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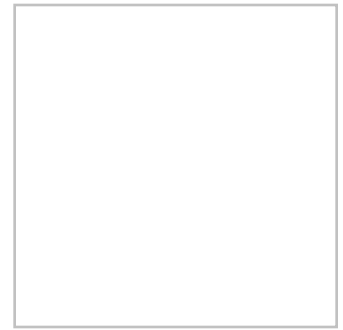
SPIRIT OF THE LAW: Will The Supreme Court Enshrine Forced Arbitration Against Workers?

September 18, 2017

By Alexander Schmidt

The most important lawsuit of the year for workers will be the very first case the United States Supreme Court hears when it opens its 2017 term on October 2. At issue is whether employers can force employees – as a condition to getting or even keeping their jobs – to

waive their rights to sue the employer in court and to require them, instead, to resolve all workplace disputes through arbitration before private individuals chosen by the employer rather than by judges.



The stakes for workers couldn't be higher. If the Court sides with the employers, tens of millions of non-unionized employees nationwide will lose the right to have a public trial before an impartial judge or jury. Non-union workers will also lose their ability to use the leverage of strength in numbers to fight employers that violate wage and labor laws, anti-discrimination laws and workplace safety rules, because they will be forced to sue only for themselves in arbitration and prevented from bringing class or collective actions to protect their fellow employees as well.

Employees' common complaints will no longer be addressed in one proceeding before an impartial judge in a public forum where the world can see what their employer has done. Instead, each victimized worker who wants to challenge an employer's misconduct will have to go it alone, risking his/her own money and job, in a private proceeding – where the rules of evidence and other protections available in court do not apply – before non-judges who are paid by the employer, and whose decisions typically are kept secret and cannot be overturned in court.

The Chamber of Commerce and other trade groups representing the interests of large employers have spent huge sums lobbying and litigating for the right to force employees into arbitration. It is easy to see why. Driven by their misperceived fiduciary duty to maximize shareholder profits, companies want leeway to violate worker-protective laws if they deem it necessary or desirable for their bottom lines. The threat of employees banding together in a public lawsuit to be decided by an impartial judge or jury is a powerful disincentive to such corporate misbehavior. An employer found to have broken the law in court can be liable for large damages payments to hundreds or thousands of employees, be ordered to change its unlawful behavior going forward, and suffer adverse publicity that harms customer relationships.

Mandatory individual arbitration eliminates those consequences. A company that loses an arbitration will be liable to just one employee, and under most forced arbitration provisions, the company can only be ordered to stop cheating that one worker, not its other employees, whom the company will be left free to continue to harm. And since employers' losses in arbitration can be kept secret, other workers may never even learn they have a valid claim, and there will be no adverse publicity leading to lost customers.

Permitting companies to force employees into individual arbitration and prevent them from suing in public courtrooms is

bad policy because it significantly alters the cost-benefit calculus for companies that risk violating the law in order to improve their bottom lines. By minimizing the consequences for breaking the law, legalizing forced arbitration will encourage companies to take the risk and cause a surge of future violations of labor, civil rights and worker safety laws.

Whether this obviously bad policy becomes the law of the land depends on how the Supreme Court rules. The NLRB has determined that forced arbitration is illegal under the National Labor Relations Act because it violates employees' rights to act collectively "in concert" to advance their common interests. Two federal appellate courts have agreed, but two others have disagreed and allowed employers to force employees into arbitration.

Those conflicting rulings are now before the Supreme Court, which will decide if the NLRB is right. Given that Donald Trump was elected and put Neil Gorsuch on the Court, workers' odds are not good. I will discuss the specific legal arguments before the Court in my next column.

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