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Arbitration Agreements – What Is The Employee Actually Signing Up For?

Kennedy Poe

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ARBITRATION AGREEMENTS—WHAT IS THE EMPLOYEE ACTUALLY SIGNING UP FOR?

Kennedy Poe*

INTRODUCTION	383
I. THE USE OF CLASS ACTION WAIVERS.....	385
<i>A. What are Class Action Waivers</i>	<i>385</i>
<i>B. The Implications of Class Action Waivers.....</i>	<i>387</i>
II. A SPLIT OF CIRCUITS: THE LEGALITY OF CLASS ACTION WAIVERS	389
<i>A. History of the National Labor Relations Act.....</i>	<i>389</i>
<i>B. The Development of the Federal Arbitration Act</i>	<i>391</i>
<i>C. The Potential for Conflict Between the NLRA and the FAA</i>	<i>392</i>
<i>D. The NLRA Takes A Stand.....</i>	<i>393</i>
III. THE FURTHERING DIVIDE	396
<i>A. The View of the Sixth, Seventh, and the Ninth Circuit Courts of Appeal.....</i>	<i>397</i>
<i>B. The Other Side of the Circuit Split.....</i>	<i>403</i>
IV. FURTHER CONSIDERATIONS.....	408
<i>A. Examination of the Effects of the Supreme Court's Potential Holding.....</i>	<i>408</i>
1. Enforceable Arbitration Clauses	408
2. NLRA Trumps the FAA	409
<i>B. Example Resolution.....</i>	<i>410</i>
CONCLUSION	411

INTRODUCTION

In 2018, the Ninth Circuit Court of Appeals certified a class action suit brought by drivers of the car service program Uber, despite the employee–employer contract, which stipulated that the company’s drivers must settle disputes that arise out of the course and nature of their employment through arbitration.¹ As it stands, there is a circuit split within the United States courts of appeals over the legality of class action waivers within arbitration agreements of employee–employer contracts, such as in

¹ O’Connor v. Uber Technologies, Inc., 904 F.3d 1087, 1095 (9th Cir. 2018).

the case of *O'Connor v. Uber Technologies, Inc.*² The split in the circuits turns upon one issue: whether the “class action waivers in employment-related arbitration agreements violate the National Labor Relations Act (NLRA)” and, as a result, whether they are unenforceable.³ The Supreme Court of the United States has granted the review of several cases consolidated into a single argument in an attempt to solve this question of novelty for good⁴—a decision that will have a significant and lasting effect upon employee–employer contracts and relations for years to come.

This note will examine the various effects and implications the Supreme Court’s decision concerning the legality of class action waivers within employee–employer contracts will have on employers, employees, and the contracts made between them. Part I will identify class action waivers within an employment contract’s arbitration agreement and will further elaborate upon the legal implications of such waivers being present in the contract. Part II will then discuss the history of the NLRA and assess its present-day role in employee–employer contract formation, in order to provide clarity as to the dispute that has arisen between the NLRA and class action waivers in employment-related arbitration agreements. Part III will analyze the split among the courts of appeals to allow a better understanding of each side of the argument surrounding the issue of class action waivers incorporated into arbitration agreements in employment contracts, as protected by the Federal Arbitration Act (FAA) and the NLAA. Finally, Part IV will discuss the implications upon companies, such as Uber, whose future business and employee–employer relations depend upon the Supreme Court’s ruling, and Part IV will also offer a potential resolution to this clear split amongst the circuits.

² Matthew Mall, *Circuit Split Deepens Over the Enforceability of Class Action Waivers in Employment Disputes*, AM. B. ASS’N. (June 1, 2017), <https://www.americanbar.org/groups/litigation/committees/class-actions/practice/2017/national-labor-relations-v-alternative-entertainment/>.

³ *Id.*

⁴ *Id.*

I. THE USE OF CLASS ACTION WAIVERS

A. *What are Class Action Waivers*

Class action waivers are implemented into a contract “to limit the means of dispute resolution or the way grievances are settled.”⁵ Companies elect to use class action waivers in an effort to avoid class actions lawsuits, which can prove to cost the company expansive amounts of time and money.⁶ Class action lawsuits are comprised of a class of claimants and based on collective claims that are brought on behalf of numerous individuals who suffered the same injury.⁷ To avoid such lawsuits, contracts often have class action waivers built in, and upon agreement of the signatory, the waiver operates as a “cost-cutting measure.”⁸

Class action waivers are implemented in various types of contracts—most commonly, employment and consumer contracts. Class action waivers in the employment context “require any employment-related claims to be adjudicated in arbitration and preclude class or collective claims.”⁹ Whether these waivers are legal is the subject of great conflict and has led to various suits that will ultimately determine “a matter fundamental to how employers and their employees and contractors argue about rights and entitlements.”¹⁰ Recently, class action suits have been filed against notorious companies such as Uber, Microsoft, and Ernst and Young LLP.¹¹

In 2016, *O’Connor v. Uber* was heard before the United States District Court for the Northern District of California in regard to whether Uber could compel claims to arbitration pursuant to driver agreements.¹²

⁵ Jocelyn Mackie, *Class Action Waivers in Terms & Conditions*, TERMSFEED (Aug. 29, 2017), <https://termsfeed.com/blog/class-action-waivers-terms-conditions/>.

⁶ *Id.*

⁷ David J. Pryzbylski, ‘*Let’s Get Ready to Rumble!*’ *Class Action Battle Kicks Off at Supreme Court*, THE NAT’L L. REV. (June 15, 2017), <https://www.natlawreview.com/article/let-s-get-ready-to-rumble-class-action-waiver-battle-kicks-supreme-court>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Ed Zimmerman, *US Supreme Court to Determine Whether Workers Waive Class Action*, FORBES (Oct. 1, 2017), <https://www.forbes.com/sites/edwardzimmerman/2017/10/01/us-supreme-court-to-determine-whether-workers-waive-class-action/#73fa9cb52267>.

¹¹ *Id.*

¹² *O’Connor v. Uber Tech., Inc.*, 311 F.R.D. 547, 563 (N. D. Cal. 2015)

The court held that it “will not definitely decide the . . . issue now,” as the case was solely addressing “drivers who are not bound to one of Uber’s more recent contracts”¹³ Although, it was held that Uber’s contracts with arbitration provisions that do not contain a corrective notice and class action opt-out procedure are unconscionable and unenforceable.¹⁴ Despite this holding, the Uber class action case continues to be litigated due to the rights and entitlements of employees and employers.¹⁵

Furthermore, in 2000, Microsoft paid out a \$97 million settlement for a class-action suit after temporary employees sued, alleging that they were permanent employees and deserved the same treatment and benefits as such.¹⁶ The absence of an applicable and enforceable arbitration provision in these workers’ contracts denied Microsoft the “powerful tool[] [needed] to shut down [this case].”¹⁷

The Supreme Court of the United States has most recently elected to hear the consolidated cases of *Epic Systems Corp. v. Lewis, Ernst & Young LLP v. Morris*, and *N.L.R.B. v. Murphy Oil USA, Inc.*¹⁸ The Court is faced with making a decision as to “whether arbitration agreements with class- and collective-action waivers *violate* the NLRA, which gives employees the right to ‘engage in concerted action for mutual aid or protection.’”¹⁹ A split has developed among the federal circuit courts of appeals as to “the interpretation of arbitration agreements as class action waivers in employment and other independent contractor agreements.”²⁰

¹³ Amended Order Granting In Part and Denying In Part Plaintiffs’ Motion For Class Certification, *O’Connor v. Uber Tech., Inc.* 311 F.R.D. 547 (N.D. Cal. 2015) (No. C-12-3826).

¹⁴ *Id.*

¹⁵ See Zimmerman, *supra* note 10.

¹⁶ Steven Greenhouse, *TECHNOLOGY; Temp Workers at Microsoft Win Lawsuit*, N.Y. TIMES (Dec. 13, 2000), <http://www.nytimes.com/2000/12/13/business/technology-temp-workers-at-microsoft-win-lawsuit.html?mcubz=0>.

¹⁷ See Zimmerman, *supra* note 10.

¹⁸ SULLIVAN & CROMWELL LLP, *Supreme Court Hears Oral Argument in Epic System Corp. v. Lewis*, (Oct. 6, 2017), <https://sullcrom.com/blogs-supreme-court-hears-oral-argument-in-epic-system-corp-v-lewis>.

¹⁹ *Id.* (emphasis added).

²⁰ See Zimmerman, *supra* note 10.

B. The Implications of Class Action Waivers

Settlement through arbitration, which is the selected method of resolution by a large share of class action waivers, is the subject of much debate. Arbitration is often viewed as a means of settlement that provides “more equitable [outcomes of which are] perhaps more favorable to the defendant,” as it is done privately and confidentially.²¹ Although, arbitration can also be viewed as “bias[ed] against individuals and consumers, especially where one party to the agreement has greater sophistication and resources.”²²

Arbitration is similar to litigation in the sense that both parties present evidence, make arguments, question witnesses, and are overheard by impartial decision makers.²³ The arbitration proceedings are commonly overheard by more than one arbitrator so both parties can have input as to the selected arbitrator.²⁴ This allows more flexibility and party control as to who presides over the case and delivers a final ruling.²⁵ Generally, arbitration is a more time efficient method of dispute resolution, which also appears to require less expense to reach a settlement.²⁶ However, both parties must agree to arbitrate the dispute for an arbitration to be valid, and “for this reason, agreements to arbitrate disputes are . . . found . . . in a written contract agreed to by both parties,” such as through the class action waiver.²⁷

Employers often prefer arbitration in lieu of class action law suits as it is a means of quietly settling singular disputes as opposed to “address[ing] widespread abuses” publicly in the court system.²⁸ This allows “companies [to] lock the courthouse doors and prevent consumers [or employees] who’ve been mistreated from joining together to seek the relief they deserve under the law.”²⁹ Furthermore, arbitration allows companies to have control of more aspects of the dispute resolution process than would be available through traditional lawsuits through the

²¹ *Id.*

²² *Id.*

²³ *What is Arbitration?*, FINDLAW (Jan. 18, 2018), <http://adr.findlaw.com/arbitration/what-is-arbitration-.html>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Jim Puzzanghera, *Senate Votes to Kill New Rule Allowing Class-Action Lawsuits Against Banks; Pence Casts Deciding Vote*, LOS ANGELES TIMES (Oct. 25, 2017), <http://www.latimes.com/business/la-fi-arbitration-rule-senate-20171024-story.html>.

²⁹ *Id.*

court—these aspects include “shorten[ing] statutes of limitations, restrict[ing] or eliminat[ing] discovery, requir[ing] a claimant to file in a particular and . . . distant forum, bar[ring] consumers or employees from recovering particular forms of relief, and, through the use of class action waivers, prohibit[ing] consumers, employees, or other plaintiffs from joining together in a class action.”³⁰ As a result of these benefits to employers, the use of arbitration clauses that include class action waivers has increased from 16.1% to 39.2% from 2012 to 2015.³¹

The Ninth Circuit Court of Appeals held in *O’Connor v. Uber* that class actions waivers are valid and signatories of such employment contracts, such as Uber’s driver contract, are subject to participate in arbitration unless “the driver timely opted-out of the contract’s arbitration agreement.”³² Previously, the District Court held in *Mohamed v. Uber* that Uber’s arbitration provisions are unconscionable and unenforceable as they do not qualify as enforceable under the *Gentry* test.³³ The *Gentry* case established that an opt-out provision cannot cure the contract of being unconscionable, because an employee may not always feel free to opt out and may feel pressure from the company to agree to participate in arbitration. Thus, this practice puts the employee at a disadvantage in the bargaining process of the employment contract.³⁴

The tension among the courts in regard to the validity of class action waivers is seen across the board as the circuits are split as to the issue and the reasoning. The Ninth Circuit joins the Seventh and Sixth Circuit courts holding that arbitration agreements that include mandatory class action waivers are not legal, whereas the Second, Eighth, and Fifth Circuit disagree and hold that such arbitration agreements are legal.³⁵

³⁰ J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1770 (2006).

³¹ Jessica Karmasek, *SCOTUS to Decide Arbitration Issue, Unclear If Trump Pick Will Be on Bench in Time*, FORBES (Jan. 19, 2017), <https://www.forbes.com/sites/legalnewsline/2017/01/19/scotus-to-decide-arbitration-issue-unclear-if-trump-pick-will-be-on-bench-in-time/4/#684910a7105a>.

³² *O’Connor v. Uber Tech., Inc.*, 311 F.R.D. 547, 563 (N. D. Cal. 2015)

³³ *Mohamed v. Uber Technologies, Inc.*, 836 F.3d 1102, 1102 (9th Cir. 2016).

³⁴ *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2008).

³⁵ Linda Chiem, *9th Circ. Uber Driver Suits Await High Court Ruling*, LAW360 (Sept. 25, 2017), <https://www.law360.com/articles/967174/9th-circ-uber-driver-suits-await-high-court-ruling>.

II. A SPLIT OF CIRCUITS: THE LEGALITY OF CLASS ACTION WAIVERS

In 2011, the United States Supreme Court ruled in *AT&T Mobility LLC v. Concepcion* that the prohibition of enforcing arbitration provisions with class action waivers implemented by state laws violated the FAA.³⁶ The National Labor Relations Board (NLRB) responded to the *Concepcion* ruling by stating that the Court's holding "did not apply in the context of employee rights under the [NLRA], specifically § 7[,] which vest employees with the right to engage in 'concerted activities.'"³⁷ The NLRB's ruling was then challenged in the Fifth Circuit, where the court "rejected the Board's conclusion that § 7 of the NLRA prohibited class/collective action waivers in arbitration agreements with employees."³⁸ This marked the beginning of the unsettled issue amongst the courts regarding the legality of the enforcement of arbitration provisions containing class or collective action waivers in employee-employer contracts—an issue that has made its way up to the Supreme Court, with no clear-cut answer in sight.³⁹

A. *History of the National Labor Relations Act*

In 1935, the NLRA was enacted by Congress with the purpose of protecting employee and employer rights, to encourage collective bargaining, and to curtail labor and management practices of the private sector in an effort to prevent harm to the general welfare of workers, businesses, and, overall, the United States economy.⁴⁰ More specifically, the NLRA works "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining," while having the secondary objective of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their

³⁶ Jim Sullivan, *Circuit Split Widens over Enforceability of Arbitration Agreements Containing Class/Collective Action Waivers*, POLSINELLI (Sept. 9, 2016), <http://www.polsinelliatwork.com/blog/2016/9/9/circuit-split-widens-over-enforceability-of-arbitration-agreements-containing-classcollective-action-waivers>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ National Labor Relations Act §§ 7-8, 29 U.S.C. §§ 151-169 (1935).

own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”⁴¹

Section 7 of the NLRA provides further clarity to the rights afforded to employees through stating that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment⁴²

Furthermore, Section 8(a)(1) of the NLRA establishes that it is unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act].”⁴³

The NLRA was passed in the 1930s, but “modern-day class-action rules were not implemented until 1966[,]” and opponents of the NLRB’s stance in this argument hold that “[i]t would have been impossible for a Congress in the 1930s to have ‘class actions’ in mind when drafting the statute.”⁴⁴ Many believe that if Congress intended for the NLRA to trump the FAA, then Congress would have ensured that this intention was clear before adopting it.⁴⁵

As the issue of the legality of class action waivers within arbitration agreements has developed, the NLRB has established its stance in the debate. The NLRB has filed a brief, which explains that “[e]mployees can bring class-action lawsuits despite having signed arbitration agreements’ class action waivers.”⁴⁶ The NLRB accepts that class-action waivers violate the NLRA’s protected right of concerted activity by employees.⁴⁷ This right is viewed as a “core substantive right

⁴¹ *Id.*

⁴² *Id.*

⁴³ National Labor Relations Act § 158.

⁴⁴ Allen Smith, *NLRB Tells Supreme Court It Opposes Class-Action Waivers*, SOC’Y FOR HUM. RESOURCE MGMT. (Aug. 18, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nlrb-opposes-class-action-waivers.aspx>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

protected by the NLRA and is the foundation on which the [A]ct and federal labor policy rest.”⁴⁸ Thus, an employer enforcing an arbitration agreement requiring legal disputes to be resolved individually is unlawful as it directly contradicts the protected concerted activity the NLRA grants as a right.⁴⁹ Although, opponents to the NLRB’s stance argue that despite the protections that the NLRA affords, the FAA protects class action waivers.⁵⁰

B. The Development of the Federal Arbitration Act

The FAA was enacted “to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts . . . among the States or Territories or with foreign nations.”⁵¹ Within the FAA, Section 2 establishes that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁵²

The FAA has seen interpretative development through recent cases where the court has ruled upon its applicability to class action waivers within arbitration clauses in employee-employer contracts. In *Lewis v. Epic System Corp.*, the Seventh Circuit appellate court previously held that the FAA has no standing or relation to the arbitration agreements in question.⁵³

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Hera S. Arsen, *Class Action Waiver Update: Ogletree Deakins Files Supreme Court Amicus Brief Supporting Businesses and Employers*, OGLETREE DEAKINS (June 16, 2017), <https://ogletree.com/shared-content/content/blog/2017/june/class-action-waiver-update-ogletree-files-supreme-court-amicus-brief-supporting-businesses-employers>.

⁵¹ *SIXTY-EIGHTH CONGRESS. SESS. II.*, LIBRARY OF CONG. <https://www.loc.gov/law/help/statutes-at-large/68th-congress/session-2/c68s2ch213.pdf> (Last visited March 13, 2019).

⁵² Federal Arbitration Act § 2.

⁵³ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2017).

Although, the FAA has further developed in cases such as *Murphy Oil USA, Inc. v. NLRB*, where the Fifth Circuit held that “the NLRA does not contain a ‘congressional command overriding’ the Federal Arbitration Act.”⁵⁴ As time has progressed, the interpretation of the FAA and its applicability to the dispute surrounding the implementation of class action waiver in arbitration clauses has progressed as well; however, this interpretation still lacks clarity due to the division amongst the various circuits.

C. *The Potential for Conflict Between the NLRA and the FAA*

The apparent conflict between the courts over the contradictory components of the NLRA and FAA in regard to the validity of class action waivers in arbitration clauses stems from the contradictory language within both acts. When examining the language of Section 7 and 8 of the NLRA, Section 8 clearly states that it is unfair for an employer to interfere or restrain the rights guaranteed in Section 7, such as engaging in concerted activities for the purpose of mutual aid or protection⁵⁵—which in this case, is the pursuit of joining as a class to successfully bring a class action suit. Thus, this text notes that the NLRA regards class action waivers within an arbitration agreement to be invalid, even if previously agreed upon.⁵⁶ In contrast, the FAA unambiguously states that if an arbitration clause is agreed upon, then that agreement is valid, irrevocable, and enforceable.⁵⁷ It is no surprise that the courts are split amongst their interpretations when both applicable laws present such an obvious contradiction, yet there is a key component to the FAA that may provide an exception to the FAA’s stance and strengthen the argument for the invalidity of such arbitration clauses.

Within Section 2 of the FAA, there is a clause that states an arbitration agreement shall be valid, “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁸ Although, this is open to interpretation, and the United States Supreme Court will ultimately decide the applicable interpretation, it appears that this clause could be the NLRA’s saving grace. If the Court decides this part of the clause applies also to the NLRA, then it would appear clear that the NLRA ultimately

⁵⁴ *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015).

⁵⁵ National Labor Relations Act §§ 7, 8, 29 U.S.C. §§ 151–69 (1935).

⁵⁶ See National Labor Relations Act §§ 7–8, 29 U.S.C. §§ 151–69 (1935).

⁵⁷ Federal Arbitration Act., 9 U.S.C. § 1 (1925).

⁵⁸ Federal Arbitration Act § 2.

trumps the FAA. Unfortunately, this speculation is as useful as the circuit split in regard to solving the clear contradiction and conflict these two acts present towards the class action waiver issue, but what is clear is that there is great ambiguity surrounding the conflict that the Court will need to consider.⁵⁹

D. The NLRA Takes A Stand

In January of 2012, the NLRB heard the case of *D.R. Horton, Inc.*, not long after the United States Supreme Court issued a decision in April of 2011 in the *Concepcion* case.⁶⁰ The *Concepcion* case granted hope to employers as people believed the holding would supply “legal support for upholding class action waivers in employee arbitration agreements, which in turn could have potentially put an end to wage and hour and other class actions against employers that included such waivers in their arbitration agreements.”⁶¹ The NLRB crushed these hopes outright by holding that Section 8(a)(1) of the NLRA is violated when an employer requires an employee to accept an agreement that relinquishes his or her right to bring “joint, class, or collective claims” that arise within the course of his or her employment or from his or her employment, in order to obtain the stated employment.⁶² This action taken by the NLRB severely limits the potential uses for class action waivers in employment contracts and requires employers to assume more liability as a result of these limits.⁶³

In the *D.R. Horton* case, the D.R. Horton Company “required all new and existing employees to sign a mutual arbitration agreement [as a condition of employment].”⁶⁴ Through the agreement, employers and employees waived their right to a trial in issues that arose between them that related to the employment; the issues were required to be decided by an arbitrator who would issue a final and binding decision, and further, the arbitrator could not consolidate numerous claims of other employees into

⁵⁹ National Labor Relations Act §§ 7–8, 29 U.S.C. §§ 151–69 (1935).

⁶⁰ MITCHELL SILBERG & KNUPP LLP, *Just When You Thought It Was Safe to Go Back in The Water... NLRB's Decision in D.R. Horton, Inc. Sinks Employer's Hopes of Stopping The Class Action Flood*, MSK (Feb. 2012), <https://www.msk.com/newsroom-alerts-1810>.

⁶¹ *Id.*

⁶² In re *D. R. Horton, Inc.*, 357 NLRB No. 184, 1 (2012).

⁶³ MITCHELL SILBERG & KNUPP LLP, *supra* note 60.

⁶⁴ Practical Law Labor & Employment, *FAA Trumps NLRA in D.R. Horton Class Action Waiver Challenge: Fifth Circuit*, THOMAS REUTERS PRAC. L. (Dec. 10. 2013), [https://content.next.westlaw.com/Document/Ia64f71ac749111e38578f7ccc38dcbee/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/Ia64f71ac749111e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1).

one case—effectively preventing any arbitration to be designed in a way that would mimic a class or collective action proceeding.⁶⁵

Michael Cuda, one of the employees of D.R. Horton, desired to bring his claims to arbitration against the company, along with the other employees across the nation that faced the same issue.⁶⁶ Cuda believed he and other “similarly situated [employees] had been misclassified as exempt from the Fair Labor Standards Act.”⁶⁷ Upon delivery of Cuda’s intent to begin the arbitration procedure to D.R. Horton, the company refused to participate in the arbitration proceedings as they “replied that the notice was ineffective because the MMA [(Mutual Arbitration Agreement)] barred the arbitration of collective claims.”⁶⁸ To be clear, the MMA was a document that required a signature by all employees as a precondition to the start of their employment at the D.R. Horton company and many other companies throughout the nation.⁶⁹ In response to the denial issued by D.R. Horton, Cuda then filed a suit with the NLRB claiming that this MMA and its class-action waiver violated the NLRA.⁷⁰

The NLRB accepted Cuda’s complaint and “held that the arbitration agreement violated Sections 8(a)(1) and (4) of the NLRA because its language would cause employees to reasonably believe that they were prohibited from filing ULPs [(Unfair Labor Practices)] with the NLRB.”⁷¹ The NLRB stated that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.”⁷² Thus, any arbitration agreement that requires an employee, “as a condition of employment, to refrain from bringing collective or class claims in any forum . . . ‘clearly and expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA.’”⁷³

This holding by the NLRB came as a result of the Board finding two separate issues with the arbitration clause required by these companies for employment.⁷⁴ The first issue was a result of the class-action waiver

⁶⁵ *Id.*

⁶⁶ MITCHELL SILBERG & KNUPP LLP, *supra* note 60.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Practical Law Labor & Employment, *supra* note 64.

⁷¹ *Id.*

⁷² MITCHELL SILBERG & KNUPP LLP, *supra* note 60.

⁷³ *Id.* (emphasis omitted).

⁷⁴ *Id.*

and the arbitration agreement being required for employment despite its purpose of waiving an employee's NLRA Section 7 substantive rights that allow an employee "to maintain joint, class, or collective employment-related actions in any forum."⁷⁵ The presence of this arbitration agreement created "an implicit threat, [and] therefore, that, if employees refused to sign the MAA, they would be fired or not hired."⁷⁶ In addition to the first issue of coercion, the second issue the NLRB found troubling was the fact that the arbitration agreements prevented the employees from any joint, class, or collective action as it barred all forms from being brought in any forum.⁷⁷ Thus, "the NLRB contended, the [arbitration agreements] impinged upon a core substantive right protected by the NLRA and the foundation upon which both the NLRA and federal labor policy rest."⁷⁸ As a result of these two problematic components of the presented arbitration agreements, the NLRB "ordered the employer[s] to revise the agreement[s] to clarify that [their] employees are not prohibited from: [1] filing charges with the Board; and [2] bringing class or collective actions for employment-related claims."⁷⁹

Although the NLRB issued its holding through the analysis of both of the previously stated points, the NLRB also "analyzed whether there was a conflict between its finding that the [arbitration agreement] was unlawful and the underlying purposes of the [FAA]."⁸⁰ The NLRB regards the FAA as an act that has its purpose in preventing the court from treating arbitration agreements with less priority in favor of other privately made contracts between parties, but the NLRB also asserts that despite the FAA, any arbitration agreements made "remain subject to the same laws and rules about enforceability as other private[ly made] contracts."⁸¹ As would seem obvious, the NLRB held that if conflict arises between an arbitration agreement and the NLRA, then the agreements must be subject to the same treatment by the NLRA as other privately made contracts would be.⁸² The NLRB also pointed to precedent set by the United States

⁷⁵ D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 349 (5th Cir. 2013).

⁷⁶ MITCHELL SILBERG & KNUPP LLP, *supra* note 60.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Practical Law Labor & Employment, *supra* note 64.

⁸⁰ MITCHELL SILBERG & KNUPP LLP, *supra* note 60.

⁸¹ PLC Labor & Employment, *Mandatory Arbitration Agreement Prohibiting Class and Collective Actions Violates the NLRA: NLRB*, THOMAS REUTERS PRAC. L. (Jan. 10, 2012), [https://content.next.westlaw.com/Document/I03f4daadeee311e28578f7ccc38dbce/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/I03f4daadeee311e28578f7ccc38dbce/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&firstPage=true&bhcp=1).

⁸² *Id.*

Supreme Court in the *AT&T Mobility v. Concepcion* case that held that “the FAA only protects parties’ rights to agree to arbitration if the parties can effectively vindicate their substantive statutory rights through arbitration.”⁸³ Furthermore, the NLRB held that “[b]ecause employees covered by the NLRA have a substantive statutory right to engage in concerted activity, including class and collective legal action, any waiver of their right to file or join collective or class actions asserting employment-related claims would interfere with their substantive statutory rights.”⁸⁴ In sum, the NLRB made clear their preference for the NLRA over the FAA in regard to the treatment of employees when the validity of an arbitration agreement that includes a class, collective, or joint action waiver is called into question.⁸⁵

Although, the NLRB made their position clear as to the belief that the NLRA trumps the FAA in situations where an arbitration agreement revokes the ability for an employee to bring a claim in any forum or where a party cannot effectively protect their substantive statutory rights through arbitration.⁸⁶ Following naturally from this system-altering holding issued by the NLRB, courts throughout the nation issued their own holdings and set precedent for other courts to follow in regard to the issues surrounding class action waivers within arbitration agreements. As a result, the circuit courts split with courts following the unbinding precedent set by the NLRB and other courts departing from the NLRB’s holding. This circuit split will be developed further within Part III.

III. THE FURTHERING DIVIDE

The split created amongst the circuits is the result of a difference in interpretations of the text of the NLRA and the FAA and the different courts’ varying public policy considerations. The following examines and discusses the reasons provided from courts on both sides of the circuit split.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

A. *The View of the Sixth, Seventh, and the
Ninth Circuit Courts of Appeal*

As of September 2016, Uber had four class actions filed against their company, which raised the question examined throughout this article: Are arbitration agreements that require class action waivers valid?⁸⁷ In the case of *Mohamed v. Uber*, the Ninth Circuit held that these arbitration agreements were valid—a decision that reversed a previous ruling by the District Court judge that they were, in fact, not.⁸⁸ In contrast, the case of *O'Connor v. Uber* previously held that a class of drivers were a certified class that could bring suit, and the court in the cases of *Yucesoy v. Uber* and *Del Rio v. Uber* granted a denial of motions to compel arbitration.⁸⁹ To understand why there is such controversy and irregularity on the subject, the root of the Uber contract must be examined.

Within their employment contracts, Uber must designate whether a driver is an independent contractor or employee—as employees are entitled to far more privileges such as benefits, overtime pay, and the ability to bring class action suits.⁹⁰ Presently, Uber uses the language within their contracts to designate drivers “as ‘partners,’ not employees.”⁹¹ The California Labor Commission held that Uber drivers “are employees of the company” as “[operating] their own cars doesn’t make them independent contractors . . . [as other employees of companies, such] as . . . pizza deliverers, who often use their own cars to conduct a separate company’s business, . . . are still considered employees.”⁹² This current holding grants that Uber drivers are entitled to those privileges previously

⁸⁷ Nicholas Iovino, *Uber Class-Action Waiver Invalid, Labor Watchdog Tells 9th Circuit*, COURTHOUSE NEWS SERV. (Sept. 20, 2017), <https://www.courthousenews.com/uber-class-action-waivers-invalid-labor-watchdog-tells-9th-circuit/>.

⁸⁸ *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102 (9th Cir. 2016).

⁸⁹ *Yucesoy v. Uber Tech., Inc.*, No. 15-cv-00262-EMC, 2016 U.S. Dist. WL 493189, at *6 (N.D. Ca. Feb. 9, 2016); *Del Rio v. Uber Tech., Inc.*, No. 15-cv-03667-EMC, 2015 U.S. Dist. WL 9025147, at *2 (N.D. Ca. Dec. 16, 2015).

⁹⁰ Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape the Sharing Economy*, FORBES (Nov. 15, 2017), <https://www.forbes.com/sites/omribensahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#4505cbd25e55>.

⁹¹ *Id.*

⁹² Megan Geuss, *Uber Drivers are Employees, California Labor Commission Ruling Suggests*, ARSTECHNICA (June 17, 2015), <https://arstechnica.com/information-technology/2015/06/uber-drivers-are-employees-california-labor-commission-rules/>.

listed that are granted to employees, and as a result, have the ability to collectively bring suit against their employer.⁹³

Although the court held that Uber drivers are employees, Uber argues that their arbitration agreements are valid despite being inclusive of a class action waiver that revokes the right of drivers to bring suit collectively, and instead requires drivers to resolve their complaints individually through arbitration.⁹⁴ The present issue being argued from both sides is not whether arbitration is a valid method of dispute resolution between employers and employees, but rather whether employers, such as Uber, can force employees to “give up their rights to pursue collective legal action against an employer.”⁹⁵ The NLRB argues, in regard to the present cases against Uber, that “[t]he NLRA precludes employers from preventing employees from engaging in concerted activity, and an opt-out provision cannot save it from illegality.”⁹⁶ In 2014, the court required notice of the arbitration provision within the contract and since, Uber has complied with the notice and opt-out procedures necessary as set by the court.⁹⁷ It was held that arbitration agreements without corrective notice of the lack of an opt-out option and more so, the simple lack of available opt-out procedures make the agreements unconscionable and unenforceable.⁹⁸

As a result, Uber argues that the Ninth Circuit previously validated the new and improved arbitration clauses presented in Uber’s employment contracts, and thus, the court should reject the granting of certified class status to these drivers.⁹⁹

These cases follow the ruling made by the Ninth Circuit in the case of *Morris v. Ernst & Young*, where the court “held that mandatory arbitration agreements with ‘concerted action waivers’ violate Sections 7 and 8 of the NLRA” and that the FAA “does not require a different result.”¹⁰⁰ In that case, the employer Ernst and Young required their

⁹³ *Mohamed v. Uber Techs.*, 836 F.3d 1102 (9th Cir. 2016).

⁹⁴ *Id.*

⁹⁵ Iovino, *supra* note 87.

⁹⁶ *Id.*

⁹⁷ *O’Connor v. Uber Technologies, Inc.*, 904 F.3d 1087, 1094 (9th Cir. 2018).

⁹⁸ *Id.*

⁹⁹ *Mohamed v. Uber Techs.*, 836 F.3d 1102 (9th Cir. 2016).

¹⁰⁰ *Ninth Circuit Holds that Mandatory Arbitration Agreements with Class Action Waivers Violate NLRA, Advances Circuit Split*, WESTLAW (May 30, 2017), <https://1.next.westlaw.com/Document/I66d469ab694>

employees to agree to an arbitration agreement that included a class action waiver in order to obtain employment.¹⁰¹ The court reasoned that “the FAA does not require enforcement of arbitration agreements that purport to waive substantive federal rights” and the arbitration agreement thus violated the statutory requirement set by the NLRA “by requiring employees to waive their substantive right to bring concerted work-related legal claims.”¹⁰² The Ninth Circuit established a consistent viewpoint in regard to class action waivers and mandatory arbitration clauses, yet it has decided to “hold off issuing a ruling on [the present] appeal[s] until the U.S. Supreme Court decides three similar cases on the validity of class action waivers.”¹⁰³

The Seventh Circuit similarly maintains their position supporting the notion that class action waivers in arbitration agreements are illegal and thus, unenforceable under the NLRA.¹⁰⁴ In the 2016 case, heard by the Seventh Circuit entitled *Lewis v. Epic-Systems Corporation*, an employee of Epic-Systems, a company that actively employed technical writers, such as the Plaintiff, “entered into an arbitration agreement . . . [where he] waived his ‘right to participate in or receive money or any other relief from any class, collective, or representative proceeding.’”¹⁰⁵ The Plaintiff subsequently chose to file a collective suit for himself and other writers employed by Epic-Systems because of the refusal to pay overtime wages as a result of the misclassification of their work—an act of employers that is deemed a violation of the Fair Labor Standards Act.¹⁰⁶ Epic-Systems relied upon the presence of the arbitration clause and the class action waiver in the employment contracts and requested a dismissal of the case, as well as enforcement of individual arbitration.¹⁰⁷ The Plaintiff argued that although there was an arbitration agreement present that did contain a

711e698dc8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Iovino, *supra* note 87.

¹⁰⁴ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2017).

¹⁰⁵ Henry D. Lederman, Sean M. McCrory & William Emanuel, *Seventh Circuit Finds Class Actions Waivers in Arbitration Agreements are Illegal and Unenforceable Under the NLRA*, LITTLER (May 27, 2016), <https://www.littler.com/publication-press/publication/seventh-circuit-finds-class-action-waivers-arbitration-agreements-are>.

¹⁰⁶ *Id.*

¹⁰⁷ John B. Lewis & Dustin M. Dow, *Lewis v. Epic Systems Opinion – Seventh Circuit Swimming Against the Tide on Mandatory Individual Arbitration*, LEXOLOGY (May 31, 2016), <https://www.lexology.com/library/detail.aspx?g=e5a83c57-ff5e-4c7f-9ac2-e20ed586a477>.

collective action waiver, the agreement itself was invalid and unenforceable as the collective action waiver “interfered with [a person’s] right to engage in concerted activities under Section 7 of the NLRA.”¹⁰⁸

The Seventh Circuit agreed with the Plaintiff and thus, strayed from the previously established positions adopted by the circuits on the other side of the split.¹⁰⁹ The court adopted the analysis and reasoning provided by the NLRB in the previously discussed *D.R. Horton* case—stating “that engaging in class, collective or representative proceedings is ‘concerted activity’ and a protected right under Section 7 of the NLRA, and . . . would be an unfair labor practice under Section 8 of the NLRA for an employer ‘to interfere with, restrain, or coerce employees in the exercise’ of this right.”¹¹⁰ To determine the intended definition of “concerted activity” as described in Section 7 of the NLRA, the Seventh Circuit looked to the legislative history and purpose of the NLRA itself and held that although it is not explicitly stated within the NLRA, it can be inferred that Section 7 was created with the intention to include class, collective, representative, and joint actions.¹¹¹ Despite the court’s holding, Epic-Systems put forth three persuasive arguments as to why the arbitration agreement and collective action waiver should stand—three arguments that will very likely be considered by the Supreme Court in the process of reaching a ruling upon this issue.

The first argument put forth by Epic-Systems was based around the fact that “class actions under Rule 23 of the Federal Rules of Civil Procedure did not exist when Congress enacted the NLRA in 1935, Congress could not have intended Rule 23 class actions to be ‘concerted activity’ under the NLRA.”¹¹² The definition of a word is subject to develop and change over time, and as a result, the exact definition of “concerted activity” at the time of the creation of Rule 23 of the Federal Rules of Civil Procedure cannot be used to defeat the Plaintiff’s claim in this case.¹¹³ Furthermore, the arbitration agreement in the employment contract not only waived the employee’s right to class actions under Rule 23 of the Federal Rules of Procedure, but also waived any other potential

¹⁰⁸ *Lewis v. Epic Sys. Corp.*, 823 F.3d at 1161.

¹⁰⁹ *Lewis & Dow*, *supra* note 107. “The decision put the Seventh Circuit decidedly at odds with the Fifth, Second, Eighth, . . . and Eleventh Circuits on this crucial issue that ultimately influences the extent to which employers can rely on class action waivers in arbitration agreements to limit class liability.” *Id.*

¹¹⁰ *Lewis v. Epic Sys. Corp.*, 823 F.3d at 1161.

¹¹¹ *Id.* See generally National Labor Relations Act § 7.

¹¹² Lederman, McCrory & Emanuel, *supra* note 105.

¹¹³ *Lewis v. Epic Sys. Corp.*, 823 F.3d at 1161.

form of “representative, collective or joint proceedings, and these types of proceedings, including collective actions under §216(b) of the FLSA [Fair Labor Standards Act], existed prior to 1935.”¹¹⁴ The majority states that “there is no reason to think that Congress intended the NLRA to protect only ‘concerted activities’ that were available at the time of the NLRA’s enactment,” and when looking at the text of Section 7 of the NLRA, it is clear that the protection was intended to be afforded to a broad spectrum of collective activities.¹¹⁵

Secondly, Epic-Systems relied on the argument accepted by every circuit on the alternate side of the split that held that the arbitration agreements in employment contracts must be enforced as required by the FAA.¹¹⁶ The court holds quite the contrary and states that “looking at the arbitration agreement [in the Epic-Systems employment contract], it is not clear to us that the FAA has anything to do with his case.”¹¹⁷ To continue, the court examined the employment contract’s arbitration agreement savings clause which stated that “if the collective-action waiver [was found] unenforceable, then any collective claim must proceed in court, not arbitration.”¹¹⁸ To their defense, Epic-Systems argued “that even if the NLRA killed off the collective-action waiver, the FAA resuscitates it, and along with it, the rest of the arbitration apparatus.”¹¹⁹ In response, the court examines both the relevant text of the FAA and the NLRA and determines that the “this argument puts the cart before the horse,” and explains that there is no conflict between the FAA and the NLRA, thus there is no requirement by the FAA to enforce the arbitration clause in this case.¹²⁰ Namely, “the FAA’s ‘savings clause,’ contained in 9 U.S.C. § 2, which provides that arbitration agreements are ‘enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . provide[s] a way to harmonize the NLRA and FAA in finding the agreement’s class waiver to be unenforceable.”¹²¹ This provides that agreements that are deemed illegal under the NLRA are neither valid nor enforceable under the FAA’s saving clause—a reasoning adopted by the Seventh Circuit to explain how the FAA and NLRA supplement each other peacefully, rather than providing for one to trump the other.¹²²

¹¹⁴ Arsen, *supra* note 50.

¹¹⁵ Lewis v. Epic Sys. Corp., 823 F.3d at 1154.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1156.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Lederman, McCrory & Emanuel, *supra* note 105.

¹²² *Id.*

Lastly, Epic-System argued that the rights provided by the NLRA are purely procedural in their nature and even if the NLRA protects the right to class or collective action, it is not a substantive right, and if the reasoning were found valid, it would require the FAA to be enforced.¹²³ The court outright rejects this argument and holds that the right to collective action in Section 7 of the NLRA is not just procedural, but also substantive.¹²⁴ It is clear to the court that Section 7 is a substantive right of the NLRA as it is the only provision in the NLRA that every other provision “of the statute serves to enforce the rights [of].”¹²⁵

The Seventh Circuit set itself apart from other circuits through its reasoning in the Epic-Systems case, but it is to be noted what exactly the court held. The Seventh Circuit holds that certain class, collective, and joint action waivers are not enforceable under the NLRA and the FAA, but it does “not extend its ruling to arbitration agreements that give employees a time period to opt out and do[es] not require consent as a mandatory term of employment.”¹²⁶

Most recently, in May 2017, the Sixth Circuit held that the NLRB’s “position that mandatory arbitration agreements that require employees to waive their right to bring claims as a class or collective action interfere with employees’ right to engage in concerted protected activity for their mutual aid or protection, a right protected under Section 7 of the NLRA.”¹²⁷ The court held 2-1 their decision and as a result, created an even 3-3 split amongst the circuits in regard to this issue.¹²⁸ The Sixth Circuit analyzed both the NLRA and the FAA and reached the conclusion that both laws “must ‘work in harmony’ and that an arbitration agreement that violates the NLRA is not enforceable under the FAA.”¹²⁹ Furthermore, the court held that there is no current conflict between the FAA and the NLRA as the NLRA’s purpose is to protect all concerted activity and that any law that interferes with the function of the NLRA is in direct violation of the NLRA itself.¹³⁰ To defend their reasoning, the

¹²³ Lewis v. Epic System Corp., 823 F.3d at 1161.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1160.

¹²⁶ Lederman, McCrory & Emanuel, *supra* note 105.

¹²⁷ Steven M. Moss & Adam Primm, *Sixth Circuit Is Latest Appellate Court to Find Class Action Waivers Violate NLRA*, BENESCH (June 1, 2017) <http://www.beneschlaw.com/Sixth-Circuit-is-Latest-Appellate-Court-to-Find-Class-Action-Waivers-Violate-NLRA-06-01-2017/>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

Sixth Circuit points to the savings clause of the FAA.¹³¹ As a result of the savings clause presence in the FAA, the court held that the clause provided the needed defense to further hold that the NLRA trumps the FAA, and ultimately, that “any arbitration provision that operates to prohibit this Section 7 [of the NLRA] is explicitly illegal.”¹³²

Until the Supreme Court delivers their holding and settles the score on the issue of class action waivers in employment contract arbitration agreements that are used commonly throughout the nation, the Ninth Circuit, Seventh Circuit, and Sixth Circuit—the circuits who presently reject the notion that such waivers are legal—will remain on a figurative “pause” in their efforts to fight against such waivers.

B. *The Other Side of the Circuit Split*

Unlike the Sixth, Seventh and Ninth Circuits, the Second, Fifth, Eighth, and Eleventh Circuits hold an opposite view in regard to the revocation of a party’s right to collective action through an employment contract’s arbitration clause. The Fifth Circuit held in the case of *NLRB v. Murphy Oil USA, Inc.* that class action waivers in arbitration agreements are enforceable so long as the company is not enforcing the arbitration clause on a “baseless” claim and cannot be “filed ‘with the intent of retaliating against an employee for the exercise of rights protected by’ Section 7 [of the NLRA] or have an ‘objective that is illegal under federal law.’”¹³³ The Fifth Circuit’s holding is based off the previous decision by the court in *D.R. Horton, Inc. v. NLRB* where arbitration agreements were deemed valid as a reasonable employee would understand such agreement to prohibit them from settling disputes in other manners except through arbitration.¹³⁴

Section 7 of the NLRA allows employees to band together for collective bargaining and more so, protects employee’s substantive rights, but the Fifth Circuit argues that “the use of class action procedures . . . is not a substantive right.”¹³⁵ The court uses the fact that the NLRA’s text fails to provide specific language that provides that its intended purpose was to override the FAA against the NLRB’s argument, and thus, the court holds that “there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA.”¹³⁶ Furthermore,

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1020 (5th Cir. 2015).

¹³⁴ *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 363 (5th Cir. 2013).

¹³⁵ *Id.* at 29.

¹³⁶ *Id.*

the court reasons that if arbitration agreements are clear and do not prohibit the filing of unfair labor practice claims by employees, then the agreement would put a reasonable employee on notice that they have “knowingly and voluntarily waiv[ed] the right to file a lawsuit or other civil proceeding relating to Employee’s employment . . . as well as the right to resolve employment-related disputes in a proceeding before a judge or jury.”¹³⁷

The Second Circuit provides similar reasoning as to why the NLRA’s argument fails in regard to the validity of class action waivers. The court determined in *Patterson v. Raymours Furniture Co.* that arbitration provisions within employment agreements are valid if the employee agrees to arbitration when the provision explicitly states that bringing such arbitral claims will prohibit the right to class action suits.¹³⁸ The dispute that gave rise to *Patterson* was based on the action taken by Raymours Furniture Company to add class action and collective action waivers to its employment agreements.¹³⁹ *Patterson* argued that Raymours “violated the Fair Labor Standards Act and New York Labor Law” and thus, “brought a putative collective action and class action.”¹⁴⁰ In response to *Patterson*’s action, Raymours “moved to compel arbitration” and was granted their motion “pursuant to the provisions of *Patterson*’s employment agreement.”¹⁴¹ The Second Circuit’s ruling covers a different circumstance than the circumstance considered by the Fifth Circuit, as will be discussed next, but as a result, the ruling of the Second Circuit adds to the precedent of this side of the circuit split—an argument that broadens the scope of the argument available to be put forth by employers in defense of such contractual provisions.

The Fifth Circuit reaffirms the Second Circuit’s holding through their ruling in *Citigroup Technology, Inc. v. NLRB* where the court reversed a ruling made by the NLRB that required that *Citigroup* remove the class action waiver from the arbitration agreements in their employee’s

¹³⁷ *Id.* at 48.

¹³⁸ *Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71, 80 (S.D.N.Y. 2015).

¹³⁹ SULLIVAN & CROMWELL LLP, *Patterson v. Raymours Furniture Co., Inc.—Enforceability of Class-Action and Collective-Action Waivers in Employment Arbitration Agreements*, LEXOLOGY (Sept. 7, 2016), <https://www.lexology.com/library/detail.aspx?g=d760956a-a943-480b-af8b-c46fa70c0110>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

contracts.¹⁴² In that case, a previous employee of Citigroup, Andrea Smith, filed an unfair labor practice charge against the company “after the American Arbitration Association rejected one of her coworkers’ requests to arbitrate unpaid overtime claims on a collective basis.”¹⁴³ Andrea argued that the class action waivers that prevented the Citigroup employees from bringing collective action against the company,¹⁴⁴ but as a result of consulting the precedent of previously decided cases before the United States Supreme Court, the Fifth Circuit “mandate[d] that arbitration agreements be enforced according to their terms, and they reject[ed] the application of other state and federal statutes to arbitration agreements in the absence of an express “congressional command” to override the FAA.”¹⁴⁵

Although the *Citigroup* case is analogous in its issue to the *Patterson* case from the Second Circuit—both cases turn upon the issue of whether class action waivers in arbitration agreements are valid—the Fifth Circuit has also ruled on a case that is not alike these two cases’ issues and consequentially, broadens the scope of protection offered to employers under its precedent. In August 2017, the Fifth Circuit held that class action waivers can still be held enforceable despite the absence of an arbitration agreement in an employee’s employment contract.¹⁴⁶ The case of *Convergys Corporation v. National Labor Relations Board* involved the Convergys Corporation “require[ing] its applicants to sign a class action waiver even though it was not contained in an arbitration agreement.”¹⁴⁷ The NLRB previously made the decision that a company cannot require job applicants to be prevented from suing the potential employer by forcing their signature to a class action waiver for employment.¹⁴⁸ Through the courts reversal of the NLRB’s decision, the court established that although Section 7 of the NLRA “guarantees the right to self-organize and collective bargain and ‘to engage in other concerted activities for the purpose of . . . other mutual aid or protection,’ . . . it does not include a

¹⁴² Katharine I. Rand, *Fifth Circuit Reaffirms Enforceability of Class Action Waivers in Employment Arbitration Agreements, but Their Fate Remains Unclear*, LEXOLOGY (Jan. 3, 2017), <https://www.lexology.com/library/detail.aspx?g=9c4d0621-a766-4d1a-99f2-9dea757e5f46>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Citigroup Tech., Inc. v. NLRB*, 671 Fed. App’x. 286 (5th Cir. 2016).

¹⁴⁶ Stephen Cockerham & Leslie Brockhoef, *The Fifth Circuit Strengthens Employers’ Right to Use Class Action Waivers*, LAB. REL. L. INSIDER (Aug. 14, 2017), <https://www.laborrelationslawinsider.com/2017/08/the-fifth-circuit-strengthens-employers-right-to-use-class-action-waivers/>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

right to participate in class and collective actions.”¹⁴⁹ This case is different in nature as the absence of an arbitration clause within the agreement removes the protection that is potentially offered by the FAA, and thus, the *Convergys* case develops further the debate as it poses a new, but nonetheless closely related issue.¹⁵⁰

In addition, the Eighth Circuit follows the Second and Fifth Circuit in the case of *Cellular Sales of Mo., LLC v. NLRB* and *Owen v. Bristol Care, Inc.*¹⁵¹ The arbitration provision examined by the court in the case *Sales of Mo., LLC v. NLRB* was required to be signed by employees in order to obtain employment and the court held that this practice did not violate the NLRA and the protections it grants under Section 8(a)(1).¹⁵² Although, in a decision unique to the Eighth Circuit’s jurisdiction, the court also held in the separate but relevant case of *Owen v. Bristol Care, Inc.* that an arbitration agreement within an employment contract does not “preclude an employee from filing a complaint with an administrative agency, which then [itself] could file suit on behalf of a class of employees.”¹⁵³ Nonetheless, the Eighth Circuit emphasized “the ‘liberal federal policy favoring arbitration agreements’ contained in the FAA” and explained that the NLRB “did not have any ‘special competence or experience’ with the FAA.”¹⁵⁴

The Eleventh Circuit agrees with the Second, Fifth, and Eighth Circuit’s rulings in regard to compelled arbitration through employment contracts but further broadens the scope of the issue. In the 2017 case of *William Jones v. Waffle House, Inc.*, the Eleventh Circuit court rejected the plaintiff’s argument that an arbitration agreement with the Defendant

¹⁴⁹ *Id.*

¹⁵⁰ See generally *id.*

¹⁵¹ *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 779-80 (8th Cir. 2016).

¹⁵² Bennet D. Alsher, *Eighth Circuit Weighs in on Legality of Class Action Waivers*, FORDHARRISON (June 16, 2016), <http://www.fordharrison.com/eighth-circuit-weighs-in-on-legality-of-class-action-waivers>.

¹⁵³ Philip B. Rosen et al., *Class and Collective Action Waivers Lawful under NLRA, Eighth Circuit Finds, Contrary to Seventh Circuit*, JACKSONLEWIS (June 3, 2016), <https://www.jacksonlewis.com/publication/class-and-collective-action-waivers-lawful-under-nlra-eighth-circuit-finds-contrary-seventh-circuit>.

¹⁵⁴ Sara E. Costello, *Class Action Waivers Hang in the Balance*, AM. B. ASS’N (Feb. 12, 2017), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2017/class-action-waivers-hang-in-the-balance/>.

that was signed after a class action suit was previously filed against the Defendant had no effect upon the suit itself.¹⁵⁵

In that case, the Plaintiff sought employment at a restaurant that required a background check.¹⁵⁶ The restaurant improperly handled the background checks and did not provide the potential employees an opportunity to dispute the findings, thus the “Plaintiff sought to represent a class of U.S. residents who applied for employment with [the restaurant], or were employed by [the restaurant], and who were subject to adverse employment actions by [the restaurant] based on a background check.”¹⁵⁷

After the Plaintiff filed suit, he gained employment with the restaurant and signed an arbitration agreement where he agreed to solve all “past, present, or future” disputes that arose “out of any aspect or pertaining in any way to [the] employment” through arbitration with the restaurant.¹⁵⁸ Furthermore, the employment contract agreement “contained a delegation provision in which the parties agreed that the arbitrator, and not the court, would have the authority to resolve any dispute regarding the arbitration agreement’s applicability and enforcement.”¹⁵⁹ The Eleventh Circuit stated “that ‘it is now basic hornbook law’ that the Federal Arbitration Act reflects ‘both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.’”¹⁶⁰ The court supplies the evidence that the language within the agreement contained a “broad, valid, and enforceable delegation provision that expressed the parties’ clear intent to arbitrate gateway issues of arbitrability, including questions regarding the agreement’s interpretation, applicability, and enforceability.”¹⁶¹ The court here, as with the other courts on this side of the circuit split, looks to the plain language of the arbitration agreement signed, regardless of the sequencing of the issues, as the language in the provision seemingly accounts for all issues, past and present.¹⁶²

It is made clear through the holdings of the Second, Fifth, Eighth, and Eleventh Circuits that the legality of the existence of class action waivers in arbitration agreements within employment contracts will

¹⁵⁵ David E. Cannella & Gary M. Pappas, *Eleventh Circuit Doesn’t Waffle on Enforceability of Arbitration Agreement*, JD SUPRA (Aug. 17, 2017), <http://classifiedclassaction.com/eleventh-circuit-doesnt-waffle-enforceability-arbitration-agreement/>.

¹⁵⁶ *Jones v. Waffle House, Inc.*, 866 F.3d 1257 (7th Cir. 2017).

¹⁵⁷ Cannella & Pappas, *supra* note 155.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *See generally id.*

remain in dispute from the views of the Sixth, Seventh and Ninth Circuit—at least until the United States Supreme Court, issues their final determination.

IV. FURTHER CONSIDERATIONS

The holding of the United States' Supreme Court in regard to the issue of the validity of class action waivers present within arbitration clauses in the employee and employer contract setting will likely be pivotal in the approach employers take in the drafting of their employment contracts and in their approach towards dispute resolution between employees and the company as a whole. This next section will examine the potential implications of the varying conclusions the Court may deliver and furthermore, will offer a potential resolution that could transform the dispute resolution process of employer-employee contracts as a whole.

A. Examination of the Effects of the Supreme Court's Potential Holding

1. Enforceable Arbitration Clauses

If the Court holds that employment contracts made between the employee–employer with arbitration agreements which include class action waivers do not violate the NLRA, the language found within the contracts will likely remain unchanged, and the arbitration provisions that were properly assented to will be enforceable, despite the aforementioned concerns examined by the Seventh and Ninth Circuit.¹⁶³ The enforceability of such arbitration provisions will force employees to forgo traditional litigation in court and instead bring their complaints individually through arbitration—an outcome that proves to be favorable to many employers as

¹⁶³ Richard Reibstein, *Why the Supreme Court's "Big" Case on Class Action Waivers May Have Little Impact on Some Companies Including Those Using Independent Contractors*, INDEP. CONTRACTOR MISCLASSIFICATION AND COMPLIANCE (Oct. 1, 2017), <https://independentcontractorcompliance.com/2017/10/01/why-the-supreme-courts-big-case-on-class-action-waivers-may-have-little-impact-on-some-companies-including-those-using-independent-contractors/>.

opposed to the alternative of arguing the case before a judge in court.¹⁶⁴ Arbitration has become a preferred method of dispute resolution for employers and companies as a whole as it offers numerous benefits. Arbitration generally presents a more efficient process for resolution of an individual's dispute, grants a streamlined discovery process, is more cost efficient, presents a less formal setting for the process, and protects the company as it offers privacy through its confidential nature.¹⁶⁵ Despite the appeals of arbitration, employees are at a disadvantage in the process as it has been shown that "on average, employees and consumers win less often and receive lower damages in arbitration than they do in court."¹⁶⁶ Furthermore, some agreements require the losing party pay the totality of the fees, including the other party's legal fees—a cost that adds to the deterrence that employees must consider when electing to resolve a dispute with an employer with a standing arbitration clause in their employment contract.¹⁶⁷

The Court could potentially develop this ruling one degree further and establish that, not only is the NLRA not violated by class action waivers in arbitration clauses, but also hold that the FAA trumps the NLRA.¹⁶⁸ If that were the case, Section 7 and 8 of the NLRA would lose the ability to assert that collective action and concerted activities by employees qualify as substantive rights protected by the NLRA.¹⁶⁹ Instead, this holding would deem such collective action as a procedural right and thus, lose its protection under the NLRA.¹⁷⁰

2. NLRA Trumps the FAA

In contrast, the Court may hold that arbitration agreements containing class action waivers within employer–employee contracts are

¹⁶⁴ Robert Fojo, *12 Reasons Businesses Should Use Arbitration Agreements*, LEGAL.IO (May 11, 2015), <https://www.legal.io/guide/5550f4df77777765ebb80100/12-Reasons-Businesses-Should-Use-Arbitration-Agreements>.

¹⁶⁵ *Id.*

¹⁶⁶ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), <http://www.epi.org/publication/the-arbitration-epidemic/>.

¹⁶⁷ *Id.*

¹⁶⁸ *See supra* note 60.

¹⁶⁹ John Jay Range & Bryan Cleveland, *Arbitration at a Cross Road: Will the Supreme Court Hold the Federal Arbitration Act Trumps Federal Labor Laws?*, AM. B. ASS'N. (Jan. 18, 2018), <https://www.hunton.com/images/content/3/3/v2/33206/arbitration-at-a-cross-road.pdf>.

¹⁷⁰ *See generally id.*

in direct violation of the NLRA—a viewpoint in line with the Seventh and Ninth Circuit’s previous rulings.¹⁷¹ If the Court were to decide as such, this would take the power governing arbitration agreements in employer–employee contracts from the FAA and place it back in the hands of the people—namely, the employees.¹⁷² By declaring class action waivers invalid, employees will no longer be subject to individual arbitration of their disputes on issues across the board—such as wage, work place discrimination, and benefits—and the employees will then be empowering employees to join collectively to bring suit.¹⁷³

Although, despite the potential for the Court to hold that the NLRA does indeed trump the FAA, there is one loop-hole that employers are using to protect against the ramifications. Within the employment contract, an employer can include an “opt-out” clause which allows the employee to avoid such arbitration proceedings and protect their right to collective action.¹⁷⁴ While opt-out clauses provide adequate protection to employees, they also allow employers to enforce the arbitration agreement prohibiting collective when employees do not opt out.¹⁷⁵ Employers who want to avoid the consequences of the Court’s potential ruling are likely to add an opt-out provision to their mandatory arbitration agreements to make them elective rather than face invalidation of their arbitration right despite a present clause.¹⁷⁶ This potential holding may force employers to completely redraft their employment agreements or else remove their arbitration agreements completely.¹⁷⁷

B. Example Resolution

If an issue of such complexity were simply resolved, and if ambiguous text within statutes allowed a clear answer to be concluded, the issue discussed in this article would never have reached the level of the

¹⁷¹ See PLC Labor & Employment *supra* note 81.

¹⁷² See generally Matthew Mall, *Circuit Split Deepens Over the Enforceability of Class Action Waivers in Employment Disputes*, AM. B. ASS’N. (June 1, 2017), <https://www.americanbar.org/groups/litigation/committees/class-actions/practice/2017/national-labor-relations-v-alternative-entertainment/>.

¹⁷³ See PLC Labor & Employment, *supra* note 81.

¹⁷⁴ *Id.*

¹⁷⁵ See Omri Ben-Shahar, , *supra* note 90.

¹⁷⁶ See generally *id.*

¹⁷⁷ *Id.*

United States Supreme Court. However, it should be noted that potential resolutions could arise from both sides of the circuit split's steadfast views.

As previously discussed, opt-out provisions protect employees while also allowing employers to keep valid arbitration agreement within the employment contract.¹⁷⁸ The notable difference between this offered resolution and current practice is to draft the opt-out clause in a non-conspicuous manner; by drafting it in such a way, this provides for an agreement that can withstand scrutiny within the court.¹⁷⁹ Thus, the employee is given notice that they is forfeiting their right to collective action and the ability to assert her rights under the NLRA.¹⁸⁰ By adopting this practice, there would be no ambiguity as to the enforceability of the agreement, and the presence of these disputes within the courts would greatly diminish.¹⁸¹ Furthermore, this offers a resolution that is fair to both employers and employees—employers will retain the ability to pursue arbitration with employees who do not opt-out of the agreement, while employees will also have the opportunity to retain the power of collective action.¹⁸²

CONCLUSION

The issue of validity regarding mandatory arbitration agreements that require employees to revoke their right to collective action and be forced to submit disputes to arbitration is widely contested throughout the courts, and it is essential to the progression of contracts in regard to the employee–employer dispute resolution process.¹⁸³ The structure of the NLRA and the FAA will inevitably be altered as a result of the Supreme Court's forthcoming decision—a decision that will forever change the drafting of employer–employee contracts.¹⁸⁴ Although, through compromise from both sides and a change in drafting practices, the issue could be avoided—a concept that a growing number of employers are embracing so the issue of validity regarding class action waivers can rest once and for all.¹⁸⁵

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See generally id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

