



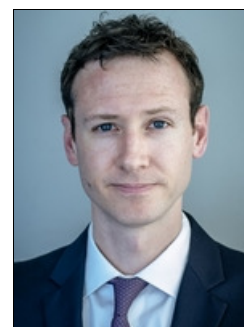
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Class Waivers At The High Court: NLRA And Employee Rights

By **William Jhaveri-Weeks** and **Katharine Fisher**

During its new term, the U.S. Supreme Court will decide whether it is legal for employers to require workers to sign arbitration agreements that include class action waivers as a condition of employment. In this Expert Analysis series, attorneys examine the case law and statutes at question in this closely watched debate.

Since the 1930s, the National Labor Relations Act and the Norris-LaGuardia Act have given employees the right to engage in concerted action to advocate for their rights. In the eight decades since the acts were passed, the federal courts and the National Labor Relations Board have unanimously agreed that the NLRA protects the right of employees to bring concerted (i.e., group) legal actions. In a trio of cases, though, the U.S. Supreme Court is now poised to decide whether employers can avoid this long-standing rule by adding the label "arbitration agreement" to a contract prohibiting employees from taking concerted legal action in any forum.



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In the early 1900s, employers sought to use contracts to prohibit workers from unionizing — so-called "yellow dog" contracts. Employers often succeeded in obtaining injunctions from federal courts to enforce the contracts and prevent organizing activity. Congress passed the Norris-LaGuardia Act in 1932 to outlaw yellow dog contracts and prevent federal courts from entering injunctions in labor disputes, and passed the NLRA in 1935 to "equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *NLRB v. City Disposal Systems*, 465 US 822, 835 (1984).



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Section 7 of the NLRA states: "*Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...*" 29 U.S.C. § 157 (emphasis added); see also Norris-LaGuardia Act, 29 U.S.C. § 102 (also protecting right to engage in "concerted activities for the purpose of ... mutual aid or protection"). The NLRA makes it an unfair labor practice to interfere with rights granted by Section 7. See 29 U.S.C. § 158(a)(1). Section 7 rights belong to anyone defined as an "employee" under the acts, not merely to unionized employees. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

As early as 1942, the board held that the filing of a lawsuit seeking unpaid overtime for three employees "constituted concerted activity protected by the act," and retaliating against the

employees for filing the suit violated the NLRA. *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49 (1942). The board has consistently adhered to this position over the past 75 years. See, e.g., *In re 127 Restaurant Corp.*, 331 NLRB 269, 275-76 (2000) ("It is well settled that the filing of a civil action by employees is protected activity ... Of course, by joining together to file the lawsuit, they engaged in concerted activity.") (citing earlier board decisions); *Harco Trucking LLC*, 344 NLRB 478, 478-80 (2005) (same).

Various circuit courts affirmed the board's position over the decades that followed passage of the act. In 1953, the Fourth Circuit held that an employee's participation in a case seeking back pay for wage violations with the union's assistance amounted to "concerted activity," explaining that employees "have the right[] to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining contemplated." *NLRB v. Moss Planing Mill Co.*, 206 F.2d 557, 560 (4th Cir. 1953); see also *Leviton Manufacturing Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (filing of lawsuit by employees, if in good faith, constitutes Section 7 concerted activity); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("[F]iling by employees of labor related civil action is protected activity under section 7"); *Mohave Electric Cooperative Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (filing of a judicial petition constituted "concerted action" under NLRA when "supported by fellow employees"); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act.").

In 1978, the Supreme Court observed that "the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." See *Eastex Inc. v. NLRB*, 437 U.S. 556, 565-66 & n.15 (1978) (affirming the board's determination that a union-sponsored newsletter was protected Section 7 activity).

Similarly, a long line of authority holds that employers may not condition employment on waiving Section 7 concerted action rights, including by requiring employees to agree to resolve disputes solely on an individual basis.

In *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), the Supreme Court struck down an employment contract that required employees to forgo various organizing protections, including the right to resolve disputes "in any way except personally." The court reasoned, "[o]bviously employers cannot set at naught the [NLRA] by inducing their workmen to agree" to waive its concerted action protections by contract. *Id.* at 364; see also, e.g., *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (holding individual dispute resolution requirements to be "the very antithesis of collective bargaining"); *Ishikawa Gasket America*, 337 NLRB 175 (2001) (unlawful to condition severance payment on promising not to assist other employees after discharge), enforced, 354 F.3d 534 (6th Cir. 2004); *Bon Harbor Nursing & Rehab Center*, 348 NLRB 1062 (2006) (unlawful to condition reinstatement on waiver of right to engage in future concerted activity).

The Supreme Court has clarified that even if an employer obtains a contract by means other than making it a mandatory condition of employment, such a contract may not be used to interfere with the employee's Section 7 rights. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336-38 (1944); see *id.* at 337 ("Wherever private contracts conflict with [enforcement of the NLRA], they obviously must yield or the [NLRA] would be reduced to a futility."). The court has also defined Section 7 "concerted activity" broadly, explaining that it is not limited "to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *City Disposal*, 465 U.S. at 822, 835.

In keeping with this history, all three of the appellate court decisions that are currently pending review by the Supreme Court appeared to agree that the filing of a class or collective action suit by employees is "concerted activity" that is protected by the NLRA. See *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016) ("The NLRA's history and purpose confirm that the phrase 'concerted activities' in Section 7 should be read broadly to include resort to representative, joint, collective, or class legal remedies."); *Morris v. Ernst & Young LLP*, 834 F.3d 975, 982 (9th Cir. 2016) ("The pursuit of a concerted work-related legal claim clearly falls

within the literal wording of § 7..."); *Murphy Oil USA Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) (citing *D.R. Horton Inc. v. NLRB*, 737 F.3d 344, 356 (5th Cir. 2013) ("These cases under the NLRA give some support to the board's analysis that collective and class claims, whether in lawsuits or arbitration, are protected by Section 7.")).

Under the long-standing authority described in this article, any employment contract — arbitration or otherwise — that forbids employees from aiding one another in bringing a legal challenge against the employer is unlawful. The Supreme Court would upend the better part of a century's worth of authority if the court concludes that an employer can contractually prohibit employees from engaging in concerted legal action simply by placing the prohibition in an arbitration agreement. The Federal Arbitration Act preserves the generally applicable contract defense of illegality. See *Morris*, 834 F.3d at 975, 989 ("[N]othing in the Supreme Court's recent arbitration case law suggests that a party may simply incant the acronym 'FAA' and receive protection for illegal contract terms anytime the party suggests it will enjoy arbitration less without those illegal terms.").

The pending cases are fully briefed, and the court will hear argument on Oct. 2, 2017.

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