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Employer Violates NLRA By Barring Employees From Bringing Class or Collective Actions, Says Ninth Circuit

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Bad news for employers in the ongoing saga of whether an employer violates the National Labor Relations Act (NLRA) by requiring that employees pursue any legal dispute against the company on an individual basis, rather than in a class or collective action with other employees. The Ninth Circuit Court of Appeals recently ruled that the NLRA precludes employees from waiving their right to have disputes heard collectively and an employer that requires employees to waive that right as a condition of employment commits an unfair labor practice. *Morris v. Ernst & Young, LLP*, No. 13-16599 (9th Cir. August 22, 2016).

Broad Ruling Extends To Any "Separate Proceedings" Requirement

Accounting firm Ernst & Young required its employees to sign agreements mandating that all legal claims against the firm be pursued exclusively through arbitration and only as individuals in "separate proceedings." When employee Stephen Morris brought a class and collective action in federal court alleging that the firm misclassified employees denying them overtime pay under the Fair Labor Standards Act, Ernst & Young sought to compel arbitration on an individual basis pursuant to its arbitration agreement. The district court agreed, dismissing the federal court case and ordering arbitration.

Morris appealed, arguing, among other things, that the "separate proceedings" clause violated the NLRA. Morris relied on determinations by the National Labor Relations Board (the Board) in the *D.R. Horton and Murphy Oil* cases in which the Board ruled that concerted action waivers violate the NLRA. The Ninth Circuit agreed. It ruled that when an employer requires employees to sign an agreement precluding them from bringing a concerted legal claim regarding wages, hours, and terms and conditions of employment, the employer violates the NLRA.

The Court focused on the Board's interpretation of the NLRA's statutory right of employees "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" to include a right to join together to pursue workplace grievances, including through litigation. It characterized this as a labor law case, not an arbitration case. It stated that the problem with the contract was not that it required arbitration, but that it excluded all concerted employee legal claims. The Court explained that the same problem would exist "if the contract required disputes to be resolved

through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to that mechanism and (2) required separate individual proceedings."

Circuit Split Sets Up Potential Supreme Court Resolution

The Ninth Circuit joined the Seventh Circuit in its rejection of class waivers, but is at odds with the Second, Fifth, and Eighth Circuits which have upheld class action waivers under the Federal Arbitration Act. The split in the appellate courts on this issue makes it ripe to be heard by the Supreme Court in the future. We'll continue to monitor whether the Supreme Court agrees to hear it.

Take Aways for Employers

Employers who utilize class or collective action waivers, requiring employees to pursue legal claims on an individual basis, will need to be aware of the rulings in the jurisdictions where they operate. For employees located in states covered by the Ninth and Seventh Circuits (which includes California, Nevada, Idaho, Montana, Oregon, Washington, Arizona, Alaska, Hawaii, Illinois, Indiana, and Wisconsin), such waivers are very likely unenforceable. If located in other states, either where courts have upheld such waivers or no definitive ruling exists, employers may have better luck in enforcing them. If you have questions or are unsure about what you should do, always consult with your labor counsel.
