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Spirit Of The Law: Employers May Win The Right To Force Arbitration Of All Employee Disputes

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By Alexander Schmidt

The Supreme Court as expected did not indicate which way it will come out when it heard oral arguments on October 2 in the

most important case of the year for non-unionized workers. (See my Sept. 18 and 30, 2017 columns.) The four Democratic justices' questioning of the lawyers revealed that they will support the National Labor Relations Board's ban against employers using forced arbitration clauses to prevent employees from banding together to sue their employers in class and collective actions in court. The five Republican justices held their cards closer.

Will the SCOTUS rule in favor of forced arbitration?

Justices Thomas and Gorsuch, the Court's two most conservative members, didn't say a word during the entire hour, but most Court watchers think they will side with the employers. Chief Justice Roberts and Justice Alito asked questions that hinted they favored the employers as well, which is their general tendency, but some have suggested Justice Alito might be a surprise vote for employees. I wouldn't hold my breath.

That would leave the balance 4 to 4, with Justice Kennedy being the deciding or "swing" vote, as he often is. Kennedy, unfortunately, has been a consistent supporter of corporate America's effort over the past two decades to eliminate employees and consumers' ability to file class actions by forcing them to sign mandatory arbitration clauses, in which they have no choice but to waive their rights to sue in court or be part of a class action and must "agree" instead to arbitrate by themselves any legal future gripes they may have against the corporation. Justice Kennedy has sided with the corporation in every case that enforced an arbitration clause to kill a class action.

One of Justice Kennedy's questions during the argument does not bode well for employees. The NLRB's ban against forced arbitration clauses is based on a long history of court rulings holding that class action lawsuits are a form of "concerted action" under the labor laws that employers cannot force employees to give up. Justice Kennedy's foreboding question was, wouldn't there still be "concerted action" if all the employees used the same lawyer?

In other words, Kennedy may be leaning towards concluding that employees don't need to have a right to band together in a class action if many of them are harmed simultaneously by their employer because the "concerted action" mandate of the labor laws can be satisfied by conducting numerous individual arbitrations where the employees are represented by the same lawyer. If that's the way he comes out, the NLRB, and employees nationwide, will lose.

There are many problems with Justice Kennedy's suggestion. One, the right for employees to take "concerted action" to

protect their mutual interests has always been interpreted as protecting any and all concerted actions. So even if individual arbitrations using the same lawyer qualifies as one type "concerted action," it shouldn't justify eliminating the use of another type of "concerted action," such as class actions.

Class actions are also a far more efficient way to achieve justice, and far less time and resource consuming, than Justice Kennedy's one-at-a-time approach. In a class action, only a few employees deal with the lawyer and represent the employees as a whole, most of whom will miss no time from work or have to endure the stress of a lawsuit but get to enjoy its benefits if it prevails. And every employee would receive the same outcome – win or lose.

In serial arbitrations, none of that is true. Every employee has to deal with the lawyers and the stress. And even if the first employee wins and proves the company cheats its employees, the next employee, who would likely have a different arbitrator, could lose. While the process burdens both sides and could lead the employer and employees to try to reach a group-wide settlement, that would not always be the case. On balance, employers will better endure the rigors of the process and can expect a high rate of attrition from employees who do not have the stomach for litigation – and many people do not.

Let's keep our fingers crossed that Justice Kennedy wakes up one day and realizes his question suggested a bad idea. If not, the NLRB will lose, and forced arbitration clauses in non-unionized employee contracts will become ubiquitous throughout the land.

If the NRLB loses, would employees have any more arrows in their quiver to keep trying to fight against forced arbitration clauses? Yes, one.

The Constitution. More on that next time.

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