# Supreme Court says employees can waive their right to file class actions

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On May 21, 2018, the U.S. Supreme Court resolved a circuit split and held that employers may include class action and/or collective action waivers in mandatory arbitration agreements. In Ernst & Young LLP v. Morris, which was one of the three consolidated cases before the court, an employee alleged violations of the Fair Labor Standards Act (FLSA) and a state wage-and-hour law. The employee sought to proceed as a collective action and as a class action, but the employer argued that the employee waived this right by agreeing to individually arbitrate his claims. This decision has the potential to limit the ability of some employees to bring class or collective actions. It cannot be overstated that there is a vast difference in the degree of potential liability for an employer facing a nationwide class/collective action versus an individual claim.

The legal issue before the court focused on whether employees have a right to class and/or collective actions under the National Labor Relations Act (NLRA). Under Section 7, the NLRA protects union and non-union employees when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. Briefly stated, the majority opinion written by Justice Neil Gorsuch held that the waivers were enforceable under the Federal Arbitration Act (FAA), and the NLRA did not otherwise invalidate the waivers.

For employers looking to draft or enforce class action waivers, the majority opinion makes a good point. While the FAA may permit these types of waivers, there is still the question of whether this makes good policy. Based on recent events, including the #MeToo movement, there has been considerable push back against privately arbitrating employment claims. Employers should weigh the pros and cons of these agreements with the assistance of counsel to see if they align with their workforce objectives.

# Authors