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D.R. Horton Hears a Huh?: How Management-Side Employment Lawyers Should Prepare for the Supreme Court's Ruling in the Class-Action Waivers Controversy

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D.R. HORTON HEARS A HUH?: HOW MANAGEMENT-SIDE EMPLOYMENT LAWYERS SHOULD PREPARE FOR THE SUPREME COURT'S RULING IN THE CLASS-ACTION WAIVERS CONTROVERSY

Alexander Castro[*]

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I. INTRODUCTION

> "What can Labor do for itself? The answer is not difficult. Labor can organize, it can unify; it can consolidate its forces. This done, it can demand and command."
> —Eugene V. Debs

When I was younger, my mother, a hospital administrator and head of a human resources department, came home sighing because much of her hospital's workforce was "threatening" to unionize. She recounted to me stories detailing why she was frustrated, specifically because unions were "making things difficult" and because it was "easier to deal with employees' problems individually." As I grew older and began to understand the issues, I was confused because I never understood unionization to be a bad thing. In fact, I always thought it was a *good* thing. After all, unions are among the most common ways for laborers to act and make their voices heard in what is otherwise an autocratic system where employers demand and employees perform without objection.

But what about employers' rights? Surely they can have say in how

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they run their business. In fact, employers *need* to have say in their business and how it operates. Otherwise, they will never be able to run the most well-oiled machines they possibly can. This is important because performance, particularly the ability to manage profits and costs,[1] of the employer is relevant for the well-being of the employees. In the world of business, efficiency is not a luxury, it is a necessity for survival. As much as we champion employees' rights, those rights mean nothing if we cannot ensure that there are successful employers through which to keep employees *employed.*

Today, there is a growing conflict between employees' rights to stand up for themselves collectively and employers' needs for efficiency and expediency. Often, the two appear difficult to harmonize at best and impossible to reconcile at worst.

Most concretely, this conflict is realized in a wide circuit split where the U.S. Courts of Appeals were being asked to decide whether an employer may include in its employment contracts a provision that requires employees to resolve their disputes with the employer through *individual* arbitration.[2] Whatever the answer may be, it will result in consequences for the balance of power between employer and employee, in consequences for the employment relationship on the grounds, and in consequences for the development of scholarship that informs courts and legislators in regulating this relationship. While this struggle is currently presented as a conflict between the National Labor Relations Act[3] and the Federal Arbitration Act (FAA),[4] these statutes embody a deeper, more fundamental issue: employees' labor rights versus the employers' interests in saving costs and the law's dogged preference for arbitration.

This Note considers the consequences, both seen and unseen, for management-side employment lawyers that may unfurl when the Supreme Court rules on the issue. Part I lays the groundwork for this conflict. Part II examines the framework of the laws on this issue and summarizes the rationales of the courts that have ruled on the issue to date. Part III considers issues that management-side employers will inevitably come across if the Court upholds class arbitration waivers, while Part IV considers the issues that may arise if the Court invalidates class arbitration waivers. Part V expands and considers the consequences of the issue on the relationship between business and individual rights.

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1. L. Anthony George, *Controlling Legal Costs in Labor Arbitration*, 28 COLO. LAW. 75, 75 (1999).

2. *See* Lewis v. Epic Systems Corp., 823 F.3d 1147, 1151 (7th Cir. 2016); Morris v. Ernst & Young LLP, 834 F.3d 975, 979 (9th Cir. 2016); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015); Sutherland v. Ernst & Young, LLP, 726 F.3d 290, 292 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1051 (8th Cir. 2013); *see also* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 348 (5th Cir. 2013).

3. 29 U.S.C. § 151 (2012).

4. 9 U.S.C. § 1 (2012).

II. PRIMER ON THE DISPUTE AND COURT DECISIONS

The National Labor Relations Act (NLRA) was enacted in 1935 in order to remedy the "inequality of bargaining power" between employees and employers.[5] The NLRA grants to private sector employees the right to "self-organization, . . . 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* . . ."[6] These rights are commonly referred to as Section 7 rights. Of particular import here is the NLRA's grant to employees of the right to *act together* when they have issues within the employment context.[7] The NLRA further specifies in Section 8 a series of "unfair labor practice[s]," including, *inter alia*, that an employer may not "interfere with, restrain, or coerce employees in the exercise of [their Section 7 rights]."[8] Read together, Sections 7 and 8 of the NLRA provide that employees have the right to concerted activity in the work context and such right will be enforced against the employer who attempts to unlawfully interfere with employees' exercise of the right.

At odds here with the NLRA is the FAA,[9] enacted in 1925 in order to "reverse the longstanding judicial hostility to arbitration agreements that had . . . been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[10] The FAA provides that written provisions in contracts providing for settling of controversies through arbitration "*shall* be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[11] Through the FAA, Congress mandated enforcement of arbitration agreements *according to their terms*.[12] And over the approaching one hundred years since its enactment, the United States Supreme Court has developed a substantial pro-arbitration jurisprudence upholding arbitration agreements per their terms.[13]

Although the FAA and the Court have made it difficult to overcome an arbitration agreement as written, Congress did not intend the FAA's

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5. 29 U.S.C. § 151 (2012).
6. *Id.* § 157 (emphasis added).
7. *Id.*
8. *Id.* § 158.
9. 9 U.S.C. § 2 (2012).
10. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); *see also* Hall St. Assocs. LLC v. Mattel, Inc., 552 U.S. 576, 581 (2008)
11. *Gilmer*, 500 U.S. at 24–25 (emphasis added).
12. Volt Info. Scis., Inc. v. Bd. of Trs of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).
13. *See, e.g.*, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983) (noting that the FAA reflects a "liberal federal policy favoring arbitration).

mandate to be limitless in power. The FAA includes a "savings clause," which provides that an arbitration agreement is valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[14] In the savings clause, Congress limits that arbitration agreements as written are valid and enforceable unless the provision violates other law or is otherwise unenforceable in equity.[15] Specifically, arbitration agreements should be enforced per their terms unless "the Arbitration Act's mandate has been overridden by a contrary congressional command"[16] or the agreement was a product of fraud, duress, or other common law defense to the enforcement of a contract.

Since 2013, the question of whether an employer violates the NLRA when it includes an individual arbitration provision in its employment contracts has been addressed by five different United States Courts of Appeals.[17] Emerging from the proverbial flames has been a 3-2 circuit split.[18] Three circuits have found that individual arbitration provisions *do not* violate the employees' rights to concerted action,[19] while two, as well as the National Labor Relations Board (NLRB),[20] have found that these provisions *do* violate the employees' rights to concerted action.[21] Recognizing such a wide circuit split, the United States Supreme Court has granted certiorari to three now-consolidated cases in order to decide upon the issue.[22]

The Seventh and Ninth Circuits, joining the rule of the NLRB,[23] have found that the right to concerted activity under section 7 of the NLRA bestows upon employees a substantive right.[24] They further agree that

14. 9 U.S.C. § 2 (2012).

15. *See AT&T Mobility*, 563 U.S. at 339 (2011).

16. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987).

17. *See* Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016); Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013).

18. *See* Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016); Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013).

19. *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) (finding that pursuant to the FAA, individual arbitrations do not violate the NLRA right to concerted action because employees' rights to concerted activity may be waived).

20. *In re* D.R. Horton, Inc., 357 N.L.R.B. 184 (2012).

21. *See* Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016); Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016) (finding that individual arbitration provisions that preclude employees from resolving disputes in concerted actions do violate the NLRA).

22. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016); Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015).

23. *See In re* D.R. Horton, Inc., 357 N.L.R.B. 184 (2012).

24. *See, e.g.*, *Morris*, 834 F.3d at 986.

substantive rights, unlike procedural rights, cannot be waived in arbitration agreements.[25] Because Section 7 rights are the "central, fundamental protections of the Act," the NLRA becomes meaningless if the substantive right to concerted employee activity could be waived in an arbitration agreement.[26] The Circuit Courts go further and find that despite the strong commands of the FAA, the FAA's savings clause does prevent the enforcement of the waiver of a substantive federal right.[27]

The Second, Fifth, and Eighth Circuits have each stated, either in holding or dicta that class waivers do not violate the NLRA when considering them in light of the FAA's demands.[28] The Fifth Circuit found that the NLRA contains no congressional command either in its language or legislative history to override the FAA's enforcement mandate.[29] The Eighth Circuit, although not specifically addressing an NLRA challenge, rejected the appellant's reliance on the NLRA and the NLRB's decision in *In re D.R. Horton*[30] when she argued that it was the "public policy of the United States . . . [] to protect workers' rights to engage in concerted activities."[31] Finding no overriding congressional commands, both circuits upheld the class waivers according to the Supreme Court's FAA jurisprudence.

Nevertheless, interesting is the effect of class action waivers against the rule of law and the word of Congress. Although the interplay between the NLRA and the FAA muddles the intent behind the NLRA, the NLRA's plain language appears clear: "[e]mployees shall have the right to . . . engage in other concerted activities for the purpose of . . . mutual aid or protection."[32] "[O]ther concerted activities" includes the right to bring concerted action, whether it be through a lawsuit, concerted arbitration, or other mechanisms for dispute resolution.[33] If the Court

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25. *See Lewis*, 823 F.3d at 1161; *Morris*, 834 F.3d at 981.

26. *See Lewis*, 823 F.3d at 1161; *Morris*, 834 F.3d at 986.

27. *See Lewis*, 823 F.3d at 1158; *Morris*, 834 F.3d at 986; *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.").

28. *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013); *see also* Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 351 n.5 (5th Cir. 2013). Although the Second Circuit did not address in its opinion whether a class arbitration waiver violates the NLRA, it did state in a footnote that, like the Eighth Circuit, it declines to follow the NLRB's decision in *D.R. Horton*, quoting language from the Eighth Circuit decision indicating that it will not invalidate class waivers where doing so would infringe upon the FAA and other federal policy.

29. *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 360 (5th Cir. 2013); *Owen*, 702 F.3d at 1052.

30. *In re* D.R. Horton, Inc., 357 N.L.R.B. 184 (2012).

31. *See Owen*, 702 F.3d at 1053.

32. 29 U.S.C. § 157 (2012).

33. *See, e.g.*, Totten v. Kellogg Brown & Root LLC, 152 F. Supp. 3d 1243, 1255 (2016); Brady v. National Football League, 644 F.3d 661, 673 (2011).

finds in favor of class action waivers, the message sent by the Court would be that employees' Section 7 rights are not as absolute as the NLRA suggests because the interests of the FAA trump those of the NLRA. Certainly many employers would be happy to eliminate another pesky tool in the employee toolbox. The natural consequence of this would be that individual arbitration and concerted action waivers would become ubiquitous in employment contracts.

Such an effortless dismissal of section 7 rights here appears an odd result, however. Congress not only granted employees the right to concerted action, but it even included provisions for its enforcement. Section 8 of the NLRA provides: "[i]t shall be an unfair labor practice for an employer . . . to interfere with, *restrain*, or coerce employees in the exercise of the rights guaranteed in section [7]."[34] Certainly by including a provision forbidding employees from bringing actions in concert, employers are "restraining" employees' section 7 rights per the language of the statute by limiting their dispute resolution to one-on-one arbitration with the employer where the statute otherwise provides for concerted action.[35]

Despite being unable to bring concerted actions against employers should concerted action waivers be held enforceable, employees would not be left helpless under the NLRA. Included in section 7 rights are the rights to "self-organization, [and] to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."[36] Employees therefore still have the right to organize amongst themselves, to join unions, and to enter into collective bargaining with the employer. Concerted action waivers, at present, do not include any restriction on these rights.[37]

If employees effectively waive their rights to seek recourse in concert, then they must look elsewhere in order to protect their interests. It is arguably preferable for employees to protect their interests *prospectively* through unionization and collective bargaining than retrospectively through arbitration or litigation (once the damage has been done and the animosity has been bred). However, the wisdom of how employees enforce their rights is only remotely marginal to this discussion.

The enforcement of concerted action waivers effectively backs employees up against a wall and considerably curtails their ability to preserve their interests. Such a cornering would put employees in a position where they must be more proactive in unionizing and collective

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34. 29 U.S.C. § 158(a)(1) (2012) (emphasis added).

35. *See* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 740 (1983) (the interpretation of an act that "restrain[s]" under the NLRA has been liberally construed).

36. 29 U.S.C. § 157 (2012).

37. *See id.* § 158(a)(1) (increasing the likelihood that efforts made by employers to lessen these rights will constitute an unfair labor practice).

bargaining. As of 2015, the union membership rate for private-sector workers was a paltry 6.7 percent.[38] Such a low unionization rate coupled with a reduced ability of employees to bring their grievances post-hoc will lead to lower, and less successful, chances for employees to successfully vindicate their rights and interests against their employers. Without forward-thinking action by employees, employers become much more able to do as they please with their employees outside of specifically delineated unlawful practices. Of course, the silver lining, if there ever was one, is that the enforcement of concerted action waivers may lead to increased unionization rates and increased involvement in collective bargaining, both of which may lead to considerably better working lives for employees than if they maintained the simple ability to bring concerted actions.

Of course, enforcing such concerted action waivers and individual arbitration provisions further the policy interests behind arbitration of efficiency, expediency, and informality.[39] Stated otherwise, arbitration is supposed to be a more "quick and painless" dispute resolution method. Without concerted action waivers and individual arbitration provisions, employees would likely be able to storm the floodgates of dispute resolution. Where a dispute involves a single employee and a single employer, the process is ostensibly more smooth and straightforward.[40] Where arbitration or litigation involves several employees, the task becomes much more difficult, requiring coordination of additional parties and reconciliation of individual differences.[41] Ultimately, the process becomes significantly moored and loses considerable value in being a simpler, more manageable ordeal, and the NLRA acts as a strong-arm against employers in favor of employees.

Until the Supreme Court rules on how these competing interests ought to be balanced, discussions on the merits of each side will be tireless. Employer-clients, who are affected by the law on the ground, however, are arguably less interested in the theoretical fervor of each argument and are more interested in knowing how the law affects them and their business. To that end, below, we take up a question-based approach of how management-side employment lawyers should advise their employer-clients when they come to their offices for advice on how to handle class arbitration waivers and any potential Supreme Court ruling. This Note seeks to explore some of the foremost-likely questions on clients' minds, and is tailored to anticipate questions that will arise if the Supreme Court chooses to either uphold class waivers or invalidate them.

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38. BUREAU OF LABOR STATISTICS: U.S. DEPT. OF LABOR, UNION MEMBERS—2015 (Jan. 26, 2017, 10:00 AM), http://www.bls.gov/news.release/pdf/union2.pdf.

39. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).

40. *Id.* at 349–50.

41. *Id.*

III. HOW MANAGEMENT-SIDE LAWYERS SHOULD ADVISE CLIENTS IF CLASS ARBITRATION WAIVERS ARE UPHELD

If waivers are upheld, employees will probably look to other ways to advocate their interests. How should I prepare for and resist against increased chances of unionization, collective bargaining agreements, and other kinds of methods of advocating their rights?

Employees who have had the ability to bring class actions or class arbitrations over disputes with their employers removed will have a more difficult time in attempting to vindicate their rights *post-hoc*. Especially in cases where employees would be limited to relatively small awards (as in claims brought under the Fair Labor Standards Act,[42] for example), employees are less likely to bring any claims at all because they are simply not worth the cost and stress of pursuing. Consider, for example, that an employee may be owed $1000 in unpaid wages, and is governed by an arbitration agreement that does not stipulate that the employer will pay the employee's costs and fees associated with arbitration. In such a case, an employee may be forced to spend, say, $10,000 to recover a mere $2,000.[43] Such an endeavor by an employee would not only be ill-advised, but near insane. The small chance of effective vindication[44] by an employee of his or her rights in individual arbitration is likely to have a chilling effect on the total number of claims even brought, as, among other reasons, employees will be hard-pressed to find attorneys willing to work on cases worth so little.[45] Given the low awards involved in many employment cases, being able to join claims, and thus damages, is one strong way for employees to entice attorneys to take their cases.

Reduced likelihood of claims in tow, employees will look to different ways of vindicating their rights. Where an employee sees that their employer has limited their ways of redressing their grievances, that employee is inevitably going to feel an air of distrust toward the employer. Among other reasons, lack of respect and feelings of unfair treatment by an employer are common motivators for employees to look to unions for fair representation.[46] Similarly, employees' attitudes and satisfaction with their employer-company have an overwhelming effect

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42. 29 U.S.C. § 216(b) (2012) (providing that employees are owed their unpaid wages and overtime, as applicable, along with an equal amount in liquidated damages).

43. *See id.*

44. *See generally* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (providing an applied explanation of the effective vindication doctrine in arbitration).

45. John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action* Law, 13 WYO. L. REV. 463, 465 (2013).

46. Fisher & Phillips, *Reasons Employees Give for Joining a Union* (Nov. 1, 2009), https://www.fisherphillips.com/resources-newsletters-article-reasons-employees-give-for-joinin g-a-union.

on the workers' desire to join a union.[47] The two concepts run parallel to each other and have a significant effect on employee unionization desires. Accordingly, when employers face a threat of their employees unionizing, they must be prepared to defend against it.

A surprisingly simple, yet highly effective way of deterring employees from unionizing is making it known, either directly or indirectly, that employers, as management, do not favor unionization or collective action. Indeed, known or perceived opposition to unionization by employers is a major reason why employees ultimately do not seek union representation.[48] Employers, however, ought to tread lightly in undertaking these tactics, as it is probable that such a deterrence technique may amount to an unfair labor practice in violation of the NLRA.[49] Tempting as its efficacy may be, management counsel should stay away from advising clients to affirmatively establish such an atmosphere of union-dislike.

There are fewer methods of learning how to do something better than modeling success. No business has been more successful at "union busting" than megacorporation Wal-Mart.[50] Although its methods seem to do their hardest to push the legal limits of combating unions,[51] Wal-Mart's model does offer some otherwise very legitimate methods that employers in all industries can extrapolate for their own usage. And in a potential United States that upholds class waivers notwithstanding the NLRA, employers must be vigilant and attentive to the increased threat of unionization.

The most obvious feature of Wal-Mart's anti-union crusade is the sheer amount of attention it gives to even the slightest inkling of unionization in one of its stores. It utilizes a union activity hotline in its headquarters at Bentonville, Arkansas to receive notice of in-store happenings from managers and department-heads in the individual stores.[52] At a moment's notice, and presumably only for credible, substantial threats, Wal-Mart dispatches members of its "labor team" to the store to take appropriate action.[53] A look at Wal-Mart's internal guide to fighting unions and monitoring its workers reveals an incredibly

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47. *See* Barry A. Friedman et al., *Factors Related to Employees' Desire to Join and Leave Unions*, 45 INDUS. REL.: J. ECON. & SOC'Y 102, 107 (2006); *see also* Tracey A. Cullen, *What to do Before the Union Knocks*, 16 N.Y. EMP. L. LETTER 4 (2009).

48. Richard B. Freeman, Briefing Paper, *Do Workers Still Want Unions? More than Ever*, 182 ECON. POL'Y INST. 1, 9 (Feb. 22 2007), http://www.sharedprosperity.org/bp182/bp182.pdf.

49. NATIONAL LABOR RELATIONS BOARD, INTERFERING WITH EMPLOYEE RIGHTS (SECTION 7 & 8(A)(1)), https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1 (last visited Nov. 11, 2016); *see also* 29 U.S.C. § 158 (2016).

50. For an incredibly detailed look at how Wal-Mart combats unions, see Nelson Lichtenstein, *How Wal-Mart Fights Unions*, 92 MINN. L. REV. 1462 (2008).

51. *See id.* at 1495–96.

52. *See id.* at 1492–93.

53. *See id.* at 1492.

serious anti-union philosophy that prioritizes vigilance on the ground, immediate notification to headquarters, and strict guidelines on what actions by managers are lawful or unlawful.[54]

To be sure, most employers will not have the types of resources that Walmart has to execute such a well-oiled machine. Nevertheless, management counsel ought to note to its clients that, like Walmart, it should learn to recognize the early warning signs of unionization and act appropriately to neutralize them before they spread like a malignant disease. The efficacy of such a method, *inter alia*, is evident in the fact that Walmart has no unionized stores in any of its 4,177[55] (in 2014) stores in the United States.[56]

If employees become aware that their employer has eliminated a powerful method of redressing their grievances, the employees are inevitably going to harbor some ill-will and suffer a loss of trust, seeing their employer more as an adversary than a partner. Although an employer may not be able to eliminate this sense entirely, it can act to mitigate it such that the employees may not even come to think about unionization.

As Walmart has demonstrated, attention and promptness to employees and unionization warning signs is a strong tool for employers. At any early signs of unionization, such as grumbling at wages, poor working conditions, unfair treatment, or unusual, reclusive behavior by employees, employers ought to take quick action to mitigate the potential precursors of unionization before they become something less manageable.

All employers should take proactive and preventative steps against unionization. However, employers who promulgate class arbitration waivers ought to be particularly mindful of preventative unionization efforts given their increased risk of unionization threats.

I understand that class action waivers have been upheld, but is there any sort of chance that these provisions could still be unenforceable if I include them in my employees' agreements? The fact that arbitration language simply exists in an agreement is insufficient to render it enforceable. The FAA provides that arbitration agreements will be held valid "save upon such grounds as exist at law or in equity for the revocation of any contract."[57] This has been held to include such

54. Walmart, *Walmart Labor Relations Training: Salaried Manager Module*, https://www.docdroid.net/86ln/manager-training.pdf.html (last visited Nov. 12, 2016).

55. Krystina Gustafson, *Time to Close Wal-Mart Stores? Analysts Think So*, CNBC (Jan. 31, 2014, 3:21 PM), http://www.cnbc.com/2014/01/31/time-to-close-wal-mart-stores-analysts-think-so.html.

56. Bryce Covert, *Walmart Penalized for Closing Store Just After it Unionized*, THINKPROGRESS (June 30, 2014), https://thinkprogress.org/walmart-penalized-for-closing-store-just-after-it-unionized-70945f29e349#.970rps1d1.

57. 9 U.S.C. § 2 (2012).

commonly applicable contract defenses as, *inter alia*, fraud, duress, or unconscionability, but does not include defenses that are only applicable to arbitration or that "derive their meaning from the fact that an agreement to arbitrate is at issue."[58]

What this means for employers is that they ought not subscribe to unsavory practices in order to procure these class action waivers. While there is undoubtedly a strong federal policy in favor of arbitration,[59] employers ought to remember that their arbitration agreements are not totally immune from assault. Attempting to procure such an agreement by any of the above-mentioned methods will render the arbitration agreement unenforceable.[60]

There is a rumbling sentiment, however, that federal FAA jurisprudence after *AT&T Mobility LLC v. Concepcion* is consuming aspects of state contract law.[61] Not surprisingly then, challengers have begun to develop theories under which the Court's holding in *Concepcion* can be undermined or circumvented.[62] Most notably, the issue of whether an arbitration agreement can be invalidated because the plaintiff's costs of arbitration would exceed their potential recovery reached the Supreme Court in *American Express Co. v. Italian Colors Restaurant*.[63] There, the Court held that even with the judge-made effective vindication exception to the enforcement of an arbitration agreement, there is no contrary congressional command sufficient to override the mandate of the FAA.[64] Thus, the Court continued a long line of jurisprudence upholding the strength of the FAA even in cases that are arguably "conservative and anti-consumer."[65] Though this tendency to uphold arbitration agreements should comfort employers to some degree, it should also signal to employers that the issue of arbitration agreements are hotly contested, and that they should remain on the alert for changes in the law that could render them unenforceable.

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58. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); *see also* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Perry v. Thomas, 482 U.S. 483, 492–93 (1987).

59. *See, e.g.*, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333 (2011); Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983) (noting that the FAA reflects a "liberal federal policy favoring arbitration").

60. *AT&T Mobility*, 563 U.S. at 339.

61. *See, e.g.*, Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 153, 155, 155 n.8 (2014).

62. *Id.*

63. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2307 (2013).

64. *Id.* at 2309.

65. James Dawson, Comment, *Contract After Concepcion: Some Lessons from the State Courts*, 124 YALE L.J. 233 (2014), http://www.yalelawjournal.org/comment/contract-after-concepcion-some-lessons-from-the-state-courts.

IV. HOW MANAGEMENT-SIDE LAWYERS SHOULD ADVISE CLIENTS IF CLASS ARBITRATION WAIVERS ARE INVALIDATED

If class waivers are held invalid, how do I prepare for and protect against the likely, and maybe even probable, increase in complexity and costs of the arbitration process? If class action waivers are invalidated, employers risk having to handle employees' claims (be it for wage claims, discrimination issues) in concert. This, together with the increasingly "legalistic" nature of the arbitration process,[66] will likely make the arbitration process more costly, more complicated, and more time-consuming. Such changes run contrary to the very spirit of arbitration, whose primary benefits arise from it being more informal, expedient, and cost-effective than litigation.[67] Thus, when faced with a potentially complex[68] arbitration by virtue of more individuals in the complaining party, employers would be wise to remember the ideals at the core of the arbitration process to ensure that the process proceeds at maximum efficiency.

Of course, that is not to suggest that in order to be effective, arbitration must take no time or result in virtually no costs (in fact, depending on the complexity of the dispute, its costs may even exceed those of litigation[69]). An effective arbitration is one that strikes a harmonious balance between being expeditious and cost-effective and being a procedure that achieves a fair and complete hearing to satisfactorily resolve the dispute for all parties involved.[70]

Attorneys are duty-bound to represent their client as best as possible, which could reasonably lead to the attorney, quite simply, taking advantage of every opportunity and mechanism they have to advocate their clients' interests.[71] Such zealousness has the potential to encumber the arbitration process by way of lengthy hearings, increased depositions, requests for continuances, submission of needless motions, and the

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66. John A. Sherrill, *Effectively Managing a Complex Commercial Arbitration*, NAT'L ACADEMY OF DISTINGUISHED NEUTRALS (2010), http://www.nadn.org/articles/SherrillJohn-EffectivelyManagingAComplexCommercialArbitration(May2010).pdf.

67. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).

68. Use of the descriptors "large" and "complex" is more broad here compared to the American Arbitration Association's use of similar words. Here, "large" and "complex" do not refer to the monetary value of the parties' claims, exclusive of interest, arbitration fees, and other costs. Rather, here, "large" and "complex" simply refer to arbitration proceedings that have become larger and more complicated, as commonly understood, by virtue of the fact that there are additional parties to consider and juggle throughout the entire process. *See* Raymond G. Bender, Jr., *Critical First Steps in Complex Commercial Arbitration: Appointing Qualified Arbitrators and Staging the Preliminary Conference*, 64 DISP. RESOL. J. 28, 30 (2009).

69. *See* Benoit, *infra* note 74, at 164.

70. John Wilkinson, *Streamlining Arbitration of the Complex Case*, 55 DISP. RESOL. J. 8 (2000).

71. Sherrill, *supra* note 66, at 8.

introduction of an unnecessary number of witnesses, among other things.[72] Because cost-saving is virtually always a premier goal in arbitration (in fact, it is often the primary benefit of arbitration),[73] the "fishing expeditions" involved in deposing multiple witnesses, conducting unnecessarily extensive discovery, and filing innumerable motions are largely disfavored in arbitration.[74] Instead, arbitrators will allow only the witnesses, documents, and motions that are key to the sufficiency of the process, disallowing the merely tangentially related documents and witnesses.[75]

Thus, the parties, and particularly the attorneys and arbitrators, ought to remain conscious of streamlining the efficiency of the process from its beginning to its end.[76] This includes, *inter alia*, selecting the arbitrator(s) and conducting the preliminary conference.[77] Although the use of a single arbitrator may be more convenient and simpler to manage, such convenience and simplicity may come at the expense of fairness or expertise.[78] A panel of three arbitrators, though more costly and likely more difficult to organize in terms of scheduling, comes with additional benefits. Unlike a single arbitrator, a panel of arbitrators would offer to the process varying expertise and perspectives (which may be necessary in more technical or heavily factual cases, such as those involving wages or discrimination) to ensure fairness and full consideration of the claims and defenses.[79] Accordingly, the parties ought to balance their needs for multiple perspectives against their needs to cut costs.

Similarly, the parties and the arbitrators should be sure to either reach an agreement as to, or otherwise establish, the scope and limits of various procedural tactics.[80] This should include limits on motion practice, discovery, depositions, witness testimony, discovery disputes, hearings, briefs, oral arguments, and other processes.[81] Each of these has significant potential for abuse, which can needlessly lengthen the time necessary to reach a resolution, raising costs exponentially. Thus, for the sake of maintaining an efficient process, the parties and arbitrators should be mindful of limiting each of these in time and scope. For example,

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72. *See generally* Wilkinson, *supra* note 70.

73. Brent Benoit, *Transcending Disciplines: What Every Transactional Lawyer Should Know about* Litigation, 45 TEX. J. BUS. L. 143, 163 (2013).

74. *Id.*

75. *Id.*

76. *Id.* at 164.

77. Raymond G. Bender, Jr., *Critical First Steps in Complex Commercial Arbitration: Appointing Qualified Arbitrators and Staging the Preliminary Conference*, 64 DISP. RESOL. J. 28, 30 (2009).

78. *Id.* at 31.

79. *Id.*

80. Limiting the scope of discovery is one of the biggest factors contributing to reduced costs of arbitration when compared to litigation. *See* Benoit, *supra* note 73, at 164.

81. Bender, *supra* note 77.

depositions may be limited to half-days, witness testimony limited to only key witnesses, time limits may be imposed on discovery, and motions may be left to the decision of only the chair of the arbitration panel, if applicable, as opposed to the entire panel of arbitrators.[82] Therefore, in order for employers to enjoy the continued efficiency and expediency of arbitration, they must take active steps to limit the process to what is necessary and avoid any "fluff" that will needlessly weigh down the process to the detriment of all parties involved. Often, doing so involves diligent budgeting of the legal fees and expenses.[83] Similarly, employers must be mindful of their own expenses, not just the out-of-pocket expenses specific to the arbitration process. This includes such often-forgotten things as loss of productive time of employees spent laboring over the arbitration process (*e.g.*, searching for documents, organizing files, communicating with parties and arbitrators) that take away from the company's own business.[84]

Can I still include class arbitration waivers for employees who are not covered under the NLRA like supervisors? Presumably, yes. Section 3 of the NLRA explicitly excludes supervisors from its definition of "employee."[85] Thus, the protections of the NLRA to concerted action are not afforded to supervisors.[86] Unless Congress or the Supreme Court states otherwise, employers ought to remain free to maintain class action waivers in their employment agreements for their supervisors without running afoul of a Supreme Court decision that invalidates class action waivers. The same exclusions apply to all managerial employees, not just strictly "supervisors."[87] Nevertheless, employers ought to remain vigilant of developments in the law for any changes in the coverage-status of more higher-ranking employees.

Of course, employers ought to be wary, as an individual's job title is not dispositive of his or her coverage under the NLRA. In order to be excluded from the NLRA as a statutory "supervisor," the employee must:[88] (1) hold authority to engage in any of a number of supervisory functions defined in the NLRA, (2) exercise such authority using independent judgment, not just in a routine or clerical manner, and (3) exercise such authority "in the interest of the employer."[89] Likewise, managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions

82. *See generally* Wilkinson, *supra* note 70, at 11.

83. L. Anthony George, *Controlling Legal Costs in Labor Arbitration*, 28 COLO. LAW. 75, 76 (1999).

84. *Id.* at 77.

85. 29 U.S.C. § 152(3) (2012).

86. *Id.*

87. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 576–77 (1994).

88. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 713 (2001).

89. *Health Care & Ret. Corp.*, 511 U.S. at 573–74.

of their employer."[90]

Although employers ought to remain free to include class action waivers in their employment agreements with supervisorial and managerial employees, employers ought to carefully consider the job duties and authority of the particular employee to determine whether or not such a waiver will be invalidated under a Supreme Court ruling that invalidates class action waivers.

Can I include the arbitration provision in the agreement anyway? I know it is unenforceable, but could I just leave it in the contract as a deterrent? Sophisticated entities commonly leave unenforceable provisions in contracts, even when they are fully aware that these provisions are unenforceable.[91] This occurrence is particularly prevalent in the employment context, in contrast to other settings.[92] Such a practice appears to be a relatively common litigation strategy designed to deter the other party to the contract.[93] In effect, the mere inclusion of these provisions may help the imposing party (here, the employer) because either: (1) the other party simply does not know that the provision is invalid[94] or (2): the other party is not going to expend the resources needed to prove that the provision is unenforceable.[95] Often, there is a low risk-reward ratio for the employer by including these unenforceable provisions because courts take such a lax approach toward them.[96] And even if the provision is unenforceable, courts frequently will blue-pencil the provision to make it enforceable or will otherwise enforce the rest of the agreement without the offending provision.[97] Arguably, a small proportion of employees will be willing to challenge these provisions, if any, and the employer may continue along with the terms of the provision as though it were enforceable. In effect, even if an employee attempts to challenge the provision, the employer would likely receive little more than a slap on the wrist for its inclusion.

However, a different risk exists with employing this litigation strategy in the context of a class action waiver. If class action waivers are invalidated, and employees thus have the right to bring concerted action against the employer, an employer may run afoul of the NLRA by nevertheless including such a provision. The employer's inclusion of that provision may rise to the level of an unfair labor practice under Section 8

90. NLRB v. Bell Aerospace Co., 416 U.S. 267, 288 (1974).

91. Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contracts Terms*, 70 OHIO ST. L.J. 1127, 1127 (2009).

92. *Id.*

93. *Id.* at 1131.

94. *Id.*

95. *Id.*

96. *Id.* at 1134.

97. *Id.* at 1131–32.

of the NLRA.[98] In particular, such an inclusion could be considered a restraint on or interference[99] with the employees' Section 7 rights (here, the ability to organize and bring concerted action). That is, employees who arguably do not have the legal wherewithal to know that a provision is unenforceable may see the provision and simply assume that it is enforceable. Presumably, the issue of whether such a provision amounts to an unfair labor practice will be discussed in a Supreme Court ruling invalidating class action waivers. But even if not, given the NLRB's tendency to establish particular employer actions as unfair labor practices under Section 8(a)(1), it would appear to be a high risk by the employer to nevertheless include such a provision even after it has been invalidated.

V. EXPANSION AND CONCLUSION

Although the issue here is framed as one between the NLRA and the FAA, the underlying rationale and policy should be understood more as one between the rights of the business versus the rights of the individual. Here, it seems somewhat likely that the present Roberts Court would rule in favor of upholding the class action waivers (especially assuming that President Donald Trump will appoint a ninth Supreme Court Justice who will presumably have a more pro-business and pro-arbitration pedigree). Indeed, the Roberts Court has been criticized as being particularly conservative and pro-business.[100] Such claims appear to be more than just biased left-wing criticism. In fact, Professors Lee Epstein and William Landes, and Judge Richard Posner recently conducted a study finding, *inter alia*, that of the ten most pro-business Supreme Court Justices since 1946, five were on the bench at the time of the study's publication in 2013 (including Chief Justice John Roberts and Justices Alito, Thomas, Kennedy, and the late Justice Scalia).[101]

Similarly, the present Roberts Court has continued a snowballing jurisprudence in favor of arbitration and the FAA.[102] Although the NLRA's mandate appears clear, it seems unlikely that such a pro-business and pro-arbitration Court will find in favor of invalidating class action waivers.

Regardless of the Court outcome, however, employers will have much

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98. 29 U.S.C. § 158 (2012).

99. *Id.* § 158(a)(1).

100. *See, e.g.*, Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, May 4, 2013, http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html (last visited Dec. 23, 2016).

101. Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471 (2013) (ranking the most pro-business Justices to serve on the Supreme Court since 1946).

102. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 369 (2011).

to adjust for and much to consider going forward. Even if employers leave this dispute with a "victory" in the form of an upholding of class action waivers, they will have to prepare for the very real possibility of their employees unionizing in order to protect their interests. In such a scenario, an upholding of class waivers may ultimately prove to be a hollow victory, as some employers may find it preferable to deal with class actions than to deal with unionization. On the flip side, if class waivers are invalidated, employers will have to become a bit more creative in their endeavors and practices in order to make sure their businesses are prepared to handle and mitigate the costs and time expenses of dealing with any potential concerted actions by employees. Most important for employers, however, is that they continue to remain vigilant of developments in the law and act accordingly. While unfortunately for employers, they cannot control the direction of the law, they can control their own preparation and how they respond to however the tide may turn.