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5 Takeaways From Employers' Win On Class Waivers

By **Vin Gurrieri**

Law360 (May 21, 2018, 9:43 PM EDT) -- The U.S. Supreme Court cleared the way Monday for employers nationwide to require workers to sign away their right to pursue class actions in a blockbuster ruling that attorneys on both sides of the bar agree will translate to millions more workers being bound by class waivers.

Authored by Justice Neil Gorsuch, a five-justice majority ruled in a trio of cases that involved Epic Systems Corp., Murphy Oil USA Inc. and Ernst & Young LLP that businesses aren't violating the National Labor Relations Act if they force workers to forgo the ability to pursue class actions by including class waivers in arbitration agreements they must sign as a condition of employment. Instead, the justices held that mandatory arbitration agreements must be enforced under the Federal Arbitration Act according to their terms, even if those terms include individual arbitration.

The justices held that mandatory arbitration agreements must be enforced under the Federal Arbitration Act according to their terms, even if those terms include individual arbitration. (AP)

"I didn't think the outcome or the rationale used in the court's decision was all that surprising, but the importance of the decision is monumental, and it affects every employer and employee in the United States," said Ron Chapman of Ogletree Deakins Nash Smoak & Stewart PC. "The big takeaway is that every employer in America needs to re-evaluate its current agreement or consider whether to adopt one in light of today's ruling."

Here, Law360 looks at five key takeaways from the high court's long-anticipated decision.

Class Waiver Explosion

Both management attorneys and plaintiffs lawyers said businesses will now take a fresh look at their arbitration agreements and consider modifying them to include class action waivers if they are not already included.

Chapman said the use of arbitration agreements containing class waivers will increase "significantly."

"Prior to today, the use of arbitration agreements was fairly common. Three months from now, it'll be the norm," said Chapman, whose firm just hours after the high court's ruling unveiled an automated tool that prepares custom arbitration agreements containing class waivers based on employers' requirements and preferences.

In September, the Economic Policy Institute released a study finding that 56 percent of private-sector nonunion workers — about 60 million people — were subject to mandatory arbitration in employment contracts that prevent them from pursuing potential claims in court. Among companies with 1,000 or more employees, about 65 percent of them have mandatory arbitration procedures, according to the study conducted by Cornell University professor Alexander J.S. Colvin.

Colvin's study found that about 30 percent of the employers that require mandatory arbitration include class action waivers as part of their policies, with large employers being more likely to include them than smaller ones.

Overall, that means about 23 percent of the nonunionized private workforce — nearly 25 million people — have waived the right to pursue class or collective actions against their employers.

Joseph Greenwald & Laake PA's Brian Markovitz, who mostly represents workers, said that management attorneys, if they hadn't been doing so already, now "definitely have to put class action bans into everything" and that such agreements will become commonplace.

Workers' Advocates Concerned

In a lengthy dissent to Monday's opinion, Justice Ruth Bader Ginsburg called the majority's decision "egregiously wrong," and expressed concern that the "inevitable result" of the decision "will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers," particularly those with claims of wage violations against their employers.

Plaintiffs lawyers and workers' advocates echoed Justice Ginsburg's worries, saying the high court made it harder for workers to vindicate their rights at all.

Seth Lesser, a partner at plaintiffs firm Klafter Olsen & Lesser LLP, said it's "a legal fiction that employees have 'consented' to give away their rights" under hundreds of laws that Congress as well as state lawmakers have enacted to protect employees, and that the high court "has probably, in effect, repealed many of our laws meant to protect workers' rights."

Andrew Melzer of Sanford Heisler Sharp LLP said the ruling "continues a trend of manipulating [the FAA] to insulate companies from being held accountable for illegal conduct," and Altshuler Berzon LLP partner Michael Rubin said in a conference call Monday that the ruling "effectively stymies any meaningful enforcement of our country's most important civil rights and workplace protection laws."

"Today's opinion will inevitably lead to far more violations of civil rights in the workplace and far less vindication of those rights," Rubin said, noting that many workers lack adequate knowledge of their legal rights and are deterred by the fear of being retaliated against or being blacklisted if they step forward with individual claims.

But Mayer Brown LLP partner Andrew Pincus, who has litigated numerous high-profile cases before the high court, including a 2011 case called AT&T v. Concepcion that dealt with class waivers in the consumer context, said he believes arbitration gives claimants "some pretty powerful tools" that they can use and will lead to a spike in claims.

Those tools include limits on costs and fees that largely fall on employers to pay, which helps claimants avoid legal fees. And arbitration leads to more rulings on the merits, which doesn't often happen in class actions since many settle after the class certification stage.

"It opens the door to employees pursuing many more claims than it would be practical to pursue in court," Pincus said.

Markovitz, however, said that class action bans essentially function as "a license to steal" by businesses and that workers won't in fact have an ability to pursue those claims if they must do so in individual arbitration.

"What [an employer] can do is take small amounts of money from people, a couple hundred bucks, and then [workers] can't band together to go after losing these several hundred dollars, and there's not a lawyer in the world who's going to take a $300 case to arbitration where they're probably going to lose," Markovitz said.

Pending Cases in Flux

While the Supreme Court's consideration of the class waiver issue in the employment context has played out, numerous cases have been stayed awaiting the high court's decision. Now, lawyers say the parties in those cases will have to contend with what Monday's decision means for those proceedings.

"For people that have current cases pending, you're going to see the litigants trying to sort through what this means for [those] cases," said Michele Gehrke, chair of Polsinelli PC's traditional labor relations practice. "I think we're likely to see those courts enforce the class action waivers and, to the extent the arbitration agreements are otherwise enforceable, send the cases to individual arbitration and the class or collective claims will have to be dismissed."

BakerHostetler partner John Lewis noted that an issue that could come up in currently pending class actions against companies in circuits that adhered to the National Labor Relations Board's view that waivers were illegal will be whether those companies waived their right to enforce the arbitration agreements with class waivers by not raising it with the court, or whether attempting to enforce those agreements in those circuits would have been futile.

"I think we'll see a lot of activity on the waiver of the right to arbitrate ... after the change of law," Lewis said.

The NLRB also issued a statement Monday saying that it currently has 55 pending cases with allegations that employers violated the NLRA because their arbitration agreements contained class waivers, adding that it is "committed to expeditiously resolving these cases" in line with the high court's precedent. The agency also noted that many similar cases that were previously before the NLRB remain pending before federal courts of appeals.

Following California's Lead

Wendy McGuire Coats, a partner at Fisher Phillips, noted that the high court's ruling Monday "sent a clear message that if a case is controlled by the FAA, that does trump and govern, and Epic would apply in those situations."

But she noted that many employers in states like California often face situations in which a contract doesn't fall under the purview of the FAA, meaning state law, like California's Private Attorneys General Act, would apply.

Under PAGA, employees can sue over workplace violations individually as well as on behalf of other current or former workers and the state of California, allowing for representative suits that are similar to class actions.

In instances where PAGA applies, Polsinelli's Gehrke said the PAGA claim wouldn't be subject to mandatory arbitration and the right to pursue a PAGA claim on a representative basis can't be waived.

Ogletree Deakins' Chapman said he believes "we'll continue to see PAGA-only cases being filed with only PAGA claims asserted to circumvent" the high court's Epic decision, and added that he expects that "other states will look at PAGA-like statutes of their own to pass."

Cathy Ruckelshaus, general counsel at the National Employment Law Project, said that a few other states "are looking at similar laws that essentially give citizens the right to step into the shoes of the state and prosecute claims."

Agency Deference Under Fire

Besides its potentially profound impact on the American workplace, legal observers noted that Justice Gorsuch's majority opinion included a long discussion over so-called Chevron deference, a legal doctrine that forces courts to defer to how regulatory agencies interpret ambiguous statutes, that could come up again in a future case.

Justice Gorsuch concluded that the NLRB wasn't entitled to such deference in this case for its interpretation of the NLRA.

Former NLRB general counsel Jerry Hunter of Bryan Cave Leighton Paisner LLP said that while the NLRB's view of certain ambiguous language in the "may be entitled to some judicial deference, the board's analysis of the interplay between the NLRA and the FAA is not entitled to any deference by the court."

"The Supreme Court has made clear in a very long line of cases even prior to today's decision ... that the board is not entitled to deference when it determines how the NLRA should be harmonized with other federal statutes," Hunter said.

But, more broadly, BakerHostetler's Lewis said the Epic decision "cast some doubt on Chevron deference from a couple directions," and could foreshadow future cases before the justices where the issue is analyzed.

"I think it also is a preview or coming attraction, because I think everyone suspects that there will be increased scrutiny of deference and whether deference is part of what has created an administrative framework that some believe is unconstitutional," Lewis said.

The cases are Epic Systems Corp. v. Lewis, case number 16-285; Ernst & Young LLP et al. v. Stephen Morris et al., case number 16-300; and NLRB v. Murphy Oil USA Inc., case number 16-307, in the Supreme Court of the United States.

--Editing by Katherine Rautenberg and Alanna Weissman.

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