CLIENT ALERT US SUPREME COURT DELAYS RULING ON CLASS ACTION WAIVERS

February 13, 2017

Jay M. Wallace
Board Certified
Labor & Employment Law
Dir: # (214) 740-1407
E: jayw@bellnunnally.com

Tom L. Case
Board Certified – Trial Law
Dir: (214) 740-1422
E: tomc@bellnunnally.com

Tammy S. Wood
Dir: (214) 740-1465
E: tammyw@bellnunnally.com

Alana Ackels
Dir: (214) 740-1412
aackels@bellnunnally.com

Mark Shoffner
Dir: (214) 740-1483
E: mshoffner@bellnunnally.com

Sonja J. McGill
Dir: (214) 740-1497)
E: smcgill@bellnunnally.com

3232 McKinney Avenue
Suite 1400
Dallas, Texas 75204

Website:
www.bellnunnally.com

On February 8, 2017, the United States Supreme Court deferred its much awaited decision on the enforcement of class action waivers in the employment context. As a refresher on this topic, class action waivers typically reside in arbitration agreements where an employee agrees to waive his or her right to pursue their claims in a class-action, instead agreeing to pursue those claims in an individual arbitration. This most commonly arises in claims for overtime wages, discrimination, or harassment that, absent the waiver, could be pursued in a class action format. On January 13, 2017 the Supreme Court consolidated the three cases discussed below for the purpose of deciding legality of these waivers. That decision will now have to wait.

In a previous case, *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013), the Supreme Court upheld a class action waiver in the context of Antitrust claims under the Sherman and Clayton Acts. However, Circuit Courts are currently divided about whether an employer can require employees to waive the right to bring FLSA collective action claims. In taking up the issue, the Supreme Court consolidated three cases.

In *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1015 (5th Cir. 2015), *cert. granted,* No. 16-307, 2017 WL 125666 (U.S. Jan. 13, 2017), the Fifth Circuit upheld a waiver of FLSA collective action claims where the provision stated that employees retained the right to proceed before the NLRB.

In *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 986 (9th Cir. 2016), *cert. granted*, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017), the Ninth Circuit found the same class waiver unenforceable because it reasoned that the right to proceed as a class under the NLRA was a non-waiveable substantive right.

In *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1152 (7th Cir. 2016), *cert. granted*, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017), the Seventh Circuit also found that class waivers were unenforceable under the NLRA.

The Supreme Court consolidated these three cases into one under the title *NLRB v. Murphy Oil USA, Inc.* Originally, the Court indicated that they would decide this case this term. However, on February 8, 2017, the Court notified the parties that they would not hear or decide the case until next term. This means that Neil Gorsuch will likely hear the case and may very well be the deciding vote.