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labor and employment alert

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**Please contact any of the attorneys in our Labor and Employment Group or the author below if you have any questions regarding this alert.**

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# The End of Wage-and-Hour Class Actions

In a decisive victory for employers, the United States Supreme Court held that, under the Federal Arbitration Act, an arbitration agreement can prohibit an individual from commencing or participating in a class action. The California Supreme Court had established a rule that an employment arbitration agreement was not enforceable if it waived an individual's right to file a class action. The U.S. Supreme Court, in a 5-4 decision, held that state laws cannot interfere with an arbitration agreement's elimination of the class action mechanism to resolve disputes. Employers can use this ruling to essentially eliminate one of the biggest litigation threats facing their business – the wage-and-hour class action.

**What the Supreme Court Did**

In *AT&T Mobility LLC v. Concepcion*, individuals entered into a cellular phone contract with AT&T. That agreement "provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'" Consumers of AT&T filed a class action in court, alleging false advertising and fraud by charging sales tax on phones it advertised as free.

When AT&T attempted to compel arbitration of the individual plaintiff's claims, the district court struck down the agreement as unconscionable because it barred class actions. The trial court cited a long line of California precedent that squarely held such arbitration agreements to be unconscionable, and hence unenforceable, even under the Federal Arbitration Act ("FAA"). The Ninth Circuit affirmed.

The U.S. Supreme Court reversed and held that an arbitration agreement that precludes the parties from resolving their claims in a class-wide setting can be enforced under the FAA. The Court expressly rejected the California cases that held that arbitration agreements that banned the use of class actions were unconscionable and therefore unenforceable.

The Court reasoned that "[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." The Court compared the California ban on class action waivers to a state law that "arbitration agreements that fail to provide for judicially monitored discovery" were "unconscionable or unenforceable as against public policy." The Court also thought California's rule against class action bans in arbitration agreements was akin to a "rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed 'a panel of twelve lay arbitrators' to help avoid preemption)." State laws or rulings that insist on such prerequisites for an arbitration agreement to be enforceable "stand as an obstacle to the accomplishment of the FAA's objectives."

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**What the Decision Means to You**

It is now settled – albeit by a razor-thin margin – that a compulsory arbitration agreement can require that the parties waive any right to bringing or participating in a class action. If the agreement is drafted correctly, this can essentially eliminate the risks to employers of facing a wage and hour class action (or any other employment based class actions). Even job applicants can be covered, as long as an employment application contains such arbitration agreements.

But before rushing out to implement class action bans in arbitration agreements, an employer must consider if it is subject to the FAA. Only federal law now permits class action waivers, so only employers that can invoke the FAA should impose these kinds of agreements on their employees.

Fortunately for employers, the reach of the FAA is broad enough to allow most employers to invoke it. The U.S. Supreme Court has held that the FAA applies to virtually all contracts of employment other than those of transportation workers. As long as the business of the employer affects interstate commerce – an extremely inclusive test – then it can invoke the FAA.

Once this threshold inquiry is resolved and FAA coverage is confirmed, employers should immediately revise existing arbitration agreements or draft new ones that clearly preclude an employee from commencing or participating in class actions. This will effectively eliminate employment based class actions that have been the jewel of the plaintiffs bar for more than a decade.

Former employees, of course, cannot be made to sign arbitration agreements forbidding the use of class actions. As a result, a former employee or any current employee who refuses to sign such an agreement will still expose the company to risk.

Such a risk, however, is only temporary and limited. Eventually, the time limits on former employee claims will expire and any potential class action claims will be eliminated. A former employee's class action, moreover, can only be asserted on behalf of those employees without arbitration agreements banning participation in class actions. Therefore, if an employer gets its entire workforce to sign such agreements, then any class action brought by a former employee cannot include a substantial segment of the class.

Although this is a beneficial decision for employers, the fight to keep class actions alive may not be over. Shortly after the Supreme Court issued its decision, consumer advocates and plaintiffs' attorneys immediately called for congressional action to move forward pending legislation which would ban mandatory arbitration agreements in most consumer and employment contracts. Indeed, Senate Judiciary Committee Chairman Patrick Leahy (D-VT) issued a statement that "Now more than ever, Congress needs to respond with legislation to clarify the original intent of the Federal Arbitration Act. In arbitration, there is no transparency, nor is there an independent arbitrator."

For any questions regarding how this ruling may affect your business, or to learn more about labor and employment claims, please contact a member of Venable's **Labor and Employment** Group.

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