Are Mandatory Arbitration Agreements Headed for the Supreme Court?

Labor & Employment Law Update

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This past June, our blog reported on the Seventh Circuit's decision in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), which found that the Federal Arbitration Act does not require enforcement of an arbitration agreement based on the employee's right under the National Labor Relations Act (NLRA) to engage in protected concerted activity. Specifically, in *Lewis* the Seventh Circuit held that employment arbitration agreements that include class action waivers violate the NLRA and cannot be enforced. This was the first time that a circuit court had adopted the NLRB's position in *D.R. Horton, Inc.,* 357 NLRB 184 (January 3, 2012).

A couple of months later, the Ninth Circuit, in *Morris v. Ernst & Young, LLP, (9th Cir. (Cal.) August 22, 2016),* followed suit and also found that an arbitration agreement that required employees to bring claims in "separate proceedings," thereby prohibiting class and collective actions, violated the employees' right to engage in concerted activity under the NLRA. Just like in *Lewis*, the employees in *Morris* had to sign arbitration agreements as a condition of employment. Stephen Morris subsequently filed a class and collective action against the company, alleging he and others had been misclassified as employees exempt from overtime under the Fair Labor Standards Act and California state law. In response, the employer filed a motion to compel arbitration pursuant to the agreements the employees had signed. The district court ordered individual arbitration for each and dismissed the complaint. The Ninth Circuit, however, reversed and held that such agreements interfere with the employees' rights under Sections 7 and 8 of the NLRA regarding concerted activity.

Back in 2013, three circuit courts ruled that the NLRA does not prohibit class waivers. First, the Eighth Circuit ruled that class waivers were appropriate in *Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013).* The Second Circuit did likewise in *Sutherland v. Ernst & Young, 726 F.3d 290 (2nd Cir. 2013).* Finally, the Fifth Circuit reversed the NLRB's decision that such agreements were unenforceable in *D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).* Then, in 2014 the Eleventh Circuit arrived at the same conclusion and upheld class waivers in *Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326 (11th Cir. 2014).*

Certainly, this split among circuits makes it more likely that the Supreme Court will soon address whether employees will be able to waive their right to participate in collective actions if they choose to sign arbitration agreements. Indeed, petitions for writs of certiorari seeking review by the Supreme Court were filed in *Lewis* on September 2nd and in *Morris* on September 8th. How this issue is ultimately resolved, of course, depends largely on the outcome of the 2016 election.

Irrespective of who fills the vacancy left as a result of Justice Scalia's passing, employers should still seek labor and employment counsel's guidance with respect to arbitration agreements to determine if they are enforceable and/or if necessary revisions and amendments are required. Similarly, employers, with counsel's assistance, should develop new strategies in light of potential changes that may be in the offing.

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