

Ninth Circuit Holds that Employees' Waiver of All Forums for Class or Collective Action Violates NLRA

by Jack Sullivan

Employers who require employees to sign arbitration agreements as a condition of employment should take care: A split is developing among the federal appellate courts regarding the enforceability of so-called "concerted action waivers" in employment agreements.

In a published decision filed on August 22, 2016, the Ninth Circuit joined the Seventh Circuit in holding that an employer violated employees' rights under the National Labor Relations Act ("NLRA") to engage in concerted activity when the employer required employees to pursue all legal claims solely on an individual basis. The court found that the lack of any forum for class or collective action infringed on employees' rights to engage in concerted activity with respect to wages, hours, and terms or conditions of employment.

In *Morris v. Ernst & Young*, the plaintiff employees were required to sign a "concerted action waiver" as a condition of employment. The waiver required employees to do two things: first, they could only arbitrate any legal claims they may have against Ernst & Young; second, if they brought a claim to arbitration, employees only could pursue arbitration in "separate proceedings," as opposed to as a class or collective action. The effect: employees could not bring a class or collective action against Ernst & Young in *any* forum.

Despite the waiver, the plaintiffs brought a class and collective action in federal court, alleging that Ernst & Young misclassified them and similarly situated employees. The complaint alleged that the misclassification resulted in the denial of overtime wages in violation of the Fair Labor Standards Act and California labor laws.

Ernst & Young moved to compel arbitration pursuant to the agreements signed by the plaintiffs. The trial court agreed that the plaintiffs were bound by the waiver, ordered individual arbitration, and dismissed the case.

On appeal, the Ninth Circuit reversed the trial court's order for individual arbitration. The

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appellate court held that an employer violates Section 7 and Section 8 of the National Labor Relations Act by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms or conditions of employment. The court held that requiring employees to pursue *all* of their legal claims in “separate proceedings” could not be enforced because it violated the NLRA. The court further held that the Federal Arbitration Act did not compel a contrary result because the “concerted action waiver” purported to waive a substantive federal right, which is impermissible under the FAA.

Employers should be mindful of the consequences of the Seventh Circuit’s and Ninth Circuit’s recent decisions. Under the holdings in these cases, employers must allow *some* forum for class or collective actions. Therefore, employers should determine how they would prefer for employees to pursue class or collective actions—*i.e.*, by arbitration or in court. Seeking a waiver of both means employers are subject to not only the underlying claim, but also a claim for violating the NLRA.

In contrast to the Seventh and Ninth Circuits, the Second, Fifth, and Eighth Circuits have enforced concerted action waivers. For employers, the circuit split means the enforceability of their provisions will depend on which court is deciding its case. It also means the Supreme Court may step in to provide uniformity.