GT GreenbergTraurig

Labor & Employment Litigation | Alert

August 2016

Ninth Circuit Court of Appeals Widens Circuit Split as to Class Action Waivers in Employee Arbitration Agreements

In a decision likely to have significant ramifications for employers, a divided panel of the Ninth Circuit Court of Appeals ruled last week that employers cannot require employees to individually arbitrate their claims by way of "separate proceedings." In *Morris v. Ernst & Young, LLP*, No. 13-16599, D.C. No. 5:12-cv-04964 (9th Cir. August 22, 2016), the Ninth Circuit joined the Seventh Circuit Court of Appeals and the National Labor Relations Board (NLRB or Board) in holding that requiring employees to sign an agreement precluding them from bringing concerted legal claims violates § 7 and § 8 of the National Labor Relations Act (NLRA).

The decision means that, at least for now, employers within the Ninth Circuit cannot prevent class and/or collective actions by mandating individual arbitration.

This ruling is at odds with three other circuit courts (the Fifth, Second, and Eighth) which have upheld class and collective action waivers in arbitration agreements. In fact, the Fifth Circuit Court of Appeals has expressly overruled the NLRB not once, but twice, on this particular issue. *See Murphy Oil USA v. NLRB*, No. 14-60800 (5th Cir., October 26, 2015); *D.R. Horton, Inc. v. NLRB*, 737 F. 3d 344 (5th Cir. 2013).

The Decision

In *Morris*, as a condition of employment, Ernst & Young required employees to sign agreements stating that legal claims had to be brought through arbitration, and in "separate proceedings." Despite signing this agreement, two plaintiffs brought a wage and hour class and collective action in federal court against Ernst & Young. In response, Ernst & Young filed a motion to compel arbitration, which the district court granted.

In reversing the order compelling arbitration, the Ninth Circuit held that the NLRA § 7's "mutual aid or protection clause" includes the substantive right to collectively "seek to improve working conditions through resort to administrative and judicial forums." The court also held that the Federal Arbitration Act (FAA) did not dictate a contrary result because when an arbitration contract professes to waive a substantive federal right, the savings clause of the FAA prevents the enforcement of that waiver. Critical to this determination was the court's acknowledgement of the distinction between substantive and procedural federal rights and the court's conclusion that "[t]he rights established in § 7 of the NLRA — including the right of employees to pursue legal claims together — are substantive. They are central, fundamental protections of the act, so the FAA does not mandate the enforcement of a contract that alleges their waiver."

The panel remanded to the district court to determine whether the "separate proceedings" clause was severable from the contract.

Significantly, the majority decision repeatedly emphasized that the problem with the contract was not that it required arbitration, but that it precluded concerted action, stating as follows:

> The illegality of the "separate proceeding" term here has nothing to do with arbitration as a forum. It would equally violate the NLRA for Ernst & Young to require its employees to sign a contract requiring the resolution of all work-related disputes *in court* and in separate proceedings. The same infirmity 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. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted worked-related legal claims. (emphasis added).

In a forceful dissent, Judge Sandra S. Ikuta called the decision "breathtaking in its scope and in its error" and accused the majority of joining "the wrong side of a circuit split." In Judge Ikuta's view, "when a party claims that a federal statute makes an arbitration agreement unenforceable … the Supreme Court requires a showing that such a federal statute includes an express "contrary congressional command." Judge Ikuta found no express congressional command within the NLRA which would override the FAA.

The dissent also took issue with the majority's view that either § 7 or § 8 of the NLRA creates a substantive right to the availability of classwide claims stating that "[w]hile the NLRA protects concerted activity, it does not give employees an unwaivable right to proceed as a group to arbitrate or litigate disputes." The dissent also charged that "[t]o the extent the Supreme Court has held that class actions are inconsistent with arbitration … the majority effectively cripples the ability of the employers and employees to enter into binding agreements to arbitrate."

Take Aways

At this point, the enforceability of agreements which mandate arbitration by way of separate proceedings and preclude class and/or collective actions in the employment context is far from certain. Given that it is often more difficult to defend against class or collective action certification in arbitration than it is in federal court, employers in the Seventh and Ninth Circuits (and possibly elsewhere) may want to consider amending their arbitration agreements to provide that if the class or collective action waiver provision is found unenforceable, then the entire arbitration agreement is rendered null and void and the class or collective action waiver is not to be severed from the agreement.

At a minimum, employers should consult with outside counsel regarding the wisdom of including waivers of class and collective actions in agreements to arbitrate.

This *GT Alert* was prepared by **Todd D. Wozniak** and **Jack S. Gearan**. Questions about this information can be directed to:

- Todd D. Wozniak | +1 678.553.7326 | wozniakt@gtlaw.com
- Jack S. Gearan | +1 617.310.5225 | gearanj@gtlaw.com
- Any member of Greenberg Traurig's Labor & Employment Group
- Or, your Greenberg Traurig Attorney

Albany
+1 518.689.1400

Amsterdam
+ 31 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Berlin¬
+49 (0) 30 700 171 100

Berlin-GT Restructuring¯
+49 (0) 30 700 171 100

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

Chicago
+1 312.456.8400

Dallas
+1 214.665.3600

Delaware
+1 302.661.7000

Denver
+1 303.572.6500

Fort Lauderdale
+1 954.765.0500

Houston
+1 713.374.3500

Las Vegas
+1 702.792.3773

London*
+44 (0)203 349 8700

Los Angeles
+1 310.586.7700

Mexico City+
+52 55 5029.0000

Miami
+1 305.579.0500

New Jersey
+1 973.360.7900

New York
+1 212.801.9200

Northern Virginia
+1 703.749.1300

Orange County
+1 949.732.6500

Orlando
+1 407.420.1000

Philadelphia
+1 215.988.7800

Phoenix
+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2.369.1000

Shanghai
+86 (0) 21.6391.6633

Silicon Valley
+1 650.328.8500

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+972 (0) 3.636.6000

Tokyo¤
+81 (0)3 4510 2200

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

Westchester County
+1 914.286.2900

West Palm Beach
+1 561.650.7900