

DOJ Now Supports Enforcement of Employment Arbitration Clause

JUNE 19, 2017

Authors: [Peter N. Kirsanow](#)

The U.S. Justice Department has abruptly reversed course in a U.S. Supreme Court case concerning an employment agreement that restricts employees from participating in class and collective lawsuits, arguing that a mandatory arbitration clause in the agreement does not deprive employees of federally protected rights.

Acting Solicitor General Jeffrey B. Wall acknowledged that the Justice Department's new pro-employer stance is a direct about face from its prior support for the National Labor Relations Board (NLRB) under the Obama Administration.

"[T]his Office previously filed a petition for a writ of certiorari on behalf of the NLRB, defending the Board's view that agreements of the sort at issue here are unenforceable," Wall wrote. "After the change in administration, the Office reconsidered the issue and has reached the opposite conclusion."

This is the latest example of the Trump Administration seeking to roll back labor law interpretations adopted under the prior administration.

On June 12, the U.S. Department of Labor issued a Notice of Proposed Rulemaking to rescind the Obama Administration's version of the "Persuader Rule," which would have broadened requirements on who must file public disclosures related to union organizing campaigns. The revisions were aimed at, among other things, discouraging law firms from being involved in organizational campaigns to avoid such disclosures.

On June 16, the Justice Department filed its amicus brief in *NLRB v. Murphy Oil* as well as two similar private actions, *Epic Systems Corp. v. Lewis* and *Ernst & Young LLP v. Morris*, which the Supreme Court is considering in addition to the *Murphy Oil* case.

The issue before the Court is whether arbitration agreements that bar employees from pursuing work-related claims under statutes such as the Fair Labor Standards Act (FLSA) on a collective or class basis violate the National Labor Relations Act (NLRA), which protect employees' rights to organize and to engage in collective bargaining.

For the Justice Department, that answer is now a resounding "no."

"Enforcement of plaintiffs' arbitration agreements would not deprive them of their substantive right under the FLSA to proper wage-and-hour compensation, or any procedural right under the NLRA to invoke whatever class or collective procedures are otherwise available to them," Wall concluded.

“We do not believe that the [NLRB] in its prior unfair-labor-practice proceedings, or the government’s certiorari petition in *Murphy Oil*, gave adequate weight to the congressional policy favoring enforcement of arbitration agreements that is reflected in the [Federal Arbitration Act].”

Even though it has changed its position, the government is not requiring the NLRB to withdraw its petition for Supreme Court review, nor has it suggested the Court dismiss any of the pending cases. Rather, Wall has authorized the NLRB to represent itself in the Supreme Court.

If you have any questions on this topic please contact a member of our Labor & Employment Practice Group.

Eric Baisden at ebaisden@beneschlaw.com or 216.363.4676.

Peter Kirsanow at pkirsanow@beneschlaw.com or 216.363.4481.

Rick Hepp at rhepp@beneschlaw.com or 216.363.4657.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.