

## 3 Ways To Approach Class Waivers In Employment Agreements

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Oh, how we long for the calm days of 2011, immediately following the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*,<sup>[1]</sup> when employers finally had a useful tool against costly and manifestly unfair wage and hour class actions. The idea back in 2011 was simple yet elegant: given that arbitration has long been considered a favored and fair venue to resolve employment disputes, and in light of the Supreme Court's decision in *Concepcion* allowing parties to an arbitration agreement to agree to waive the ability to pursue class/collective actions, why not adopt employment arbitration agreements that include class waivers? And that is what many employers did.



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In the years since 2011, a significant number of employers have implemented arbitration agreements that include class waivers.<sup>[2]</sup> And while it has hardly been smooth sailing since *Concepcion*, as state and federal courts have wrestled with issues of contract formation and procedural and substantive unconscionability (many with considerable hostility toward arbitration), with few notable exceptions courts have enforced these agreements. That was until late last month when the Seventh Circuit in *Lewis v. Epic Systems Corp*,<sup>[3]</sup> took an about-face, telling employers with employees in the circuit that class waivers violate their employees' rights under Section 7 of the National Labor Relations Act.

The court in *Lewis* held that because the current National Labor Relations Board has repeatedly found that arbitration agreements with class waivers intrude upon Section 7, and because federal courts should defer to the board's interpretations of the NLRA, mandatory arbitration agreements with express class waivers are unenforceable for nonmanagement employees (those who are not defined as "supervisors" under the NLRA). In reaching this decision, the Seventh Circuit disregarded the weight and force of the Federal Arbitration Act and Supreme Court precedent, and created considerable uncertainty about the future of class waivers in the employment context.

Much will be written in the following months as to whether the Supreme Court will resolve the circuit split on this issue (I predict it will), and if the court takes it up, how they will ultimately rule (hint: much will likely depend on who is elected as our 45th president). While trying to predict what will happen at the court is an interesting parlor game, employers and their counsel should take this opportunity to consider the following options in case *Lewis* turns out to be more than a blip on the radar.

### Option 1: The "Wait-and-See" Approach

For those employers who are on the fence about whether to implement arbitration agreements, they may want to stay on the fence and see how things shake out in the next two years. If the Supreme Court ultimately finds that the Federal Arbitration Act trumps the NLRA (pardon the pun), and so long as Congress does not legislate this issue (which appears to be highly unlikely), then at that time employers may decide that nonclass arbitration is a worthwhile endeavor. Alternatively, if a future Supreme Court takes a pickaxe to arbitration agreements with class waivers, employers can evaluate whether arbitration continues to be a preferred method of dispute resolution for their organization, even if it only encompasses single-plaintiff disputes.

### **Option 2: The “Strike While the Iron is Hot” Approach**

For employers who have been waiting for a reason to implement arbitration agreements, they may want to consider giving employees the option (as opposed to making it mandatory) to pursue arbitration before the Supreme Court addresses this issue. If a future Supreme Court invalidates arbitration agreements with class waivers, it is conceivable the court could find that it does not want to disrupt existing agreements, and apply any decision prospectively. Because any finding that would invalidate millions of lawfully enacted arbitration agreements would necessitate a new analysis of the FAA and the NLRA, the court could find that employers and employees already bound by existing arbitration agreements with a class waiver should have their agreements enforced. See, e.g. *Landgraf v. USI Film Products*, 511 U. S. 244 (1994) (stating that “retroactivity analysis” focuses on “considerations of fair notice, reasonable reliance and settled expectations”).

In addition, it is too early to know whether the court is interested in hearing another arbitration fight, and if it is, there is no telling how long it will take to resolve this issue. The passage of time may be another reason for employers to consider moving forward with arbitration agreements containing class action waivers now.

### **Option 3: The “Reconsider, Review and Revise” Approach**

When a plaintiff attacks the enforceability of an arbitration agreement the reviewing court will usually conduct a comprehensive pathological analysis of every aspect of the contract in order to determine whether to compel arbitration or retain the case. For this reason, employers should consider refining their agreements whenever there are significant developments in the law. The Lewis decision is one such opportunity.

The court in Lewis deferred to the board’s analysis of class action waivers in *D.R. Horton*.<sup>[4]</sup> There, the board held that a class action waiver improperly interferes with an employee’s Section 7 right to “engage in concerted action for mutual aid or protection.” And that there is, “no conflict between federal labor law and policy ... and the Federal Arbitration Act.”

Section 7 of the NLRA guarantees employees “the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Notably, Section 7 also gives employees “the right to refrain from any or all such activities ...” — i.e., the right to waive their ability to pursue any claims as a class or collective action.

With the caveat that only a fool could claim to know how the Supreme Court will rule if it decides to take up Lewis, if the court considers the interplay between the Federal Arbitration Act and the NLRA, it is possible that rather than declaring that all class waivers are invalid, the court could find that a class

waiver in an arbitration agreement is valid provided it does not otherwise conflict with Section 7.

Employers may be wise to consider revising their arbitration agreements to make it explicitly clear that in agreeing to individual arbitration and forgoing the right to take advantage of the procedural vehicle of a class or collective action, employees are not relinquishing their right to join a labor organization and engage in collective bargaining (recognizing that a court may still find that Section 7 rights cannot coexist with a class waiver).

In addition, employers should consider clauses that permit employees to file unfair labor practice charges with the board as well as a reasonable “opt out” provisions giving employees a certain number of days to inform their employer that they do not assent to arbitration (as opposed to the mandatory arbitration provision in Lewis). While these changes may ultimately prove to be futile, for the time being, they can help an employer establish why their arbitration agreements should be enforced.

### **The Future?**

Employers and their counsel must carefully weigh a variety of factors before deciding to adopt and/or amend an arbitration agreement that includes a class waiver. The fluid nature of the law in this area requires caution. And with the uncertainty created by Lewis, and the board’s recent efforts to push other circuits to follow Lewis,[5] employers and employees have to be comfortable living with considerable uncertainty on this important issue.

—By Adam Rosenthal, Sheppard Mullin Richter & Hampton LLP

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[1] AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

[2] See, Carlton Fields Jordan Burt, The 2015 Carlton Fields Jordan Burt Class Action Survey: Best Practices in Reducing Risk and Managing Cost in Class Action Litigation.

[3] <https://www.law360.com/articles/801074/7th-circ-nixes-class-waiver-in-split-with-with-5th-circ->

[4] D.R. Horton Inc., 357 N.L.R.B. No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and the subsequent reaffirming board decision of Murphy Oil USA Inc., 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015).

[5] <http://www.law360.com/articles/803941/nlrb-tells-9th-circ-5th-circ-arbitration-deals-illegal>

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