

Class and Collective Action Waivers in Arbitration Agreements: A Useful Tool for Employers or An Unfair Labor Practice?

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An increasingly popular tool for employers is the arbitration agreement. Employers can have their employees sign an arbitration agreement, which waives the employee's right to bring a claim against the employer in court, and instead requires that any claims be brought in an arbitration proceeding. Arbitration can be more cost effective and efficient than litigation, and thus can greatly benefit the employer. However, the agreements must be carefully crafted to ensure they are enforceable.

At the moment, one gray area with respect to enforceability involves class and collective actions. Arbitration agreements often limit an employee's ability to participate in a class or collective action, but the legality of this practice is in question. Both the Seventh Circuit and the Ninth Circuit have found that requiring employees to waive their rights to pursue class or collective actions is an unfair labor practice under the National Labor Relations Act ("the Act"). This is because the waivers are perceived as violating the employees' rights to engage in "concerted activity," a cornerstone of the Act. However, not all circuit courts agree; the Fifth Circuit has held that class and collective action waivers in arbitration clauses do not violate the Act.

The good news is that this particular gray area should soon be resolved by the Supreme Court. The Supreme Court will be hearing three consolidated cases involving this issue in October 2017. We will continue to keep you updated on this important issue for employers.

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