

U.S. Supreme Court Grants Certiorari To Evaluate Class Waivers Under the National Labor Relations Act

by Melissa Raphan, Ryan E. Mick, and Jillian Kornblatt

The U.S. Supreme Court decided today to consider related cases addressing whether arbitration agreements containing class action waivers violate employee rights under the National Labor Relations Act (“NLRA”).

The National Labor Relations Board (“NLRB”) has long issued decisions in unfair labor practice cases holding that class action waivers in employee arbitration agreements are illegal under the NLRA. The NLRB has taken the position that an agreement between employers and employees to litigate disputes solely on an individual basis, under which employees agree not to commence or participate in employment-related claims on a class, collective, or representative basis, violates Section 7 of the NLRA, which protects employees’ rights to engage in “concerted activity” to improve wages or work conditions. The Fifth Circuit twice reversed such rulings by the NLRB. *DR Horton, Inc. v. NLRB*, 737 F. 3d 344 (5th Cir. 2013); *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015). The Eighth Circuit and the Second Circuit also have issued decisions enforcing employee arbitration agreements containing class action waivers, as have many federal district courts. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016).

The landscape changed in May 2016, when the Seventh Circuit sided with the NLRB and held that an arbitration agreement containing a class action waiver violated the NLRA and was unenforceable. *Lewis v. Epic Systems Corp.*, 823 F. 3d 1147 (7th Cir. 2016). The Ninth Circuit followed suit in August 2016, similarly holding that some employee arbitration agreements with class action waivers could violate employees’ Section 7 rights. *Morris v. Ernst & Young, LLP*, 834 F. 3d 975 (9th Cir. 2016).

The NLRB sought U.S. Supreme Court review of the Fifth Circuit’s decision in *Murphy Oil*. Subsequently, Ernst & Young LLP sought review of the Ninth Circuit’s decision invalidating its agreement, and Epic Systems Corp. sought review of the Seventh Circuit’s decision. In a closely watched development on the circuit split, the U.S. Supreme Court granted petitions for certiorari in all three cases on Friday, January 13,

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It remains uncertain when the appeals will be decided. Certiorari petitions granted in January often are heard by April, with decisions the following June, but oral argument could take place in October with a decision by December. The impending appointment of the next Supreme Court Justice, and the timing and extent of the Senate confirmation process, could affect the timing of these decisions.

The cases are *Ernst & Young LLP et al. v. Stephen Morris et al.*, Case No. 16-300; *NLRB v. Murphy Oil USA Inc.*, Case No. 16-307; and *Epic Systems Corp. v. Lewis*, Case No. 16-285, before the Supreme Court of the United States.