Ninth Circuit Invalidates Class Action Waivers in Mandatory Arbitration Agreements

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At the end of 2015, Governor Jerry Brown vetoed AB 465, which would have banned mandatory arbitration agreements in the employment setting, including arbitration agreements with class action waivers. As many employers know, including a class action waiver in an arbitration agreement or clause has been a great deterrent to class action lawsuits over the past several years since the California courts have blessed their viability. What Jerry Brown and the California state courts have given, the Ninth Circuit and the federal courts are trying to take away.

On August, 22, 2016, a three-judge panel of the Ninth Circuit Court of Appeals found that class action waivers in mandatory employee arbitration agreements are unlawful, holding that a class action waiver contained in an arbitration agreement signed as a condition of employment violated employees' rights under the National Labor Relations Act (NLRA). (*Morris v. Ernst & Young LLP* (9th Cir. August 22, 2016).) The Morris decision came on the heels of a May 2016 Seventh Circuit opinion, which ruled the same way. In contrast, both the Fifth and the Eighth Circuits have found in favor of employers, holding that such class action waivers are lawful and do not violate the NLRA. (Note that the victorious employer in the Eighth Circuit case was represented by Lathrop Gage's Kansas City office.) This creates a "split in the circuits," or a divide amongst the federal courts interpreting the NLRA. Unfortunately, for California employers, the state resides squarely in the Ninth Circuit, and any federal cases brought here would be governed by the Morris decision.

In Morris, the plaintiff and other accounting employees were required to sign an arbitration agreement. The agreement mandated the employees: 1) could only pursue legal claims against Ernst & Young through arbitration; and (2) could arbitrate only as individuals and in "separate proceedings" — effectively, a class action waiver. Despite signing these agreements, the employees brought a class action against Ernst & Young in federal court, alleging they were misclassified and denied overtime wages. After Ernst & Young moved to compel arbitration pursuant to the signed agreements, the trial court ordered the employees to individual arbitration and dismissed the case. The employees appealed.

In a majority opinion authored by Chief Judge Sidney R. Thomas, the Ninth Circuit panel concluded that the class action waiver was unlawful and vacated the trial court's decision to compel individual arbitration.

According to the court, the NLRA provides employees with the "essential" right to pursue work-related legal claims together. Because Ernst & Young's mandatory class action waiver prevented employees from bringing a concerted legal action (by making them resolve all their work-related legal claims in "separate proceedings"), the waiver was unlawful and unenforceable.

Tremendous uncertainty over the future of class action waivers remains, since as recently as September 8, 2016, Ernst & Young asked the United States Supreme Court (SCOTUS) to take on the question of whether class action waivers clash with the NLRA. However, it is not clear if SCOTUS will agree to hear this case or, if so, when. This ambiguity is further compounded by uncertainty over the potential makeup of the Supreme Court if/when it decides the issue, after the death of Justice Antonin Scalia.

For now, however, employers doing business in the Ninth Circuit, and California in particular, should be prepared for employees to challenge class action waivers in mandatory arbitration agreements in federal court and to deal with this unfavorable precedent.

If you have any questions about the new or continued use of arbitration agreements and class action waivers for your workforce, please feel free to contact your Lathrop Gage attorney or the attorneys listed above.