XpertHR Podcast

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Supreme Court Weighs Crucial Mandatory Arbitration Dispute

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The Supreme Court opened its new term by hearing a major employment arbitration dispute affecting an estimated 25 million workers and their employment contracts. At issue was whether an employer may compel its employees to arbitrate workplace complaints individually rather than as part of a class.

On this podcast, I'll have a full report from inside and outside the courtroom about what the justices had to say. The Court has upheld the use of mandatory arbitration clauses by businesses in a series of five to four decisions. But this case goes a bit further because it involves a trio of agreements that not only required workers to arbitrate their disputes but prevented them from banding together. And to the lawyer representing the employees, Daniel Ortiz, that makes all the difference.

Speaking outside the Supreme Court, Ortiz said none of the Court's past cases involved arbitration agreements bumping up against the National Labor Relations Act. He explained that the agreements currently before the Court all waived the employees' rights to engage in protected concerted activity about workplace conditions:

"Well it's one thing to be in favor of arbitration. It's another to impose these kinds of joint action waivers so harshly. And none of these other cases concerned another federal statute which created a substantive right, which would be violated if you held people to the terms of their contracts under the FAA."

Inside the courtroom Justice Stephen Breyer clearly agreed, telling a lawyer representing the employers that he feared upholding these arbitration agreements would overturn decades of labor law going all the way back to FDR and the New Deal.

Meanwhile, Justice Ruth Bader Ginsburg questioned how much of an agreement truly existed, saying there was no true bargaining:

“It’s the employer says, “You want to work here? You sign this. It’s what was called a ‘yellow dog contract.’ This has all the essential features of the yellow dog contract. That is that there is no true liberty to contract on the part of the employee. And that’s what Norris-LaGuardia wanted to exclude.”

Justice Ginsburg later told Deputy Solicitor General Jeffrey Wall, arguing on behalf of the Trump administration in favor of the employers, that there is strength in numbers. She pointed out that it’s much more expensive for an individual worker to proceed through arbitration.

However, Wall said the Federal Arbitration Act is clear that these agreements ought to be enforced. In contrast, he argued the National Labor Relations Act doesn’t say anything about this.

The federal appellate courts have been deeply divided over the issue. The Chicago-based Seventh Circuit Court of Appeals and San Francisco-based Ninth Circuit both sided with the employees and struck down these mandatory arbitration agreements as unenforceable. But the New Orleans-based Fifth Circuit disagreed and sided with an oil company, finding that an employer does not engage in an unfair labor practice by enforcing an arbitration agreement that prohibits class actions.

Those three cases were combined into the one argument before the Supreme Court, but the justices appeared no less divided. While Justices Elena Kagan and Sonia Sotomayor joined Justices Breyer and Ginsburg in expressing skepticism about these mandatory agreements, the Court’s more conservative members appeared unlikely to invalidate them.

Perhaps somewhat tellingly, the Court’s frequent swing voter, Justice Anthony Kennedy, wondered why these workers could not proceed collectively. When NLRB General Counsel Richard Griffin told the Court that these arbitration agreements stopped any kind of joint activity, Kennedy didn’t seem convinced, and suggested they could move forward collectively, as shown by this exchange:

“You say this rule means that three people, employees, can’t go to the same attorney and say, ‘Please represent us and we’ll share our information with you. We have three individual arbitrations, but you represent all three of us.’ They can do that.”

“They could do that, Your Honor, but it does–“

“Well that’s collective action.”

“But it’s not the collective action that’s protected here. The Act protects the employees’ rights to proceed concertedly in...”

“Well they’re proceeding concertedly. They have a single attorney. They’re presenting their case that’s going to be decided maybe in three different hearings.”

Later in the oral argument, when the employee’s attorney, Daniel Ortiz, told the Court that the Federal Arbitration Act creates an exception for contractual provisions that are illegal, he drew this mild rebuke from Chief Justice John Roberts:

"We're trying to figure out if this is illegal. We can't assume that that type of arbitration agreement is illegal, and therefore it's covered by a clause that prevents the enforcement of illegal arbitration agreements."

The one thing both sides can agree upon is that the stakes are high. As Daniel Ortiz noted during the argument, approximately 55% of non-union private employees have contracts that are covered by mandatory arbitration agreements, covering 60 million people. And of those agreements, an estimated 25 million require non-class arbitration.

Interestingly, the Supreme Court first agreed to hear the present cases in January 2017, but it delayed hearing arguments until the late Justice Antonin Scalia's vacant seat was filled.

The Court had narrowly upheld the mandatory arbitration agreement in the consumer realm in *AT&T vs Concepcion*, that prevented unhappy cell phone customers from bringing a class action lawsuit. But Justice Scalia provided the fifth vote in that 2011 case, as well as in previous employment arbitration disputes.

His replacement, Justice Neil Gorsuch, gave no clues as to how he might vote as he asked no questions of either side during the oral arguments. However, Justice Gorsuch generally sided with employers in workplace disputes during his time as a judge on the Tenth Circuit Court of Appeals.

The HR Policy Association and the US Chamber of Commerce have filed briefs in the case, urging the Supreme Court to uphold the arbitration agreements. A decision in these combined cases of *Epic Systems Corporation vs Lewis*, *Ernst & Young vs Morris*, and *NLRB vs Murphy Oil*, is expected before the end of the Court's term in June 2018.

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