

To: Our Clients and Friends

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Arbitration Clauses May Waive Class Proceedings

Recent Supreme Court Decision

The United States Supreme Court, in *AT&T Mobility v. Concepcion*, recently ruled that the Federal Arbitration Act ("FAA") does not allow state law to invalidate class action waivers in arbitration agreements on the basis of unconscionability. While *Concepcion* involved consumer claims, the language of the ruling will bolster enforceability of class action waivers in employment related arbitration agreements.

In *Concepcion*, AT&T customers in California asserted class claims over unexpected sales taxes, and sought to arbitrate the issue on a class basis. AT&T's arbitration provisions required consumers with disputes to be arbitrate individually and expressly prohibited class-wide arbitrations. The 9th Circuit Court of Appeals ruled that the class-action waiver was unconscionable under California state law and refused to enforce individual arbitration. The Supreme Court reversed and upheld the waiver, stating that the "principal purpose" of the Federal Arbitration Act is to "ensure[e] that private arbitration agreements are enforced according to their terms." The Court further stated that class arbitrations sacrifice some of the essential benefits of arbitration, principally the informality and the expedited nature of the proceedings.

With this ruling, the Supreme Court continued its preference for enforcing individual arbitration under the principles of the FAA. In 2010, the Court ruled in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.* that class arbitration under the FAA cannot be enforced unless the parties have agreed to arbitrate on a class-wide basis.

What this Means for You

Employers have been overwhelmed by the exponential increase in class and collective actions over the last decade. Even employers with sophisticated arbitration agreements that uniformly are enforced across jurisdictions have had unanswered questions as to whether and how their agreements will be enforced in the context of a class, multi-claimant or collective actions. Uniformly, employers do not want class claims litigated in an arbitration setting. The informality and streamlined process of arbitration is at odds with the large, complex claims brought on a class basis. While employers may

have chosen to remain silent on this topic in light of *Stolt-Nielsen*, the *Concepcion* ruling provides a direct endorsement of an express waiver, eliminating the chance for misinterpretation of simply remaining silent.

Further, employers should now be able to expect uniformity among the courts in enforcing waivers of class claims in employee arbitration agreements. *Concepcion* should make class action waivers in employment arbitration easier to enforce by eliminating the unconscionability argument that was the primary basis for courts to invalidate class wide arbitration waivers. Employers now may be able to eliminate the potential for class-wide arbitration for employment law claims that are susceptible to arbitration and covered by the FAA.

What to Do Now

In light of these developments, and given the explosion of class based employment claims, employers should revisit the topic of employee arbitration agreements, regardless of whether an employer is new to arbitration or has an arbitration program in place:

New To Arbitration. Employers who have yet to implement an employment dispute arbitration program should explore whether their litigation demands would be lessened by implementing an arbitration program designed to streamline the litigation process across jurisdictions, limit the impact of unpredictable juries, maintain privacy of their disputes and reduce expenditures on litigation.

Existing Arbitration Programs. Employers with arbitration programs should proactively address these legal developments by considering incorporation into the existing arbitration program of a waiver of class claims, collective claims and other multi-claimant claims and procedures. Revisiting this topic is particularly important for employers who have struggled to enforce arbitration provisions across multiple jurisdictions.

For further information, contact Bryan Cave LLP's [Labor and Employment Client Service Group](#).