LABOR AND EMPLOYMENT

SUPREME COURT TAKES UP ARBITRATION AGREEMENTS IN THE CONTEXT OF SECTION 7 OF NLRA

by Aaron V. Burrell

On October 2, 2017, the Supreme Court in, *NLRB v Murphy Oil, USA*, considered whether employment agreements that require employees to arbitrate claims and preclude them from participating in collective actions violate the National Labor Relations Act ("NLRA"). There, a gas station operator, Murphy Oil, required each of its employees to, as a condition of employment, enter into a "Binding Arbitration Agreement and Waiver of Jury Trial:"

> Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever to [sic] Individual's employment . . . by binding arbitration.
>
> By signing this Agreement, Individual and the Company waive their right to commence, be a party to or [act as a] class member [in any class] or collective action in any court against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.

The employee in question entered into the agreement when she applied for employment at Murphy Oil in 2008. In June 2010, she and three others filed a collective action against Murphy Oil in the Northern District of Alabama, alleging violations of the Fair Labor Standards Act. Murphy Oil moved to dismiss, arguing that the agreement's provisions required the employee to proceed to individual arbitration. The district court granted the motion.

The employee filed a related unfair-labor-practice charge with the National Labor Relations Board ("NLRB"). The NLRB determined that the agreement violated employee rights to engage in concerted activities under Section 158(a)(1). On appeal, the Fifth Circuit rejected the NLRB's holding, finding that the "use of class action procedures . . . is not a substantive right" under the NLRA. *DR Horton, Inc.* v. NLRB, 737 F.3d 344, 357, 360-362 (2013). The Fifth Circuit further concluded that the NLRA does not "contain a congressional-command to override the FAA [Federal Arbitration Act]." *Id*. at 360.

In a related administrative proceeding against Murphy Oil in 2014, the NLRB issued a decision rejecting the Fifth Circuit, noting that Section 157 of the NLRA provides employees with the "right to engage in collective action—including collective *legal* action, "and that it was "the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." (emphasis in original).

On appeal to the Fifth Circuit, the Court, en banc, found that the agreement was nonetheless enforceable. The NLRB appealed to the United States Supreme Court Supreme Court, which granted certiorari.

At the Supreme Court, the NLRB argued that the agreements waiving employees' ability to pursue work-related claims on a class or collective basis in any forum interfere with the employees' right to engage in "other concerted activities" under the NLRA, and are "therefore not enforceable in light of the savings clause" of the FAA.

In response, Murphy Oil argued that the NLRA contains no "congressional command to override the FAA." Specifically, Murphy Oil argued that the NLRB "does not and cannot point to anything in either the FAA's or NLRA's text or legislative history that could support a finding that a congressional command renders the FAA subservient to the NLRA."

Although the Office of the Solicitor General originally supported the position of the NLRB last year, in August of this year, it filed an amicus brief on behalf of the employers. During oral argument, the liberal wing of the Court was skeptical of the employer's argument that employers could mandate, as a condition of employment, that employees give up their right to file a collective or class action, as such a prohibition seems to directly contradict the NLRA's edict allowing employees to engage in "concerted activity." The conservative wing of the Court seemed to agree with the employers that employees may waive such rights on an individual basis.

The Court will issue its decision on this matter in the short term. In the interim, employers should consider whether provisions in their employment agreements may infringe on employee's rights to engage in protected concerted activities. For more information, feel free to contact us.

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