

# U.S. Supreme Court Rules That Employers Can Require Employees to Sign Collective and Class Action Waivers in Arbitration Agreements

McGlinchey Labor & Employment Alert

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The Supreme Court in *Epic Systems v. Lewis* recently upheld the rights of employers to require employees to sign mandatory arbitration agreements in which employees must waive their rights to bring a class or collective action against their employers.

## Do Class and Collective Action Waivers Impair Employees' Rights Under the NLRA?

The crux of the *Lewis* decision was that class and collective action waivers do not violate Section 8(a)(1) of the National Labor Relations Act (NLRA) by infringing upon or chilling the exercise of employees' rights to file unfair labor practice charges with the National Labor Relations Board. Writing for the majority, Justice Neil Gorsuch harmonized the Federal Arbitration Act (FAA), which made arbitration agreements valid and enforceable, and the NLRA, which enables employees to form unions and collectively bargain terms of employment, ruling that the two laws are not at odds with each other. The NLRA does not provide employees the right to participate in class or collective actions – this does not fall under the scope of the NLRA-protected right of employees to coalesce for mutual aid and protection. Further, an employee's execution of an employment contract which includes an arbitration agreement does not constitute fraud or duress which would render the agreement unenforceable.

## Do Class and Collective Action Waivers Have to Be Contained in an Arbitration Agreement to Be Valid?

In a pair of related cases published in the Fifth Circuit of Appeals, *Convergys Corporation v. National Labor Relations Board*, 866 F. 3d 635 (5th Cir. 2017) and *Logisticare Solutions, Inc. v. NLRB*, 866 F.3d 715 (5th Cir. 2017), the Fifth Circuit held that an employer has the right to require job applicants to sign a class and collective action waiver and enforce the same. Similar to the reasoning in *Lewis*, the Fifth Circuit determined that the NLRA's guarantee to engage in concerted activities for the purpose of mutual aid or protection did not extend to the right to participate in class and collective actions. While *Convergys* and *Logisticare* were decided prior to *Lewis*, the decision in *Lewis* was consistent with the rulings in *Convergys* and *Logisticare*. Accordingly, employers in the Fifth Circuit (Texas, Louisiana, and Mississippi) are free to require employees to sign class and collective action waivers outside of a mandatory arbitration agreement. Employers in other circuits do not enjoy the protection of the *Convergys* and *Logisticare* decisions and should be cautious in employing such waivers outside of arbitration agreements with their employees.

## Can States Curb the Use of Mandatory Arbitration and Class Action Waivers?

While it is now clear that there is no right contained in the NLRA for employees to bring a class or collective action, this does not prevent states from enacting their own administrative laws to curb the practice of requiring employees to sign arbitration agreements and class action waivers. For example, California has enacted the Private Attorney General Act (PAGA), which provides employees with an administrative private right of action against a California employer on behalf of the state's Labor and Workforce Development Agency for labor code violations. In a PAGA action, an aggrieved employee can file a lawsuit to recover civil penalties against an employer both personally, and on behalf of other current and former employees. An employee who brings a representative action under PAGA may recover civil penalties without satisfying class action certification requirements. Importantly, both the California Supreme Court and the Ninth Circuit Court of Appeals have ruled that an employee cannot waive a future PAGA claim by signing an arbitration agreement or class action waiver. However, PAGA claims can be compelled to arbitration if they fall within the scope of an arbitration clause.

**Action Item:** If you have employees in California and it is your practice to have them sign arbitration agreements, review these agreements to ensure that PAGA claims fall within the scope of these agreements.

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