KING & SPALDING

Client Alert

Labor & Employment Practice Group

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Department of Justice Reverses Course on Class Action Waivers

In the ongoing debate over whether class action waivers in employee arbitration agreements violate the National Labor Relations Act ("NLRA"), the Department of Justice ("DOJ") has done an about-face–switching stances from pro-employee to pro-employer.

During the Obama administration, the DOJ supported the National Labor Relations Board's ("NLRB") controversial position that class action waivers in employee arbitration agreements violate Section 7 of the NLRA. This meant that in many jurisdictions, employers were prohibited from including class action waivers in their arbitration agreements.[1] Now, six months into a new administration, the DOJ has reversed its position in a case pending before the U.S. Supreme Court.[2] In an amicus brief filed last week, the DOJ argues that an employment contract that requires an employee to waive his or her right to bring a class action lawsuit does not infringe upon that employee's rights under the NLRA. Further, the DOJ argues, "Courts must enforce agreements to arbitrate federal claims unless the [Federal Arbitration Act]'s mandate has been overridden by a contrary congressional command or unless enforcing the parties' agreement would deprive the plaintiff of a substantial federal right."[3]

The DOJ acknowledges that it had previously taken an opposing position but states that it "reconsidered the issue" and determined that "nothing in the NLRA's legislative history indicates that Congress intended to bar enforcement of arbitration agreements like those at issue here."[4] The DOJ states further, "We do not believe that the Board in its prior unfair-labor-practice proceedings, or the government's certiorari petition in *Murphy Oil*, gave adequate weight to the congressional policy favoring enforcement of arbitration agreements that is reflected in the [Federal Arbitration Act]."[5]

Because class action waivers can be an effective tool for companies seeking to avoid burdensome class or collective action litigation, a definitive ruling by the Supreme Court that such waivers are enforceable in the employment context would be welcome news to employers across the country. We recommend that employers consult the King & Spalding labor and employment team to discuss both your current arbitration practices and the potential impact of the Supreme Court's forthcoming decision.

For more information, contact:

Michael W. Johnston
+1 404 572 3581
mjohnston@kslaw.com

Scott B. Mario
+1 404 572 4865
smario@kslaw.com

Sedric Bailey
+1 404 572 2882
sbailey@kslaw.com

King & Spalding
Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

www.kslaw.com

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[1] There is currently a split among circuit courts as to whether arbitration agreement class action waivers violate the NLRA. The U.S. Courts of Appeals for the Sixth, Seventh, and Ninth Circuits have held that such agreements violate the NLRA while the Fifth and Eighth Circuits have held that they do not.

[2] *NLRB v. Murphy Oil USA, Inc*., No. 16-307.

[3] Brief for United States as Amicus Curiae Supporting Respondent at 9.

[4] *Id.* at 10.

[5] *Id.* at 13. Interestingly, *Murphy Oil* reached the Supreme Court on a certiorari petition from the NLRB on which the deputy solicitor general under the Obama administration was listed as counsel of record. In the amicus brief filed last week, the new acting solicitor general under the Trump administration is listed as counsel of record. The DOJ's decision to switch sides means that the DOJ and the NLRB will be on opposite sides when the Supreme Court hears oral argument in *Murphy Oil* and two consolidated cases during the October 2017 term.