

Sixth Circuit is Latest Appellate Court to Find Class Action Waivers Violate NLRA

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On Friday, May 26, the Sixth Circuit Court of Appeals became the latest federal appellate court to weigh in on whether or not arbitration agreements that include class action waivers violate federal labor law, specifically, the National Labor Relations Act (“NLRA”). *NLRB v. Alt. Entm’t, Inc.*, No. 16-1385, 2017 U.S. App. LEXIS 9272 (6th Cir. May 26, 2017). In a 2-1 decision, the Court agreed with the National Labor Relations Board’s (“NLRB”) position that mandatory arbitration agreements that require employees to waive their right to bring claims as a class or collective action interfere with employees’ right to engage in concerted protected activity for their mutual aid or protection, a right protected under Section 7 of the NLRA.

This issue has been percolating at the appellate court level since 2013 and at least six federal appellate courts have now considered the issue. With the Sixth Circuit’s decision last week, circuits now have split evenly on the issue, 3-3.

In *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), the Fifth Circuit rejected the NLRB’s ruling that requiring employees to agree to mandatory arbitration and forego class and collection actions as a condition of employment violates the NLRA. The Fifth Circuit refused to enforce the NLRB’s order, holding that it violated the Federal Arbitration Act (“FAA”). The Fifth Circuit dismissed the NLRB’s argument that the FAA’s savings clause (providing that arbitration agreements shall be enforceable except “upon such grounds as exist at law or in equity for the revocation of any contract”) renders an arbitration agreement with a class action waiver invalid. The Fifth Circuit also found that the NLRA did not contain a congressional command exempting the statute from application of the FAA. Thus, the arbitration agreement was enforceable. The Second and Eighth Circuits subsequently agreed. *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013); *Patterson v. Raymours Furniture Co.*, 659 Fed. Appx. 40 (2d Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016). The Fifth Circuit reiterated its position in 2015 and again rejected the NLRB’s argument that class action waivers contained in arbitration agreements violate the NLRA. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

On the other side, the Sixth Circuit has now joined the Seventh and Ninth Circuits in following the NLRB’s position that such class action waivers violate Section 7 of the NLRA. *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). The Sixth Circuit pronounced that the NLRA and FAA must “work in harmony” and that an arbitration agreement that violates the NLRA is not enforceable under the FAA. The Sixth Circuit determined that no conflict exists between the FAA and the NLRA because the NLRA protects all concerted activity. The Court further maintained that interference with such concerted activity - such as

enforcing a class action waiver in a mandatory arbitration agreement - violates the NLRA. The Sixth Circuit concluded that the right to concerted legal action, whether substantive or procedural, is a right guaranteed by Section 7 of the NLRA. Consequently, any arbitration provision that operates to prohibit this Section 7 right is explicitly illegal and, as such, falls within the savings clause of the FAA.

The Supreme Court has already granted certiorari to hear the *Murphy Oil* (5th Circuit), *Epic Systems* (7th Circuit), and *Ernst & Young* (9th Circuit) cases to resolve the split.

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