

# **Ninth Circuit: Arbitration Agreements Cannot Require Employees to Individually Arbitrate Claims in Separate Proceedings**

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The Ninth Circuit is the latest court to consider the NLRB's position that class and collective action waivers violate the NLRA; here, the court ruled that an arbitration agreement that completely prevents employees from bringing legal claims together interferes with employees' substantive rights to engage in concerted activity.

On August 22, the US Court of Appeals for the Ninth Circuit issued its decision in *Morris v. Ernst & Young, LLP*, becoming the latest circuit court to consider the position of the National Labor Relations Board (NLRB) that employment arbitration agreements that prevent employees from bringing legal claims together violate the National Labor Relations Act (NLRA). In a two-to-one decision, the Ninth Circuit ruled that employers cannot impose, as a condition of employment, an arbitration agreement requiring employees to arbitrate claims individually that had the effect of barring employees from joining together to bring legal claims in one arbitration. The court agreed with the NLRB that such an agreement violates an employee's substantive right to engage in "concerted activity" protected by Sections 7 and 8 of the NLRA. This decision continues a split among the circuit courts on whether the NLRB's position is correct, which will ultimately need to be decided by the US Supreme Court.

## **Background**

As a condition of employment with Ernst & Young, employees had to sign an arbitration agreement providing that covered disputes pertaining to different employees would be arbitrated individually in separate proceedings. According to the Ninth Circuit, this "separate proceedings" clause required employees to pursue work-related claims individually and so involved a waiver of the right to bring any claims by groups of employees in a single arbitration, including but not limited to class and collective actions.

*Morris* involved a class and collective action alleging wage and hour claims for violation of the Fair Labor Standards Act and California labor laws. The district court ordered individual arbitration of the two plaintiffs' claims, which the plaintiffs appealed.

## **The Ruling**

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The Ninth Circuit reversed the district court's order and held that the "separate proceedings" clause directly interferes with an employee's substantive right under the NLRA to engage in concerted activity—specifically, "the right of employees to pursue work-related legal claims, and to do so together." The court agreed with the NLRB's view that because the ability to act in concert is a substantive right, employers cannot require employees to pursue all work-related legal claims individually in separate proceedings. Under this interpretation, such a "concerted action waiver" that prevents an employee from acting in concert with other employees by joining together to bring their claims in arbitration violates Sections 7 and 8 of the NLRA. Therefore, the court ruled that the "separate proceedings" terms in the contract at issue cannot be enforced.

The Ninth Circuit also found that the Federal Arbitration Act (FAA) did not affect the result because the illegality of the "separate proceedings" provision would be the same if the term was in a contract that required court resolution of disputes. Also, the court viewed the contract as waiving substantive NLRA rights, causing the FAA's mandate to enforce arbitration agreements to yield to another federal law under the FAA's saving clause.

## **Limitations on the Court's Holding**

Although the NLRB takes the position that all arbitration agreements with class or collective action waivers violate the NLRA, the Ninth Circuit opinion does not go this far.

First, the court noted its prior holding in *Johnmohammadi v. Bloomingdale's, Inc.*, that an arbitration agreement with a class and collective action waiver did not violate Section 8 of the NLRA because the employee had the right to opt out of agreeing to individual arbitration and chose not to do so. Second, in *Morris*, the court refused to enforce an arbitration agreement that required employees to pursue all work-related legal claims individually in separate proceedings. The court did not address whether an agreement that waived only the procedural right to bring claims as a class or collective action in arbitration was unenforceable. Indeed, the Ninth Circuit stated that the distinction between "substantive" and "procedural" rights in federal law was crucial to the result in *Morris*, as substantive rights cannot be waived in arbitration agreements. The court described the Section 7 rights of employees to pursue legal claims together as a substantive right established by the NLRA that, therefore, cannot be waived. However, the court referred to the right to use class proceedings in federal court as a procedural right that could be waived. Instead of reaching the NLRB's broader conclusion, the Ninth Circuit's holding was that an arbitration agreement cannot be structured to exclude *all* concerted employee legal claims.

## **Impact on Employers with Arbitration Agreements**

Until the Supreme Court rules on the NLRB's position, employers will face uncertainty, and the enforcement of various arbitration agreements will depend on where the challenge to arbitration is made. For example, the California Supreme Court has rejected the NLRB's position and ruled that class and collective action waivers are enforceable because the NLRA does not override the FAA. The California Supreme Court did not decide, however, whether an agreement that more broadly restricts collective activity (such as prohibiting joint or consolidated claims) would violate the NLRA.

## **Practical Guidance**

*Morris* clearly holds that arbitration agreements cannot be structured so as to preclude all concerted legal claims by groups of employees. Although other circuit courts have disagreed with this view,

employers will have to consider whether to have their arbitration agreements allow joinder of claimants in arbitration (under circumstances where joinder is permitted under FRCP Rule 20) while still prohibiting class and collective action procedures in arbitration. Another option to consider, based on Ninth Circuit law, is providing employees with a clear right to opt out of the arbitration agreement without penalty so that any waiver of the right to bring concerted legal claims is not a mandatory condition of employment. Employers should also consider where challenges to an arbitration agreement will be litigated, as the outcome may be dependent on which federal court, or whether a state court, decides the challenge.

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