SEBRIS BUSTO JAMES Employment Law Note September 2016

**Class Action Waivers Take a Hit**
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In a decision handed down on August 22, 2016, the Court of Appeals for the Ninth Circuit--the federal court with jurisdiction over Washington State--set aside an employment class-action waiver requiring employees to pursue employment claims exclusively through arbitration and only as individuals in "separate proceedings." In the decision of *Morris, et. Al. v. Ernst & Young, LLP, et al*, the Ninth Circuit held that such a mandatory waiver violated the employees' right under Section 7 of the National Labor Relations Act ("NLRA") to engage in so-called "concerted activities." In setting aside the mandatory waiver, the Court has set up a battle between various federal circuits that have upheld such waivers (Second, Fifth and Eighth Circuits) and those that have set them aside (Seventh and now Ninth). This Note reviews the decision and how it impacts employers.

By and large, federal and state courts, including the Ninth Circuit and Washington State courts, have upheld mandatory arbitration provisions for employees either in handbooks or employment agreements, as long as the notice of such a waiver of the right to file civil actions is clear. The legal rub arises when the mandatory arbitration provision includes the employee's waiver of the right to participate in class or collective actions. The National Labor Relations Board ("NLRB" or "Board") has taken a clear position since its 2012 decision of *D.R. Horton*, 357 NLRB No. 184, that such waivers violate the Section 7 right of employees to act collectively. Even when the Court of Appeals for the Fifth Circuit reversed the Board's *D.R. Horton* decision and sent the matter back for the Board's reappraisal, the Board refused to change its mind and reiterated that an employer mandate requiring employees to agree to resolve all employment-related claims through individual arbitration violates the NLRA's Section 7 right that "[e]mployees shall have the right…to engage in…concerted activities for the purposes of…mutual aid or protection."

In the *Morris* case, the plaintiff-employees had been required, as a condition of employment, to sign an agreement that any and all employment claims would be pursued through arbitration on an individual basis through "separate proceedings." The employees brought a federal court class action against the employer alleging wage and hour violations, and the employer moved to compel arbitration under the waiver. The federal district court granted the motion and dismissed the case.

On appeal, the Ninth Circuit examined the plaintiff-employees' claim that the waiver violated the NLRA. The Court reviewed the NLRB's holdings on collective action waivers and agreed with the Board's *D.R. Horton* analysis. In so doing the Court was careful to point out that it was not taking direct issue with the portion of the mandatory waiver requiring arbitration of disputes, but only with the portion proscribing collective actions by mandating separate proceedings: "The NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration." According to the Court, "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*." (Emphasis in original.)

The Court suggested that the ruling might have been different had the plaintiff-employees in this case been offered the ability to opt-out of the waiver option, but the mandatory nature of the waiver agreement made that impossible. The Court sent the matter back to the district court to determine whether the "separate proceedings" clause was severable from the contractual waiver in this case, at the same time indicating that a mandatory arbitration requirement without a prohibition on joint claims would likely be valid. Ironically, the result might have been different had the plaintiff-employees filed in state court inasmuch as many state courts, including California, where the case was brought, have upheld such collective action waivers.

What are the options for employers as a result of the *Morris* holding? First, we continue to recommend that employers consider using arbitration agreements with litigation waivers, because arbitrations are generally far less costly than litigation. Second, any broad requirement in such waivers mandating "separate" or "individual" proceedings should be stricken in favor of a more direct proscription on "class actions." This would allow for the possibility of multiple plaintiff-employees filing for arbitration together and engaging in "concerted activities for the purpose of …mutual aid or protection," while they also agree not to utilize the vehicle of class-action litigation in court. Finally, employers should examine whether to add an "opt-out" option to such waivers, as the Ninth Circuit has previously held that a collective action waiver is lawful if it is not a condition of employment. An opt-out option would consist of notice to the new hire of the waiver, as well as a reasonable period of time to return a form indicating that the employee chooses "<u>not</u> to be covered by the benefits of arbitration." Absent timely submittal of such a form by a date certain, the employee's voluntary agreement to a class- or collective-action waiver may not be found to violate the NLRA or the Court's holding in *Morris.*