

Expert Analysis

Should Employers Include Class-Action Waivers In Their Arbitration Agreements?

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The specter of defending against employment-related class actions, which are at an all-time high, looms in the minds of employers and, in particular, their in-house counsel. For years, employers have grappled with how to guard against, prevent or minimize such expensive litigation.

Presenting employees with mandated arbitration agreements at the time of hire has become more common among businesses looking to reduce their legal expenses, since arbitrating is often more efficient and cheaper than litigating in court. Wise employers have also added class-action waivers to their arbitration agreements so employees must agree, as a condition of employment, to bring any employment-related claims against the employer on an individual basis.

This defensive strategy has received increased attention since the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion* last year.¹

This commentary addresses the benefits and limitations of employment-related class-action waivers in arbitration agreements, and the effect of the *Concepcion* decision and subsequent authority on the enforceability of such agreements.

BENEFITS OF ARBITRATION AGREEMENTS

Employees who agree to submit their employment-related claims to an arbitrator instead of filing a lawsuit in court may be seen as providing their employers a significant advantage, but this arrangement can be advantageous for the employee as well. Depending on the state in which the agreement is made, employees may enter into these agreements in exchange for compensation, initial or continued employment, and the employer's mutual promise to submit the same claims to arbitration, which usually provides a faster and less expensive means of resolving disputes.

Proponents of arbitration cite many advantages — lower overall cost and confidentiality being prominent examples.² Arbitration proceedings have the potential to reduce overall cost because they can lead to a more expeditious decision. Accessing

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an arbitrator is easier than going to court, and the scheduling is typically on a faster track.

Most often, discovery is more circumscribed, with less time allotted than in court, and parties rarely brief discovery issues for arbitrators, thereby saving additional time and expense.

Discovery disputes are usually quickly resolved through a telephone conference with the arbitrator, as opposed to waiting weeks or months for a hearing before a judge.

While arbitrators' knowledge and skills may vary, arbitrators are often practicing lawyers with much more legal knowledge and rational problem-solving abilities than most juries possess. Accordingly, arbitration is seen as a means of reducing, if not eliminating, the often-feared "runaway" jury verdict. Further, arbitration decisions are more likely to be final than court decisions, as it is difficult to challenge arbitration decisions. Of course, this can be as much a negative as a positive aspect of arbitration, depending on the decision.

Finally, and importantly, arbitrations offer a more confidential resolution of matters.

Documents are not publicly filed, and the arbitrator's findings are typically sealed with only the outcome being made public.

DISADVANTAGES OF EMPLOYMENT ARBITRATION AGREEMENTS

There are also disadvantages to arbitrating employment agreements. For example, the issue of whether an arbitration agreement is enforceable is often litigated by the employee at the outset of a dispute, particularly in jurisdictions where courts disfavor arbitration or require very specific arbitration agreements. Such an exercise can be time-consuming and often adds an extra layer of costs for the employer.

In addition, some practitioners believe arbitrators are more likely to admit all evidence rather than exclude some based on procedural defenses or the rules of evidence.

Pros and Cons of Arbitration for Resolving Employment disputes

PROS:

- Reduction of overall cost
- Scheduling and deadlines typically faster
- "Runaway" jury verdict eliminated
- Resolution of disputes more confidential

CONS:

- Enforceability of arbitration agreements often litigated
- Arbitrators may admit all evidence rather than selectively excluding
- Arbitrators less likely to decide cases on dispositive motions
- Difficult to appeal arbitrator's decision

This may have a negative impact on the employer given the volume of documents the employer maintains compared to that from the employee.

Arbitrators are less likely than judges to decide cases on dispositive motions, such as motions to dismiss or motions for summary judgment and, while there is a high rate of summary dismissal of employment cases in the courts, the majority of arbitration cases proceed to live testimony before the arbitrator. Finally, and perhaps most importantly, it is very difficult to appeal an arbitrator's decision.

CLASS-ACTION WAIVERS AFTER CONCEPCION

One recent and more expanded potential benefit of arbitration agreements is the elimination of employee class- or collective-action claims. Often, class or collective actions are filed as such because they are more efficient for obtaining relief, especially when the individual claims are too small to incentivize plaintiffs' lawyers.

Similarly, a plaintiff might rethink the value of bringing a claim if they can simply join a class-based claim that will proceed forward without much participation or individualized proof from such an employee. This may especially be so in wage-and-hour litigation, where the individual disputed amounts are often small, but when viewed collectively, may lead attorneys to pursue large judgments and statutory attorney fees, regardless of the merits of any one claim. Employers have repeatedly voiced concerns that individual merits, or the lack thereof, are too often ignored in such cases in the interest of efficiency.

Including class-action waivers in arbitration agreements, preventing employment class-action and collective-action lawsuits altogether, forces employees to prove the merits of their own claims. If the employer takes such a step requiring individual claims to be brought and proven separately, many may never come to fruition, which would result in tremendous savings to employers.

Most practitioners are optimistic that the likelihood of class-action waivers being enforced by the courts has increased in the wake of the Supreme Court's decision last term in *Concepcion*. Recent cases applying generally the Supreme Court decision in *Concepcion* provide a basis for this optimism.

Notably, the class-action waiver agreement considered by the Supreme Court in *Concepcion* arose in the consumer arbitration context. In the case, Vincent and Liza Concepcion signed a wireless service agreement with AT&T that included an arbitration clause prohibiting class actions over disputes between the customer and the carrier. Under the agreement, the Concepcions received free cellular phones, but AT&T charged them sales tax totaling \$30.22.

The Concepcions filed a class-action lawsuit in California, alleging deceptive advertising because their cell phones were not truly "free." Applying state law, both the federal district court and 9th U.S. Circuit Court of Appeals refused to enforce the waiver based on a leading California case, *Discover Bank v. Superior Court*.³ That court found arbitration clauses containing class-action waivers to be unconscionable, particularly when the individual amount at issue was effectively too small to incentivize litigation.

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Class-action or collective-action waivers will not always prevent multi-party litigation.

The U.S. Supreme Court reversed the lower courts, noting that the Federal Arbitration Act preempted state laws conditioning the enforceability of arbitration agreements on the availability of class proceedings.

“The overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings,” the high court said. “Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”⁴

Thus, the Supreme Court’s decision appears to provide broad preemption of any state law requiring the availability of class-action relief in arbitration, even outside of the consumer arbitration context.

DO CLASS-ACTION WAIVERS APPLY IN EMPLOYMENT CASES?

Many observers have predicted that the Supreme Court’s reasoning in *Concepcion* would, and arguably should, apply equally to class-action waivers in employment arbitration agreements. Based on the results of early cases, the predictions largely appear to be correct.⁵

For example, the 8th Circuit recently said as much:

“Like the phone customers in *Concepcion* who based their challenge to the enforceability of a class-action waiver provision based upon California law, [plaintiff Mack] Green and the other drivers make a Minnesota-state-law-based challenge to the enforceability of the class-action waivers in the [arbitration agreements]. Our reading of *Concepcion* convinces us the state-law-based challenge involved here suffers from the same flaw as the state-law-based challenge in *Concepcion* — it is preempted by the FAA. Consequently, *Concepcion* forecloses Green’s claim that the District Court erred in concluding the class-action waivers were enforceable [in this action under the Minnesota Fair Labor Standards Act].”⁶

Likewise, in *Lewis v. UBS Financial Services Inc.*, a federal court in the Northern District of California compelled arbitration of claims under the California Labor Code. That court found that *Concepcion* tacitly overruled California cases that extended the *Discover Bank* case to arbitration agreements in the employment context, noting *Concepcion* could not be read so narrowly as to not apply in the employment context.

Similarly, in *Morse v. ServiceMaster Global Holdings Inc.*, another federal court in the Northern District of California found the unique facts of that case established that defendants had not waived their arbitration rights despite proceeding in litigation because, prior to *AT&T Mobility LLC v. Concepcion*, they could not have compelled arbitration under California law.



Scan this code with your QR reader to see the *Concepcion* decision on Westlaw.

EXCEPTIONS TO ENFORCEABILITY OF ARBITRATION AGREEMENTS WITH CLASS-ACTION WAIVERS

Class- or collective-action waivers will not always prevent multiparty litigation. For instance, class-action waivers likely will not prohibit the Equal Employment Opportunity Commission or Department of Labor from bringing suit on behalf of the government, potentially for the benefit of numerous individuals. Thus, *Concepcion* should have no effect on governmental enforcement actions under the Fair Labor Standards Act because, in those cases, the secretary of labor is the party bringing the action.⁷

The Supreme Court long ago made clear that the EEOC may bring lawsuits to pursue reinstatement, back pay and compensatory or punitive damages in enforcement actions under Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act, even if the employer and employee have a valid agreement to arbitrate employment-related disputes.⁸

In doing so, the Supreme Court held that “it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.”⁹

Additionally, one court in the Southern District of New York has also refused to compel arbitration where the plaintiff had signed an arbitration agreement with a class-action waiver, because she was bringing a “pattern and practice” discrimination claim against her employer.¹⁰ In a pattern-and-practice claim, a plaintiff usually argues that discrimination is an employer’s standard operating procedure, and the matter therefore proceeds on a class basis.

In this light, the court said that under the applicable substantive law, the plaintiff could not bring a pattern-and-practice claim individually, so compelling single-party arbitration would deny the plaintiff her substantive rights under Title VII. The court said its decision was consistent with *Concepcion*, which the court said applied to preempting state-law-based concerns but not to the federal statutory concerns present in that case.

Employers should also anticipate that arbitration agreements with class-action waivers might be challenged as violating the National Labor Relations Act by prohibiting collective action. Courts have not yet adopted this position, which the National Labor Relations Board is spearheading under a novel but questionable theory.¹¹

Since *Concepcion*, at least one court in the Southern District of California found the NLRA did not operate to invalidate or otherwise render unenforceable an arbitration agreement containing a class-action waiver.¹²

WHAT CAN EMPLOYERS EXPECT?

Cases interpreting *Concepcion* are still working their way through the courts, and the holdings will likely become more refined as different situations are presented for review. As more cases are decided, the applicability of *Concepcion* to other types of collective actions, including employment cases, will become clearer.

Nonetheless, based on the early cases interpreting this Supreme Court authority, it appears that *Concepcion* is not limited to the consumer context and holds significant

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promise for employers. The *Concepcion* decision increases the likelihood that courts will compel arbitration in FLSA, NLRA and in similar contexts. Employers should be aware, however, that this area is complex, quickly changing and may vary by jurisdiction.

Arbitration agreements with class-action waivers might not prohibit all collective actions, but they could likely prevent many actions and significantly reduce the risks and costs attendant to large collective actions. Employers should make a careful determination as to whether arbitration agreements with class-action waivers are appropriate for their companies in light of the benefits and limitations of arbitration agreements, as well as the prospect of stemming collective actions for most claims.

NOTES

¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

² See e.g., JOHN W. COOLEY & STEVEN LUBET, *ARBITRATION ADVOCACY* 5 (2d ed. 2003).

³ *Discover Bank v. Super. Ct.*, 36 Cal. 4th 148 (2005).

⁴ *Concepcion*, 131 S. Ct. at 1747.

⁵ Cases have uniformly considered *Concepcion* in the employment context, often compelling arbitration. See e.g., *Green v. Super Shuttle Int'l*, 653 F.3d 766, 769 (8th Cir. 2011) (affirming the District Court's grant of a motion to compel arbitration and its enforcement of the class-action waivers in a case brought under the Minnesota Fair Labor Standards Act because the waivers were valid and enforceable under *Concepcion*); *Urbino v. Orkin Servs. of Cal.*, 2011 WL 4595249, at *9–12 (C.D. Cal. Oct. 5, 2011) (denying a motion to compel arbitration in a case brought under California's Labor Code Private Attorney General Act because the arbitration agreement contains an unconscionable PAGA arbitration waiver); *Lewis v. UBS Fin. Servs.*, 2011 WL 4727795, at *3–6 (N.D. Cal. Sept. 30, 2011) (granting a motion to compel arbitration, finding that *Concepcion* also overrules *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007)); *Plows v. Rockwell Collins Inc.*, 2011 WL 3501872, at *4–6 (C.D. Cal. Aug. 9, 2011) (denying a motion to compel arbitration although the waiver was valid because the court was bound by *Gentry* until it was explicitly overruled); *Morse v. ServiceMaster Global Holdings*, 2011 WL 3203919, at *3–4 (N.D. Cal. July 27, 2011) (granting a motion to compel arbitration because defendants' actions in litigating the claims prior to *Concepcion* did not amount to waive their right to compel arbitration); *Williams v. Securitax Sec. Servs.*, 2011 WL 2713741, at *3–4 (E.D. Pa. July 13, 2011) (finding *Concepcion* inapplicable to plaintiff's motion for a protective order in FLSA case seeking to invalidate an arbitration agreement circulated to class members because plaintiff's motion did not implicate any state law ground to invalidate the arbitration agreement); *Chen-Oster v. Goldman Sachs & Co.*, 2011 WL 2671813, **3–4 (S.D.N.Y. July 7, 2011) (finding *Concepcion* did not require the court to compel arbitration of a "pattern and practice" claim under Title VII); *Quevedo v. Macy's Inc.*, 2011 WL 3135052, at *17 (C.D. Cal. June 16, 2011) (finding a PAGA claim arbitrable because *Concepcion* preempts California law); *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 859-863 (2011) (holding that the FAA does not preempt California law regarding the enforceability of contractual waivers of an employee's right to bring representative PAGA claims).

⁶ *Green*, 653 F.3d at 769.

⁷ Employees might also try to argue that individuals cannot waive the right to proceed collectively under Section 216(b) of the Fair Labor Standards Act. One court recently observed, though, that "[c]ourts routinely hold that FLSA does not grant employees the unwaivable right to proceed in court collectively under Section 216(b)." See *Copello v. Boehringer Ingelheim Pharms.*, 2011 WL 3325857, at *7 (N.D. Ill. Aug. 2, 2011) (listing cases). See also *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004); *Norman v. Alliant Group*, 2011 WL 4862945, at *1 (S.D. Tex. Oct. 13, 2011). But see *Saincome v. Truly Nolen of Am.*, 2011 WL 3420604, *11-12 (S.D. Cal. Aug. 3, 2011) (reserving decision for arbitrator).

⁸ *EEOC v. Waffle House Inc.*, 534 U.S. 279, 287 (2002).

⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)

¹⁰ *Chen-Oster*, 2011 WL 2671813, at *3–4.

¹¹ See *Braun Elec. Co.*, 324 NLRB 1, 3 (1997) ("It is well-settled that Section 7 of the act protects the right of employees to utilize the board's processes, including the right to file unfair-labor-

practice charges”). See also *Bill’s Elec.*, 350 NLRB 292, 296 (2007); *U-Haul Co. of Cal.*, 347 NLRB 375, 377 (2006); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); Office of Gen. Counsel, Nat’l Labor Relations Bd., Memorandum GC 10-06, Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers’ Mandatory Arbitration Policies 4 (2010) (“A mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class-action lawsuit is unlawful.”).

¹² *Grabowski v. Robinson*, 2011 WL 4353998 at *7–8 (S.D. Cal. Sept. 19, 2011).



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