BARNES & THORNBURG LLP

‘Let’s Get Ready To Rumble!’ Class Action Waiver Battle Kicks Off At Supreme Court

June 15, 2017 | | National Labor Relations Board,Labor And Employment

David J. Pryzbylski
Partner

The class action waiver battle between employers and the National Labor Relations Board (NLRB) has been brewing for years. It’s finally coming to a head, as the U.S. Supreme Court agreed to resolve the dispute earlier this year and a group of employers just filed their opening briefs in the matter. Class action waivers are a tool utilized by companies to blunt costly and time-intensive class or collective claims brought by a large group of individuals. The waivers usually are included in arbitration agreements in a variety of contexts. For example, some organizations have mandatory arbitration agreements for consumers that require customers to resolve disputes via arbitration rather than in court and further mandate that claims be brought on an individual rather than class basis. In the employment setting, some companies require employees to sign compulsory arbitration pacts that similarly require any employment-related claims to be adjudicated in arbitration and preclude class or collective claims. While the Supreme Court previously has upheld class action waivers in the consumer context, the NLRB has held such provisions are unlawful as they pertain to employment claims because, in the agency’s view, the potential formation of class actions contesting alleged unlawful employment practices is “group activity” protected by the National Labor Relations Act (NLRA). The issue has come up in various federal appellate courts. The U.S. Courts of Appeal for the Sixth, Seventh, and Ninth Circuits have agreed with the NLRB’s stance that such clauses are invalid under the NLRA, but the Fifth and Eighth Circuits have rejected the NLRB’s arguments on grounds that the clauses are enforceable under the Federal Arbitration Act (FAA). Given the split in appellate authority, employers utilizing or considering these mechanisms have been operating in an environment of uncertainty. Three employers now have filed their opening briefs with the Supreme Court arguing that the NLRB’s position on class action waivers is wrong in light of the FAA. We should know by the end of the year whether employers may lawfully utilize class action waivers in the employment context. To the extent the Supreme Court authorizes the use of such clauses by companies, more employers should consider them because they can be invaluable for staving off costly class and/or collective actions. Thankfully, the much needed clarity on this front is coming soon.

RELATED PRACTICE AREAS

Labor and Employment
Labor Relations
National Labor Relations Board (NLRB)