

# U.S. Supreme Court to Address Legality of Class Action Waivers in Arbitrations Agreements

## Labor & Employment Law Update

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The U.S. Supreme Court announced Friday, January 13, 2017 that it will hear a trio of cases concerning the right of employers to include class action waivers in employment-related arbitration agreements. Arbitration agreements are contracts through which an employee and an employer agree to resolve potential future disputes through binding arbitration rather than through the courts. Class action waivers are provisions in arbitration agreements that prohibit employees from joining together to arbitrate multiple related claims in a class or collective action. If such a waiver is enforced, employees are required instead to arbitrate each employee's dispute separately.

The general counsel for the National Labor Relations Board (NLRB) has long argued, with varying degrees of success, that the right to engage in collective legal action is itself "concerted activity" protected by Section 7 of the National Labor Relations Act, and therefore, it is unlawful to ask employees to waive that right.

As we previously reported, the Federal Court of Appeals for the Fifth Circuit (Louisiana, Mississippi and Texas) rejected the general counsel's argument back in 2013 and upheld an employer's right to include a class action waiver in an employment arbitration agreement. Other circuits agreed. However, the NLRB continued to challenge these provisions, and as a result, many employers remained wary.

In May 2016, the Federal Court of Appeals for the Seventh Circuit (Illinois, Indiana, and Wisconsin) sided with the NLRB's general counsel. The seventh circuit struck down a class action waiver concluding it was an impermissible restraint of employees' right to engage in "protected concerted activities." Later in the year the ninth circuit followed suit. This split between the circuits further clouded the issue, leaving employers with no clear answer.

It is this difference of opinion between the federal courts of appeal that prompted the Supreme Court to agree to hear the issue. While a definitive ruling is not guaranteed, the fact that the Supreme Court granted *certiorari* (i.e. agreed

to hear) three cases on the issue (consolidating them for purposes of oral argument) suggests the Court intends to issue a definitive ruling. Resolution on this issue will provide employers with welcome clarity and certainty regardless of how the Court ultimately rules on the legality of class action waivers in employment arbitration agreements.

For now, employers should stay the course. We will continue to monitor the issue and report on significant developments as they arise.

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