New Orleans CityBusiness

How the Supreme Court arbitration ruling could impact civil rights cases, workers and employers

By: Michael Joe, Reporter June 1, 2018 0

The U.S. Supreme Court's recent decision that arbitration agreements can block workers from joining forces in workplace disputes allows companies to remove their largest employment law risk with a clause in their employees' contracts.

In a 5-4 ruling by the court's conservative majority, the justices endorsed a growing practice among companies to force employees to agree to arbitration agreements waiving their right to bring class- or collective-action claims to challenge federal labor law violations.

Employers can now insist that employees resolve disputes individually, one-on-one in the private arbitration process as a condition of employment. And workers will find it much harder to band together in concerted legal actions, which they say is often the most effective way to win small value remedies for a large group of similarly affected people, such as is common in wage and hour disputes.

The ruling in Epic Systems Corp. v. Lewis, which settled a split in circuit courts, is expected to encourage more companies to include class-action waivers in employment contracts. Already, about 25 million nonunion U.S. employees have such provisions in mandatory arbitration agreements that they have agreed to, albeit often unknowingly.

But while it is a significant ruling in a line of pro-business decisions favoring arbitration, what remains to be seen is its broader impact on civil rights discrimination and harassment claims, how plaintiffs and their attorneys might

respond and how many more employers might actually take the opportunity to adopt class-action waivers, according to attorneys on both sides of the decision and an arbitration expert.

Justice Neil Gorsuch's majority opinion and Justice Ruth Bader Ginsburg's rigorous dissent also reignited a long-simmering debate over the merits of arbitration and class actions in the employment context.

The court ruled on three consolidated cases in which groups of employees at large companies say they were denied overtime pay and challenged an arbitration ban on their ability to sue collectively. Workers argued the class-action waivers were in violation of the National Labor Relations Act of 1935, which guarantees union and private workers the right to engage in "concerted activities" for mutual aid or protection.

But Gorsuch said the court's decision was based on court precedent and the Federal Arbitration Act favoring arbitration. That 1925 law says such agreements are "valid, irrevocable and enforceable" except where Congress deems an exception, and Gorsuch said there was no exception to the FAA in the labor law.

"The virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace" if workers were allowed to join together in claims, Gorsuch wrote.

Ginsberg, in her dissent, said that the court has taken the arbitration act beyond what lawmakers originally intended, which was to encourage the settling of commercial disputes privately between merchants.

Ginsburg also said class-action waivers amount to arm-twisting agreements and discourage workers from pursuing smaller claims.

"By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation," she wrote.

Ginsburg added that class waivers might also encourage employer misconduct.

"Employers, aware that employees will be disinclined to pursue small-value

claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations," she wrote.

Loyola University law professor Imre Szalai, who wrote a book taking a critical look at the rise of modern arbitration law, said the court's decision "knocks out really the last categorial, broad defense against arbitration."

"This defense was working in some districts and in some circuits that accepted the argument that it is an unfair labor practice to ban collective action through an arbitration clause," Szalai said.

Workers and plaintiffs' attorneys generally dislike arbitration. Unlike court proceedings, arbitration forums are private and typically limit procedural tools such as discovery used to build a case. And when damages are awarded, they tend to be much smaller than in federal courts.

Szalai said a cynic might also say that plaintiff attorneys would rather try a case in front of a sympathetic jury if their client's case is weak on facts. But Szalai also noted that in recent years some companies have sought to tilt the playing field in their favor — by including provisions in agreements that severely limit discovery, place time limits of 30 or 60 days in which an employee can file a claim or by drawing a line on what arbiters can award.

"You can think of arbitration as an agreement to negotiate. But employers will put a lot of bells and whistles on the arbitration agreements. They can twist it so that it is less attractive. So you can't go to court and then you are stuck with a system that is certainly a hard road to climb," Szalai said.

J. Arthur Smith, a Baton Rouge labor attorney and president of the Louisiana Employment Lawyers Association, said the imbalance stems from the vastly different bargaining power that employers have over workers being asked to sign arbitration agreements as a condition of employment.

"It's not a level playing field, it's not an arms-length transaction and the failure of the court to recognize this is really at the heart of the problem with this case," Smith said.

But employers have been alarmed by a rise in class-action claims brought by workers and the plaintiff's bar on wage issues. Class actions can result in large damage awards and are more difficult to combat than individual claims. More are demanding employees sign class waivers.

David Whitaker, an employment attorney at Kean Miller in New Orleans, disagrees that the decision was a blow to workers' rights. Whitaker said there should be nothing controversial about arbitration. Workers can get compensatory damages; various federal employment statutes provide for penalty damages and plaintiff's attorney fees are recoverable, he said.

"All of this is available to employees even without a collective action. Arbitration is nothing new, and it is viewed as affording all the same protections and due process and safeguards to ensure that legal rights are correctly and neutrally enforced," Whitaker said.

Whitaker said employers that overreach with overly restrictive limits on punitive damages or the recovery of attorney fees and the like run the risk of a judge tossing out the entire agreement.

On the issue of how much discovery is allowed, Whitaker says that while there may not be as much discovery in arbitration as a consequence of being a more streamlined process, he thinks that in each case — regardless of what's in the agreement — the amount of discovery will be decided by the arbitrator in negotiation with the parties.

"I think the arbitrator will tend to use what the federal rules say is a baseline," Whitaker said.

"You've got to have due process for it to be fair," he added. "Especially in the employment arena, it's got to be a functional equivalent of giving a person his or her day in court."

A broader issue that attorneys and their clients will be watching is what effect the decision may have on discrimination and harassment civil rights claims such as those being brought in response to the #MeToo movement that has raised awareness of workplace sexual harassment.

While lawsuits brought by the federal Equal Employment Opportunity Commission are not bound by arbitration agreements, plaintiff attorneys expect companies to try to shunt other civil rights cases into arbitration. Gorsuch's opinion was silent on the issue, but Ginsberg said that she did not think that the court's ruling in favor of class-action waivers applies civil rights claims.

"She was trying to toss out a life preserver to the plaintiffs and employees" to distinguish the majority's decision from employment discrimination cases, Szalai said.

"It is clever because in the context of civil rights disputes, the Supreme Court has recognized the importance of collective action," Szalai said.

Bills introduced last winter with bipartisan support in Congress would shield sexual harassment and discrimination claims from arbitration agreements, but they have yet to advance out of committee.

Smith said that he thinks the plaintiff's bar nationwide will work together and pool resources to bring multiple claims through the individual arbitration process as way to have a large impact.

Such an approach would be akin to what happened after the Supreme Court in 2011 denied female Wal-Mart employees certification as a class in a gender discrimination suit.

"These came back down and they were litigated on an individual basis," Smith said. "I think what the plaintiff's employment bar is planning is cooperative actions in some of these individual employment arbitrations."

Hundreds or thousands of individual arbitrations could get expensive for companies that pay for the cost of the proceedings, Smith and Whitaker agreed.

Whitaker said other factors that employers need to consider in deciding whether to adopt arbitration agreements and class waivers include the judicial jurisdiction they are in and whether most of their claims are handled in state or federal court.

"If you are representing a company and ask, do you want an arbiter or a judge?

I would say, which arbiter and which judge? I can't answer that question in a vacuum. So I think employers that are looking at this and deciding is arbitration right for me, you have to look at a lot of things," Whitaker said.

"For every employer, the answer is going to be different. In many cases it could be a good idea, but for some companies it may not."

Edit

Tagged with: ARBITRATION CLASS WAIVERS DAVID WHITAKER EPIC SYSTEMS IMRE SZALAI J. ARTHUR SMITH SUPREME COURT