The U.S. Supreme Court's Recent *Concepcion* Decision Regarding Class Action Waivers, and What it Means for Employers.

The *AT & T Mobility, LLC v. Concepcion* Decision

On April 27, 2011, the U. S. Supreme Court held, in a 5-4 decision written by Justice Anton Scalia, that a consumer arbitration agreement that precluded class action arbitrations was enforceable. The arbitration provision that the Court addressed was set forth in a cell phone contract between the Concepcions and AT & T. The provision provided for arbitration of all disputes, and prohibited classwide arbitration. The Concepcions brought a class action against AT & T based on their contention that AT & T advertised free cell phones but then charged Concepcions and others sales tax on the phones. As part of its response, AT & T sought to force the Concepcions to arbitrate only their claim and to prevent the class arbitration from proceeding.

AT & T lost its argument in California state courts and at the Ninth Circuit Court of Appeals, which ruled that the provision prohibiting class arbitrations was unenforceable pursuant to the California Supreme Court's 2005 ruling in *Discover Bank v. Superior Court*. The "*Discover Bank* rule" provided that under California law, arbitration provisions prohibiting class actions are generally "unconscionable and shall not be enforced."

But the U.S. Supreme Court reversed the Ninth Circuit and found that the provision in the cell phone contract was enforceable pursuant to the Federal Arbitration Act ("FAA"). The Court noted that the FAA's purpose is to "ensure that private arbitration agreements are enforced according to their terms," and ruled that because the *Discover Bank* rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, [it] is preempted by the FAA." The Court held that the arbitration provision prohibiting classwide arbitration was therefore enforceable, and that AT & T was able to require Concepcions to pursue only their individual claims and not those of the class.

The Eighth Circuit Applies *Concepcion* to Minnesota Law

On September 6, 2011, the Eighth Circuit Court of Appeals followed *Concepcion* and held that a class action waiver in an arbitration provision in a franchise agreement was enforceable. In *Green v. SuperShuttle International, Inc.*, Green had brought a class action and argued that he and the other plaintiff drivers, who had signed franchise

agreements with SuperShuttle, were actually misclassified employees rather than franchisees. Green argued that as employees, he and the other drivers were entitled to wages and damages under Minnesota's Fair Labor Standards Act ("MFLSA").

The franchise agreement between Green and SuperShuttle contained an arbitration provision with a class action waiver. Green argued that the class action waiver in the franchise agreement was unconscionable and therefore unenforceable under Minnesota law. The Eighth Circuit rejected that argument and affirmed the district court's grant of SuperShuttle's motion to compel arbitration and its enforcement of the class action waiver. The court specifically found that Green's argument that the class action waiver violated Minnesota law "suffers from the same flaw as the state-law-based challenge in *Concepcion* – it is preempted by the FAA."

What *Concepcion* Means for Employers

Although *Concepcion* dealt with an arbitration provision in a consumer contract, *Green* applied *Concepcion* to a provision in a franchise agreement where the underlying claims were employment-related – plaintiffs had asserted a wage claim under the MFLSA. *Green* also held that any challenges to the class action waivers could not be based on Minnesota law because the FAA preempts Minnesota law on that issue.

Accordingly, the *Concepcion* holding and rationale appears equally applicable to class action waivers in arbitration provisions in employment contracts. *Concepcion* could therefore allow employers to effectively prevent future class actions from proceeding against them by including arbitration provisions with class and collective action waivers in their employment contracts (employees could still pursue their individual claims).

For employers that already have arbitration provisions in their employment agreements, they should ask an attorney to review the arbitration provisions and determine if and how to add the class action waivers. For employers that don't have arbitration provisions in their employment contracts, they should explore with an attorney whether arbitration provisions with the waivers should be added.

In every instance, employers should consult with an employment attorney to discuss the options made available to them by these recent decisions.

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