Ninth Circuit Decision Solidifies Circuit Split On Enforceability Of Class Action Waivers In Arbitration Agreements

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howtostartablogonline.net / Flickr / CC BY 2.0In a decision that may have a significant impact on the litigation of employment disputes, the Ninth Circuit Court of Appeals recently joined the Seventh Circuit in holding that the National Labor Relations Act ("NLRA") prohibits employers from enforcing class and collection action waivers in arbitration agreements with their employees. *See Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016) *petition for cert. filed* (U.S. Sep. 8, 2016) (NO. 16-300); *Jacob Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) *petition for cert. filed* (U.S. Sep. 8, 2016). The Ninth Circuit's decision deviates from decisions on the same issue rendered by the Second, Fifth and Eighth Circuit Courts of Appeal.

The decision in *Morris* interprets 29 U.S.C. § 157 ("Section 157"), a section of the NLRA that grants workers the right to self-organize and engage in collective and concerted activity. In *Morris*, two employees filed a class action lawsuit alleging that their employer, Ernst & Young LLP ("E&Y"), violated the Fair Labor Standards Act ("FLSA") and California state law by failing to pay them premium overtime compensation. *Id*. E&Y moved to compel individual arbitration of the claims because the plaintiffs and putative class members had previously signed an arbitration agreement that contained a class action waiver. *Id*. The District Court granted E&Y's motion and the plaintiffs appealed to the Ninth Circuit.

In a split decision, a three member panel of the Ninth Circuit reversed, holding that Section 157 prohibits an employer from requiring employees to sign class or collective action waivers in arbitration agreements as a condition of employment. The decision in *Morris* relied in large part on prior decisions of the National Labor Relation Board (the "NLRB"), an administrative agency tasked with enforcing the NLRA. Specifically, the Ninth Circuit cited *D.R. Horton*, 357 NLRB No. 184 (2012), in which the NLRB held that Section 157 prohibits employers from "circumvent[ing] the right to concerted legal activity by requiring that employees resolve all employment disputes individually . . . [i]n other words, employees must be able to initiate a work-related legal claim ***together*** in some forum, whether in court, in arbitration, or somewhere else." *Morris*, 2016 WL 4433080, at *2 (emphasis added). Although the Ninth Circuit was not bound to follow *D.R. Horton* – indeed, the relevant aspect of the decision in *D.R. Horton* was later vacated by the Fifth Circuit – it found that the NLRB's decision in *D.R. Horton* was entitled to significant deference and ultimately agreed with the NLRB's rationale.

As noted above, the decision in *Morris* departs from decisions on the same issue by the Second, Fifth and Eighth Circuit Courts, all of which have enforced class and collective action waivers in arbitration agreements. *See Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013); *Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542 (2d Cir. Sept. 2, 2016); *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir. 2013), *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013). Each of these cases explicitly or implicitly held that the NLRA either: (i) does not provide a substantive right to bring class or collective actions; and/or (ii) is trumped

by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, which provides that arbitration agreements must be enforced according to their terms. In contrast to those decisions, the Ninth Circuit held that the right to bring a class or collective action is a "substantive" right under the NLRA that is not and cannot be waived in an arbitration agreement.

The *Morris* decision mirrors the Seventh Circuit's decision in *Jacob Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) *petition for cert. filed* (U.S. Sep. 8, 2016). In *Epic Systems*, the defendant required its employees, as a condition of employment, to agree to waive "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." *Id*. at 1151. Nevertheless, the plaintiff brought a collective action for violations of the FLSA. The company moved to dismiss pursuant to the class and collective action waiver, but the District Court denied the motion and the company appealed to the Seventh Circuit. The Seventh Circuit affirmed, holding that "the NLRA provides workers with a substantive right to engage in 'collective, representative, and class legal proceedings'" and that the company's attempt to compel employees to waive this right was unlawful. *Id.* at 1153. The Seventh Circuit further held that the NLRA is not in conflict with the FAA. The former renders the arbitration agreement illegal, and the latter specifically states that arbitration agreements can be voided "upon such grounds as exist at law or in equity for the revocation of any contract," such as illegality. *Id.* at 1156.

The decision in *Morris* further solidified the circuit split created earlier in 2016 by *Epic Systems* on the enforceability of class and collective action waivers in arbitration agreements. The NLRB and the defendants in *Morris* and *Epic Systems* have all petitioned for the Supreme Court to rule on this issue. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* (U.S. Sep. 9, 2016) (NO. 16-307); *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016) *petition for cert. filed* (U.S. Sep. 8, 2016) (NO. 16-300); *Jacob Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) *petition for cert. filed* (U.S. Sep. 8, 2016). If the Supreme Court chooses to rule on this issue, it will be closely followed by employment lawyers as the implications could be far-reaching for employees and employers.

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