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CLIENT ALERT EMPLOYERS SCORE BIG WIN AT U.S. SUPREME COURT - CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS ARE UPHELD

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On May 21, 2018, the Supreme Court made its long awaited ruling on enforcement of class action waivers in arbitration agreements. This decision resolved a critical split of opinion among Federal Courts of Appeal.

By way of background, mandatory employer-sponsored arbitration has become exceedingly popular over the last fifteen years. As part of these arbitration agreements, many employers have inserted "class action waivers." These waiver provisions provide that the employee executing the arbitration agreement also waives his or her right to pursue any claim as part of a class action. These provisions are most relevant in the labor and employment context with respect to Fair Labor Standards Act ("FLSA"). The net effect is that an employee covered by an arbitration agreement containing a class waiver must pursue his or her claim individually, rather than joining a group of employees as part of a class action. In an FLSA case where individual relief may be nominal, but class relief may be great, class waivers can make pursuit of wage claims on an individual basis impractical. Notably, in 2012, the National Labor Relations Board ("NLRB") found that class action waivers were not enforceable because they infringed on the rights of employees to participate in protected concerted activity under the National Labor Relations Act ("NLRA").

The Supreme Court's decision this week ruled on a trio of cases involving class action waivers: Murphy Oil USA, Inc., Epic Systems Corporation, and Ernst & Young. In rendering its opinion, the Court, with the newest member, Neil Gorsuch, writing for the majority, observed that the Federal Arbitration Act ("FAA") governs the vast majority of these arbitration agreements. The FAA provides only for the individualized assessment of an employee's claim.

Of particular importance was the Court's ruling that under the FAA, arbitration agreements must be enforced according to their terms. Judge Gorsuch noted that the FAA not only contemplates individualized proceedings for employment disputes, but also that courts should enforce arbitration agreements "as they are written." Consequently, an arbitration agreement containing a class action waiver is interpreted according to those terms. The majority was unwilling to find a conflict between the FAA, FLSA and NLRA and found there was no congressional mandate that class relief be permitted under any of the three statutes. Judge Gorsuch said that over the years, "we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes 'individual attempts at conciliation' through arbitration."

Opponents of class action waivers take the position that forcing employees to individually pursue their claims prevents them from using the collective strength of a class action to correct an employer's alleged violation of the

	law. The Supreme Court's decision leaves it to the legislature to amend the FAA if it determines that class action waivers in arbitration agreements should not be permitted.