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Decision Alert: Supreme Court Holds Class Action Waiver in Arbitration Agreement is Enforceable

In a 5-3 ruling in *American Express Co. v. Italian Colors Restaurant ("Amex")*, 570 U.S. ___ (2013), the Supreme Court reversed the Second Circuit and held that an arbitration provision that barred class actions was enforceable. Our summary of the February 27, 2013 Supreme Court oral argument for this case is available here.

After originally ruling that the arbitration provision was unenforceable, the Second Circuit twice reconsidered its decision in response to intervening Supreme Court cases that evidenced a strong federal policy favoring the enforcement of arbitration provisions. But on both occasions, the Second Circuit reaffirmed that the provision was unenforceable because the only economically feasible way for plaintiffs to bring their antitrust claim against American Express was to do so as a class. Reversing the Second Circuit, the Supreme Court held that "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." (slip. op., at 4). And extending its decision beyond antitrust claims, the Court declared that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." (slip op., at 7) (emphasis in original). Thus, the Court found that the class action waiver "no more eliminates those parties' rights to pursue their statutory remedy than did federal law before its adoption of class action legal relief in 1938." *Id*.

The dissent argued that this case was not about the enforceability of a class action waiver; instead, it concerned an arbitration provision that "cuts off not just class arbitration, but *any* avenues for sharing, shifting, or shrinking necessary costs" of litigating claims against American Express. (slip op., at 8) (Kagan, J. dissenting) (emphasis added). The dissent concluded that the provision should be unenforceable because it made it prohibitively expensive for plaintiffs to arbitrate their claims against American Express. The decision is available in its entirety here.

The *Amex* decision is good news for employers that wish to enforce class action waivers in employment agreements. In particular, with respect to FLSA claims, courts applying *Amex* are likely to enforce arbitration provisions that bar collective action even when plaintiffs argue that it is economically infeasible to bring such claims individually.

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