

FOCUS ON POLICY: CLASS ACTION WAIVERS

Federal Labor Law Prohibits Workers' Arbitration Agreements from Including Class Action Waivers, Says Ninth Circuit

The Ninth Circuit Court of Appeals recently added to a circuit split over the legality of class waivers in arbitration agreements. In its *Morris v. Ernst & Young LLP* [decision](#) on August 22, 2016, the court found that an Ernst & Young contract provision barring employees from filing class actions over hours, wages and employment terms and conditions violated the National Labor Relations Act (NLRA).

With its 2-1 ruling, the Ninth Circuit became the second appellate court to agree with the National Labor Relations Board's (NLRB) position that federal labor law prohibits workers' arbitration agreements from including class action waivers. The Seventh Circuit similarly found that worker arbitration agreements containing class action waivers are illegal. *See Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016). The NLRB has struck down such requirements in the contracts of dozens of companies, including American Express Co., Citigroup Inc. and Domino's Pizza, Inc.

The Fifth, Eighth and Second Circuits have decided the waivers do not violate the NLRA. *See Murphy Oil USA Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2^d Cir. 2013).

In *Morris v. Ernst & Young LLP*, Ernst & Young argued the Federal Arbitration Act, which provides that courts cannot disfavor arbitration, entitled it to enforce its employment contracts requiring employees to pursue their claims individually in arbitration. The Ninth Circuit found that the Federal Arbitration Act, through its savings clause, does not mandate arbitration where a substantive federal right would be waived. Ernst & Young's contract, on the other hand, required employees to waive their substantive right to act under the NLRA because they were required to agree not to act as a group.

Given the clear circuit split, the enforceability of class waivers in arbitration agreements appears likely to be headed to the U.S. Supreme Court. Unless and until the Supreme Court settles the issue, however, businesses will have to contend with a patchwork of different standards in the enforcement of class waivers in employment contracts.

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