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EMPLOYERS BEWARE: THE ARBITRATION AGREEMENT IN YOUR EMPLOYMENT CONTRACT MAY VIOLATE §7 AND §8 OF THE NATIONAL LABOR RELATIONS ACT "NLRA"

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In *Morris v. Ernst & Young*, a panel for the Ninth Circuit recently entered into a circuit split when it sided with the 7th Circuit and National Labor Relations Board (NLRB) in affirming the NLRB's determination that "Concerted Action Waivers" required by employers as a condition of employment, violate §7 and §8 of the National Labor Relations Act (NLRA).

The NLRA is a Federal Act that grants employees the right to unionize and to join together to advance their interests as employees. Save for a few exceptions, the NLRA applies to most private employers. Under §7 of the NLRA, employees have the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." §8 of the NLRA provides for the enforcement of §7 by making it an unfair labor practice for an employer "to interfere with . . . employees in the exercise of [their §7 rights]."

The Plaintiff's in *Morris* were employees at Ernst & Young and, as a condition of their employment, were required to enter into a Concerted Action Waiver "the Waiver,",= which contained two key provisions. The first provision required all employees to pursue any legal claims against the employer exclusively through arbitration. The second provision provided that employees could only arbitrate as individuals in "separate proceedings." Despite the Waiver, the Plaintiffs brought a class action lawsuit alleging that their employer, Ernst & Young, misclassified them and other similarly situated employees in order to avoid paying overtime wages. Due to the waiver, the District Court held that the Plaintiffs were required to arbitrate their claims, separately. The Plaintiffs appealed to the Ninth Circuit, arguing that the requirement to arbitrate in "separate proceedings" violated their §7 and §8 NLRA rights to engage in concerted activity for the purpose of mutual aid or protection.

A three judge panel for the Ninth Circuit, led by Chief Judge Sidney R. Thomas, in a two to one decision, deferred to the NLRB's interpretation that Concerted Action Waivers, such as the one here, do indeed violate §7 and §8 of the NLRA. The court noted that under the NLRA, employees have a substantive federal right to pursue work related legal claims in concert, or together, regardless of the forum. The court went on to explain that the "separate proceedings" clause within the Waiver at issue interfered with this right by requiring employees to resolve their legal claims separately, which effectively prevented them from resolving their legal claims together.

The court also rejected the defendants' argument that the Federal Arbitration Act (FAA) requires mandatory enforcement of arbitration provisions, as a matter of contract law. In its rejection, the court pointed to the FAA's "savings clause," which requires the enforcement mandate to yield when an arbitration agreement requires waiver of a substantive federal right—such as the right of employees to pursue their legal claims together. The court emphatically clarified that the illegality of the "separate proceedings" clause arose solely

from the restriction on concerted activity and had nothing to do with the use of arbitration, exclusively, as the mandatory forum selected for resolving legal disputes.

INSIGHTS FOR EMPLOYERS

To date, the 2nd, 5th and 8th Circuits have concluded that the NLRA does not invalidate Concerted Action Waivers, while the 7th and 9th Circuits along with the NLRB have held otherwise. Given the carefully crafted dissent penned by Judge Ikuta in *Morris v. Ernst & Young*, there is a chance that the Ninth Circuit could revive the case for *en banc* review.

In the meantime, employers within the Ninth Circuit's jurisdiction should review and update any arbitration clauses or Collective Action Waivers, required as a condition of employment, to ensure that the language in such clauses does not restrict employees from pursuing legal claims together.

For more information on §7 and §8 of the NLRA head to https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1.

Please contact a Gjording Fouser lawyer at 208.336.9777 if you would like any additional information about this topic or any other employment issues facing your company.