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Employment Arbitration Agreements

NEW STRATEGIES AFTER THE SUPREME COURT SPEAKS

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I. AN OVERVIEW OF EMPLOYMENT ARBITRATION

Employment arbitration first received the Supreme Court's approval in 2001 in *Circuit City Stores, Inc. v. Adams*.[1] After *Circuit City*, employers' interest in arbitration gradually increased. By 2008, it was estimated that 25% or more of non-unionized workers were covered by arbitration agreements.[2]

As a general matter, employers' interest in arbitration has typically derived from the following potential benefits:

- Lower costs
- Quicker
- Less stringent procedural rules
- No runaway jury awards
- More flexible deadlines
- Confidentiality (?)
- Arbitrators with employment law expertise
- Some control over arbitrator selection
- Easier access to the arbitrator
- Some plaintiffs' lawyers will go away.

At the same time, employers have learned through experience that employment arbitration can present some risks. These include:

- Satellite/pre-arbitration litigation that increases costs
- Arbitrator's fees
- Arbitration entity's fees
- Few summary judgment victories, more hearings
- Rick of compromise awards
- Weak cases/inflated values
- Constant arbitrator contacts as plaintiff's weapon
- Nightmare arbitrator
- Too little procedure
- Too much discovery
- Limited appellate rights
- Risk of class arbitration

More recently, employers have recognized another potential benefit of employment arbitration that may outweigh most or all of these risks. That benefit is the ability to include class and collective action waivers that limit arbitration to individual proceedings.

II. EMPLOYMENT ARBITRATION AT A CROSSROADS

Employment arbitration has received significant new attention in recent months due to two developments. First, the Supreme Court considered *Murphy Oil* and its companion cases to decide whether class and collective action waivers are enforceable. Second, some members of the #MeToo Movement have begun to contend that employment arbitration contributes to sexual harassment and should be banned.

The outcome of these two developments will determine the future of employment arbitration. On one hand, the ability to include class and collective action waivers may lead to a

dramatic increase in the use of employment arbitration. On the other hand, if legislation is passed barring the arbitration of any specific types of employment claims, such regulation may be a start down the slippery slope toward a complete ban of all employment arbitration.

A. Class Action Waivers

Three consolidated cases – *Murphy Oil v. NLRB, Lewis v. Epic Systems, and Morris v. Ernst & Young* – were the first to be argued during the Court's current term and are likely the most important employment cases to be decided all year.[3] These cases involve the future of class action waivers in employment arbitration.

Prior to the high court's involvement, a fierce dispute had raged for nearly six years. In 2012, the Obama administration's National Labor Relations Board ("Board" or "NLRB") held in *D.R. Horton, Inc.* employees' right under Section 7 of the National Labor Relations Act ("NLRA") to engage in concerted activity includes a right to pursue collective and class action litigation.[4] The Board concluded the NLRA thus prohibits employers from requiring "employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." The Board ordered that class action waivers in employment arbitration agreements are therefore unenforceable.

The *D.R. Horton* decision set up a showdown between the Board and the courts. D.R. Horton (represented by Ron Chapman and Chris Murray of Ogletree Deakins) appealed the Board's decision to the Fifth Circuit Court of Appeals. The Fifth Circuit decisively rejected the Board's decision and refused to enforce it.[5] Instead, the Court held class action waivers are enforceable under the Federal Arbitration Act ("FAA").

Dozens of other cases around the country raised the same issue.[6] In those cases, employees typically opposed motions to compel arbitration by citing the NLRB's *D.R. Horton* decision and arguing the class action waiver was unenforceable. Almost every court to consider that argument rejected it and refused to adopt the Board's view.

Despite strong judicial opposition, the Board refused to back down. Invoking its "non-acquiescence policy," the Board continued to apply its own view of the law in dozens of cases in which employees filed unfair labor practice charges challenging their arbitration agreements. The Board adhered to its own *D.R. Horton* reasoning in *Murphy Oil* and dozens of subsequent decisions.[7]

At the same time, the vast majority of courts continued to reject the Board's view. The Second, Fifth, and Eighth Circuits all expressly rejected *D.R. Horton*/*Murphy Oil* and found class action waivers enforceable.[8]

However, two exceptions developed in 2016. The Seventh Circuit and the Ninth Circuit became the first U.S. Courts of Appeals to adopt the Board's view, at least in part, in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016) and *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).

Significantly, even the Seventh and the Ninth Circuits did not follow the Board's reasoning entirely. Moreover, in another decision, the Ninth Circuit found that if an arbitration agreement included an opt-out provision, it remained enforceable[9] because when an employee is given the chance to opt-out of the arbitration agreement and still keep his or her employment,

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