THE
NATIONAL LAW REVIEW

Split Among Circuit Courts in Compelling Individual Arbitration in Class Actions Continues

Article By
Pascal Benyamini
Drinker Biddle & Reath LLPLabor Sphere

Labor & Employment
Litigation / Trial Practice
9th Circuit (incl. bankruptcy)

Wednesday, August 24, 2016

Earlier this week, the *Ninth Circuit* Court of Appeals issued a ruling in ***Morris v. Ernst & Young*** and aligned itself with the Seventh Circuit[1] in holding that an employer cannot compel individual arbitration of an employee's class and collective action claims.

In *Morris*, Plaintiffs Stephen Morris and Kelly McDaniel ("Plaintiffs") worked for the accounting firm Ernst & Young. As a condition of their employment, Plaintiffs were required to sign an agreement that the Ninth Circuit determined Plaintiffs could only "(1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in 'separate proceedings.'" In a relatively surprising move and 2-1 decision, the Ninth Circuit found that the employer violated Sections 7 and 8 of the National Labor Relations Act (NLRA)[2] by "requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment." In doing so, the Ninth Circuit overruled the lower court's ruling in favor of Ernst & Young in its motion to compel individual arbitration and held that the agreements in question precluded Plaintiffs from "initiat[ing] concerted legal claims against the company in any forum—in court, in arbitration proceedings, or elsewhere."

The *Morris* Court explained that it did not view the arbitration requirement as a problem. But rather, "[t]he problem with the contract at issue is […] that the contract term defeats a substantive federal right to pursue concerted work-related legal claims." The Court continued:

The NLRA establishes a core right to concerted activity. Irrespective of the forum in which disputes are resolved, employees must be able to act in the forum together. The structure of the Ernst & Young contract prevents that. Arbitration, like any other forum for resolving disputes, cannot be structured so as to exclude all concerted employee legal claims. As the Supreme Court has instructed, when 'private contracts conflict with' the NLRA, 'they obviously must yield or the Act would be reduced to a futility.' [citation omitted]."

Accordingly, the Ninth Circuit remanded the case back to the lower court to determine whether the "separate proceedings" clause in the agreement could be severed from the rest of the agreement.

As noted above, the decision in *Morris* was not unanimous. In her dissent, Judge Ikuta was quite critical of the majority opinion, finding it "breathtaking in its scope and in its error; […] directly contrary to Supreme Court precedent; […] join[ing] the wrong side of a circuit split; […] lead[ing] to a result that is directly contrary to Congress's goals in enacting the [Federal Arbitration Act]. Indeed, Judge Ikuta specifically acknowledged the holdings by the Second, Fifth and Eight Circuits (which have concluded that the NLRA does not invalidate collective action waivers in arbitration agreements) and further stated that: "the majority's reasoning is specious because it is based on the erroneous assumption that the waiver of the right to use a collective mechanism in arbitration or litigation is 'illegal.' But such a waiver would be illegal only if it were precluded by a "contrary congressional command" in the NLRA, and here there is no such command."

In sum, now that the Seventh and Ninth Circuit Court of Appeals have aligned themselves against the Second, Fifth and Eighth Circuit Court of Appeals, a decision by the U.S. Supreme Court is greatly needed to provide clarity and certainty for employers with respect to class action/collective action arbitration waivers.

In the meantime, employers need to know that class and collective action waivers will not be enforced in federal courts in the Seventh and Ninth Circuits.[3] Such employers who have existing agreements containing such waivers or employers that are considering such waivers should carefully evaluate and discuss this matter further with their counsel.

---

[1] For our previous discussion of the Seventh Circuit decision in the *Lewis v. Epic-Systems Corp.* case and background on the enforceability of class action waivers, please click here.

[2] The NLRA establishes the rights of employees in Section 7 and provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, 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." 29 U.S.C. § 157. Section 8 of the NLRA is viewed as an enforcement provision which enforces the rights under Section 7 by making it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158.

[3] There are three (3) states within the Seventh Circuit: Illinois, Indiana and Wisconsin. There are eleven (11) states and jurisdictions within the Ninth Circuit: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington.

© 2019 Drinker Biddle & Reath LLP. All Rights Reserved

Source URL: https://www.natlawreview.com/article/split-among-circuit-courts-compelling-individual-arbitration-class-actions-continues