics of a general-election year have blocked the appointment of a successor, leaving the court divided along ideological lines.

Should the Supreme Court choose to take up an appeal of one of the circuit court decisions in the near future, it's not clear that anything would be settled. Experts widely predict a 4-4 split that would effectively change nothing. A tie vote would uphold the appellate-court ruling at issue, but apply only in the states involved. A nationwide precedent-setting decision would still have to wait for a new case and a full Supreme Court.

All of this makes it "an uncertain environment" for employers, especially in the 7th Circuit states of Illinois, Wisconsin and Indiana, says Pasternak.

And companies across the nation that have -- or are considering -- class-action waivers "need to carefully monitor the issue," Pasternak says. "They need to analyze the risks."

Daming notes that employers concerned with the legal limbo surrounding collective-action waivers could take a cautious approach to disputes, at least for the time being.

"You might maintain one of these waivers ... and choose not to enforce it," she says. "In light of the uncertainty, that's an

option."

Another strategy worth considering, Daming suggests, is including language in arbitration agreements advising employees they always have the right to complain to the NLRB. That could help protect against a court finding that the agreement is not improperly broad.

"Putting in that kind of language makes it very clear that employees still have those rights," she says.

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