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The Supreme Court Hears Arguments on Collective Proceeding Waivers in Employment Arbitration Agreements

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In its first argument of the new term, the U.S. Supreme Court considered whether collective proceeding waivers in employment arbitration agreements may be enforced.

The Federal Arbitration Act ("FAA") allows employers to include arbitration agreements that require workers to bring legal claims to arbitration, rather than to court. Collective proceeding waivers are becoming a common addition to arbitration agreements. In response, the National Labor Relations Board ("NLRB") found collective proceeding waivers to violate the NLRA because litigating collectively is protected concerted activity.

The Supreme Court is now considering three consolidated disputes. In 2015, the Fifth Circuit found that collective proceeding waivers did not violate the NLRA. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). However, in 2016, the Seventh Circuit found collective proceeding waivers did violate the NLRA. *Lewis v. Epic Systems Corp.* , 823 F.3d 1147 (7th Cir. 2016). Additionally, the Ninth Circuit also found these waivers did violate the NLRA. *Morris v. Ernst and Young*, No. 13-16599, 2016 U.S. App. LEXIS 15638 (9th Cir. Aug. 22, 2016). The Supreme Court is now asked to resolve split among the circuits.

Workers argue that a ban on collective proceedings will strip them of their legal rights and makes small claims impossible to pursue. Conversely, employers assert that there are many benefits of arbitration, including speed, efficiency, and manageable costs.

Previously, the Obama administration and the U.S. Department of Justice both filed briefs supporting the rights of workers. However, the Trump administration has reversed course and supports collective proceeding waivers, in order to protect employers.

During oral argument, some justices suggested that even without collective proceedings, employees could still work together, obtain the same counsel, share information and strategize about their cases. Justice Ginsberg, on the other hand, emphasized that that approach may not be enough because robust enforcement of employees' rights to engage in the concerted activity is at the heart of the NLRA and forms the essence of collective proceedings which must remain protected.

The decision is not expected until early 2018. The Court's decision will provide employers and workers with clarity that may affect 25 million employment contracts.

If you have any questions or concerns regarding employment related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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