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Arbitration Merry-Go-Round: Employers Await Trilogy of Supreme Court Decisions

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Over the past several years, the Supreme Court has taken a keen interest in arbitration agreements, both in the employment context and beyond. In its last term, the Supreme Court affirmed the use of class waivers in arbitration agreements and specifically affirmed the availability of one-on-one arbitration between employers and their employees. In this term, the Supreme Court will tackle three more arbitration cases, each of which will impact employers and their continued reliance on workplace arbitration agreements.

The Court does not publicize when it will decide cases, but we know when it will hear oral arguments regarding them. Arguments on all three arbitration cases were heard by the Court in October. Having done so, the Court could decide the cases at any time, although complicated or "hot button" cases are usually decided towards the end of the Court's term.

The first case, *New Prime Inc. v. Oliveira*, involves two issues. The first is the scope of "delegation clauses." In an arbitration agreement, delegation clauses set what disputes should be heard by a court and what disputes should be heard by an arbitrator. Say, for example, the parties dispute whether they have an *enforceable* arbitration agreement, or whether their agreement allows for class arbitration. A delegation clause can specifically say whether these disputes are decided by a court (before arbitration) or by an arbitrator (as part of arbitration). The second issue is whether independent contractors in the transportation industry are bound by arbitration agreements. These issues arise out of the argument that the FAA, or Federal Arbitration Act, prohibits the use of arbitration in "contracts for employment" in the transportation industry. The Court will decide whether "contracts for employment" encompass both employees and independent contractors or only employees. If the Court concludes that it covers both, lower courts will be far less likely to enforce arbitration agreements in the transportation industry, such as one between a driver and a trucking company.

The second case, *Lamps Plus, Inc. v. Varela*, should decide whether an arbitration agreement must expressly state that class arbitration is allowed, or if the availability of class arbitration can be inferred from the agreement. As mentioned above, the Court decided last term that an arbitration agreement that expressly forbids – i.e., waives – class arbitration is enforceable. So, if an agreement includes a class waiver, arbitration can and will proceed on an individual basis only. But what if the arbitration agreement does not expressly forbid class arbitration – can class arbitration still occur? That is the primary question in *Lamps Plus*. Notably, the case itself started when employees sued their employer after their personal information was accessed in a data breach. Also of note, a jurisdictional issue has been raised before the Supreme Court, and some have predicted that the Court may resolve the case on jurisdictional grounds, leaving the primary question for another day. For now, employers can avoid these questions altogether by including a class waiver in their workplace arbitration agreements. The waiver should not only prohibit "class" arbitration but also any "collective" or "group" arbitration. Additionally, the waiver should affirmatively state that arbitration will proceed on a one-on-one, individual basis only.

The third and final case, *Henry Schein Inc. v. Archer and White Sales Inc.*, squarely presents the "delegation clause" issue that exists to a lesser degree in *New Prime*. In *Henry Schein*, the arbitration agreement stated

that, essentially, all disputes between the parties should be decided by an arbitrator. Now, the parties are locked in an antitrust dispute. One side argues that the dispute is not covered by the arbitration agreement; therefore, it can be heard by a court. The other side argues that the dispute is covered by the agreement; therefore, must be heard by an arbitrator, not a court. Why is the Supreme Court involved? In short, the question is who decides the parties' "coverage" dispute. In other words, does a court decide which disputes are covered by an arbitration agreement, or does an arbitrator decide which disputes are covered by an arbitration agreement? To date, the Supreme Court has been largely willing to enforce arbitration agreements according to their terms. If the Supreme Court continues with this reasoning, it may mean that an arbitration agreement covering "all disputes" means all disputes, including disputes over what claims are and are not covered by the agreement. For employers, delegation clauses provide an option for keeping the entirety of a workplace dispute in arbitration. Accordingly, employers must draft their workplace arbitration agreements with care and, like most workplace policies, with precision.

For additional information regarding these cases or the benefits of workplace arbitration agreements in general, please contact the author, Zachary B. Busey, or any member of the Labor & Employment Group.