Published on *The National Law Review* https://natlawreview.com

Class Action Waiver in Employment Arbitration Agreement is Unenforceable, Court Rules

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A class action waiver in an arbitration agreement is unenforceable under the ***National Labor Relations Act***, Judge Gonzalo P. Curiel has ruled. ***Neal Pataky et al. v. The Brigantine, Inc.*****,** No. 3:17-cv-00352 (S.D. Cal. May 3, 2017).

Judge Curiel's decision tracks the Ninth Circuit's ***Morris v. Ernst & Young***, 834 F.3d 975 (9th Cir. 2016), *cert. granted,* No. 16-300 (U.S. Jan. 13, 2017), finding that engaging in concerted activity by jointly pursuing legal claims with other employees is a substantive right and distinguishing earlier case law in which a plaintiff had the right to opt out of an agreement but voluntarily chose not to do so. *Morris* did not extend its holding to class waivers in arbitration agreements that are not required to be signed as a condition of employment. Thus, both *Morris* and *Pataky* indicate that agreements with opt-out clauses may still be enforceable.

Significantly, Judge Curiel found the class waiver provision of the agreement was not severable from the arbitration agreement, he stated, "because the parties did not agree to class arbitration, the Court cannot rely on the severability provision in the arbitration agreement to compel Plaintiffs to class arbitration."

Judge Curiel further denied the defendant's request for stay pending the U.S. Supreme Court's review of *Morris* based on its finding that the defendant did not demonstrate hardship or inequity resulting from proceeding in court and, thus, did not meet its burden in requesting the stay.

Therefore, employers should take care in demonstrating hardship and inequity in any requests for stays pending the Supreme Court's ruling in *Morris*.

National Law Review, Volume VII, Number 135