

Employment Edge 122nd Edition—Supreme Court Decision May Pave the Way For Employers to Include Class Action Waivers in Arbitration Agreements...But Do You Really Want to Arbitrate?

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In a consumer products case that will likely have a significant impact on employers and employees who enter into arbitration agreements, the U.S. Supreme Court ruled last Wednesday, April 27, 2011, that the Federal Arbitration Act preempts states from prohibiting enforcement of arbitration agreements that bar arbitration of class action disputes (*AT&T Mobility LLC v. Concepcion*, Docket No. 09-893, April 27, 2011). In a divided decision, the Court reversed a Ninth Circuit Court of Appeals decision that a class action arbitration waiver in AT&T's wireless service agreement was unconscionable and unenforceable under California state law.

The Supreme Court specifically held that California's law "stands as an obstacle" to the purpose of Congress in enacting the FAA and thus was preempted by federal law. In addition, the majority expressly stated that classwide arbitration itself is inconsistent with the FAA. Although it is unclear at this point whether the Court's ruling in *Concepcion* will be applied in the employment context, the decision does provide employers with a strong argument that the FAA requires enforcement of class action waivers in arbitration agreements, and therefore may allow employers to reduce their exposure to class action liability through properly drafted arbitration agreements.

While the Court's decision may provide employers with a powerful tool to avoid class action employment litigation, we do not recommend that employers rush to enter into arbitration agreements with their employees. Employers that have not previously used arbitration provision should consider the pros and cons of such agreements. In particular, some of the benefits of arbitration include:

- The cost, which can sometimes be less than litigation in court
- The less formal procedure with relaxed rules of evidence
- The efficiency of arbitration compared to litigation
- The ability to select an arbitrator

- The confidentiality of the proceedings

Curiously, many of the advantages to arbitration are also its primary disadvantages. Specifically, some disadvantages include:

- The cost, which can be more expensive in complex cases or when the arbitration provision itself is challenged in court
- The arbitrator's inclination to "split the baby" when making an award
- The unlikelihood that an arbitrator would grant summary judgment or early dismissal
- The difficulty in getting an arbitration decision overturned on appeal

In light of the positive aspects of arbitration as well as its potential pitfalls, employers should consider all of the factors before entering into arbitration agreements with their employees. While arbitration may be a good idea for some employers, it may not be well-suited for others. Another consideration to bear in mind is that immediately following the Court's decision in *Concepcion*, Senators Al Franken and Richard Blumenthal announced their plan to reintroduce the Arbitration Fairness Act in Congress. If enacted, the Arbitration Fairness Act would invalidate pre-dispute provisions in the employment, consumer, and franchise law context. This would mean that employers would no longer be allowed to include arbitration clauses in employment agreements. Instead, if an employer prefers to arbitrate employment disputes, it would have to seek an agreement with the employee to resolve the matter in arbitration after a dispute arises. Whether any legislation will be enacted anytime soon remains to be seen, but mandatory pre-dispute arbitration provisions are clearly a target for lawmakers.

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