Labor and Employment Alert: The Split Widens: Now the Ninth Circuit Invalidates Class Action Waivers

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On August 22, 2016, the Ninth Circuit Court of Appeals held that requiring employees to sign an arbitration agreement prohibiting them from filing class or collective actions over wages, hours, and employment terms and conditions violated the National Labor Relations Act (NLRA). This is the position advocated by the National Labor Relations Board (NLRB). In *Morris v. Ernst & Young LLP*, a three-judge panel of the Court (in a 2-1 decision) found that "employees have the right to pursue work-related claims together" and concerted activity "is the essential, substantive right established by the NLRA." Therefore, in the Ninth Circuit, requiring employees to resolve their legal claims in separate proceedings – as opposed to class or collective actions – violates the NLRA and is unenforceable.

This case follows the Seventh Circuit's decision in May 2016 in which the Court held that an employer's arbitration agreement barring employees from participating in "any class, collective or representative proceeding" violated the employees' right to engage in protected, concerted activity under the NLRA.

There is now a clear split among the federal circuits on this issue. The Seventh Circuit (covering Illinois, Indiana, and Wisconsin) and Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) have sided with the NLRB's position. The Second Circuit (Connecticut, New York, and Vermont), Fifth Circuit (Louisiana, Mississippi, and Texas), and Eighth Circuit (Iowa and Arkansas) have held the exact opposition – arbitration agreements prohibiting the filing of class and collective actions do not violate the NLRA.

The Ninth Circuit's decision was not unanimous. The two Democratic appointees sided with the employee, adopting the position of the NLRA. The Republican appointee dissented, calling the majority's decision "breathtaking in its scope and in its error." It remains to be seen whether Ernst & Young will ask the full Ninth Circuit to rehear the case or whether it will appeal to the U.S. Supreme Court to resolve the circuit split. The Supreme Court may do so given that the circuit split

now affects 20 states, including the most populous.

The recent decisions of the Seventh and Ninth Circuits create further difficulty and confusion for employers in determining whether and in what states they may implement mandatory arbitration programs to stem the tide of class and collective actions. This is especially so for employers operating in multiple states across different federal circuits. Contact your Vorys lawyer if you have questions about mandatory class or collective action waivers.