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Ninth Circuit Holds Mandatory Class Action Waivers Violate NLRA

The Ninth Circuit has rocked the legal framework of employment class action waivers with a new decision holding that the National Labor Relations Act (NLRA) prohibits employers from requiring employees to waive, as a condition of employment, the right to participate in a "concerted legal claim." *Morris, et al. v. Ernst & Young, LLP, et al.,* No 13-16599 (August 22, 2016). The case breathes new life into the National Labor Relations Board's *D.R. Horton* decision (357 NLRB No. 184 (2012)), which was overturned by the Fifth Circuit and rejected by most other federal courts, and sets up a double standard in California, where the California Supreme Court has already put its stamp of approval on class action waivers.

In *Morris*, the plaintiffs worked for the accounting firm Ernst & Young. As a condition of their employment, they were required to sign an agreement that they would pursue any legal claims through arbitration, and only as individuals, in "separate proceedings," such that two or more plaintiffs could never bring a case together and no plaintiff could bring a case on behalf of any other person. The plaintiffs brought a wage and hour class and collective action in federal court against Ernst & Young, and the district court granted Ernst & Young's motion to compel arbitration.

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

12121 WILSHIRE BLVD
SUITE 1375
LOS ANGELES
CA 90025
310 943 8500 T
310 943 8501 F

Now, the Ninth Circuit has reversed, holding that the arbitration agreement's "separate proceedings" provision violated the NLRA because it interfered with "the essential, substantive right established by the NLRA" to participate in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Ninth Circuit emphasized that the problem with the agreement was not that it required arbitration, but that it prohibited employees from pursuing "concerted" work-related claims.

Of note, the court did not state that the NLRA conferred a right to participate in class or collective actions, specifically. Indeed, the U.S. Supreme Court has previously held that no such right exists, leaving open the possibility that the Ninth Circuit might in the future hold that something else – more than a "separate proceeding" but less than a class or collective action – could satisfy the NLRA right to participate in a "concerted legal claim." The Ninth Circuit also explained that its decision in *Johnmohammadi v. Bloomingdale's, Inc.,* 755 F.3d 1072, 1075 (9th Cir. 2014), holding that a class action waiver did not violate the NLRA, was

distinct because there the employee had an opportunity to opt out of the agreement altogether.

The *Morris* decision aligns the Ninth and Seventh Circuits in a split with the Second, Fifth and Eighth Circuits, which have previously rejected the NRLB's position that mandatory class action waivers violate the NLRA. And in California, *Morris* seemingly conflicts with the California Supreme Court's decision in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 373 (2014), which upheld class action waivers. The *Iskanian* court hinted, however, that an agreement that more broadly restricted collective activity might run afoul of the NLRA. In this manner, *Morris* is both at odds with *Iskanian,* and distinct: the agreement in *Iskanian* prohibited class and collective actions, but, unlike the agreement in *Morris*, did not require "separate proceedings," which leaves open the possibility of other forms of concerted actions, such as actions with multiple named plaintiffs against a defendant employer. This distinction may not be enough to stop invalidation of *Iskanian*-style class action waivers by the California federal courts, which are now bound to apply *Morris*. Future decisions from the California state and federal courts may well reflect *Iskanian* and *Morris'* differing outcomes, with state courts enforcing class action waivers under *Iskanian* as a matter of stare decisis and federal district courts invalidating them under *Morris*.

Action Steps

In light of the *Morris* decision, the future of class action waivers is uncertain. While the courts continue to sort these issues out, California employers can take a number of steps to increase the odds that a class action waiver will be upheld.

First, employers that wish to continue using class action waivers should consider removing language that may be similar to the "separate proceedings" provision in *Morris.* Without such provisions, employees may participate in *some* type of concerted legal activity such as multiple employees filing a lawsuit together as named plaintiffs against the employer in the same proceeding, even if they have waived the right to participate in a class or collective action.

Second, employers should consider permitting employees to opt out of any class action waiver agreement. In *Johnmohammadi v. Bloomingdale's, Inc.,* the Ninth Circuit upheld a class action waiver in an arbitration agreement with an opt-out provision.

Third, as California state courts will be more likely to enforce class action waivers than federal courts, employers should evaluate which forum will be more advantageous, and then take steps to increase the likelihood that any lawsuits will be filed or transferred to that court. In particular, employers should consider the use of carefully drafted forum selection clauses and should thoroughly evaluate lawsuits to determine whether there is federal subject matter jurisdiction.

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