BARRAN LIEBMAN LLP
ATTORNEYS
Employment | Labor | Benefits | Higher Education
www.barran.com | 503.228.0500

Electronic Alert

Volume 19, Issue 25 August 23, 2016

The Ninth Circuit Sides with the NLRB, Class Action Waivers are Unlawful

By Kyle Abraham and Nicole Elgin

On August 22, 2016, the Court of Appeals for the Ninth Circuit ruled that employers may not require employees to sign arbitration agreements that include class action waivers as a mandatory condition of employment. In the case of (*Morris v. Ernst & Young*), the Ninth Circuit sided with the National Labor Relations Board ("NLRB") in the national debate over the enforceability of such waivers.

The waiver at issue in the *Ernst & Young* case is a fairly common provision in most mandatory arbitration agreements. The employer required employees to sign an arbitration agreement as a condition of their employment, and the agreement required disputes to be heard in separate proceedings. The upshot is that employees must bring claims against their employer individually, and employees are prohibiting from bringing group or class claims.

Since 2012, in the *DR Horton* case, the NLRB has ruled that such waivers violate an employee's right to engage in concerted activity under the National Labor Relations Act ("Act"). Since 2013, three circuit courts (Fifth, Second, and Eighth) have disagreed with the NLRB; instead, those courts all ruled that an employer may lawfully require employees to sign arbitration agreements that include class action waivers. Those courts relied on the Federal Arbitration Act's ("FAA") policy in favor of giving full effect to arbitration agreements and ruled that employees may waive class action claims, effectively finding that the Act's right to concerted activity does not trump the FAA.

The Ninth Circuit panel disagreed, finding that a provision in the FAA prevents an employee from waiving a substantive federal right, such as engaging in concerted activity under the Act. The Ninth Circuit's decision comes after the Seventh Circuit also found class action waivers unenforceable in May of this year. The Ninth Circuit's decision adds to the split amongst the circuit courts, and means that the Supreme Court will likely take up this question to resolve the split.

For employers in the Ninth Circuit's jurisdiction, including Oregon and Washington, the opinion means that employers should immediately review all arbitration agreements for any provisions prohibiting employees from bringing group or class claims. If arbitration agreements include such waivers, employers should consult with counsel.