Will Your Mandatory Arbitration Agreement Survive Judicial Scrutiny?

Labor & Employment Law Update

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Last week, clearly identifying the creation of a circuit court split, the Seventh Circuit (covering IL, IN and WI) held that class action waivers violate the NLRA, even in a non-union setting. *Lewis v. Epic Sys. Corp.*, No. 15-2997 (5/26/2016). By way of background,

- The Supreme Court previously held that the Federal Arbitration Act ("FAA") preempted a state court's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts – even if the contract was a "contract of adhesion" between parties of significantly disparate bargaining power and involving small amounts of money. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (4/27/2011).

- Subsequently, the Fifth Circuit reversed the NLRB and held that an employer does not violate the National Labor Relations Act ("NLRA") by requiring employees to sign an agreement precluding joint, class, or collective claims addressing wages, hours, or other working conditions. *R. Horton, Inc. v. NLRB*, No. 12-60031 (12/3/2013). The Fifth Circuit affirmed its holding in *Murphy Oil USA, Inc. v. NLRB*, No. 15-60800 (10/26/2015).

In *Lewis*, the Seventh Circuit found that the FAA does not require enforcement of an arbitration agreement if there are grounds (either at law or in equity) to revoke it, such as an employee's right under the NLRA to engage in protected concerted activity. Accordingly, in the eyes of the Seventh Circuit, employment arbitration agreements that include class action waivers violate the NLRA and cannot be enforced. However, the *Lewis* court noted that it would enforce agreements providing for class arbitration (e.g., simply shifting from judicial/jury forum to an arbitrator on a class wide basis).

Mandatory Employment Arbitration Is Alive and Well – If Done Right

The good news is that most federal and state courts will enforce properly drafted arbitration agreements, including class waivers. Indeed, these agreements are alive and well in the Second (Connecticut, New York, Vermont), Fifth (Louisiana, Mississippi, Texas), Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota), and Ninth (Alaska, Arizona, California, Hawaii, Idaho,

Montana, Nevada, Oregon, Washington, Guam, and Northern Mariana Islands) Circuits.

The bad news is that until the 2016 election dust settles, including subsequent appointments and confirmation of the ninth Supreme Court justice, employers may need to adjust their policies and practices to comply with developing changes.

Take Action Now

Experienced labor and employment counsel can guide employers in determining threshold issues such as, whether arbitration will satisfy the employer's needs, what types of claims should be covered, and whether the agreement may be enforced in a particular state. Where a mandatory class action waiver may not be enforced, employers may still have options. Employers with mandatory employment arbitration agreements should immediately review them to ensure that they are enforceable, and consider strategy in light of new developments.