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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *September 2016*

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JUDICIAL

Federal

Ninth Circuit Holds that Class Action Waivers Violate the National Labor Relations Act

In *Morris v. Ernst & Young*, the Ninth Circuit Court of Appeals ("Ninth Circuit") concurred with an administrative decision issued by the National Labor Relations Board ("NLRB"), in which the NLRB determined that class action waivers in employment arbitration agreements violate the National Labor Relations Act ("NLRA"). According to the Ninth Circuit and the NLRB, an employer cannot require an employee to waive his or her right to pursue class or collective claims, whether in arbitration or in court, for such a requirement defies the NLRA's mandate that employees be permitted to engage in "concerted activity"—the right to work together to address workplace grievances.

In *Morris*, two employees of Ernst & Young filed class action lawsuits against the company, alleging violations of California and federal wage and hour laws. Ernst & Young moved to compel arbitration and to dismiss the class action claims, based on a "separate proceedings" clause in the arbitration agreements signed by the plaintiffs. The "separate proceedings" clause provided that the plaintiffs could: (1) pursue legal claims against Ernst & Young only in arbitration; and (2) arbitrate only as individuals and in "separate proceedings." Together, these two provisions effected a waiver of class and collective claims against the company—the plaintiffs could not pursue such claims either in court or in arbitration.

In opposing the motion to compel arbitration, the plaintiffs argued that the "separate proceedings" clause denied employees the right to engage in "concerted activity" and therefore violated the NLRA. The plaintiffs relied upon the NLRB's administrative decision in *D.R. Horton* (2012) 357 NLRB No. 184 ("*D.R. Horton*") in support of their position. In *D.R. Horton*, the NLRB concluded that an employer violates the NLRA by requiring employees to, as a condition of their employment, sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial. The Ninth Circuit, tasked with reviewing the reasonableness of the NLRB's interpretation of the NLRA, examined whether the NLRA permits a total waiver of class and collective claims by employees.

Section 7 of the NLRA provides that employees have the right to "self-organization, to form, join, or assist labor associations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8 of the NLRA enforces these rights by making it "an unfair labor practice for an employer … to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]."

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The Ninth Circuit determined that the Section 7 establishes the right of employees to pursue work-related legal claims, and to do so together. Other courts have previously held that filing labor-related lawsuits and administrative claims constitutes "concerted activity" within the meaning of the NLRA. Further, the NLRA specifically contemplates the ability of employees to act in "concert" for "mutual" aid and protection. Accordingly, the Ninth Circuit held that the Congress' intent in Section 7 is clear, and the NLRB's interpretation of the NLRA is consistent with Congress' intent.

The Ninth Circuit also agreed with the NLRB's interpretation of Section 8 of the NLRA—that requiring a waiver of class and collective claims constitutes "interference" with the exercise of Section 7 rights. Requiring employees to agree to individual activity circumvents the NLRA's explicit guarantee of the right to engage in concerted activity. Thus, the Ninth Circuit concluded that Congress' intent in Section 8 is also clear, and the NLRB's interpretation of Section 8 comports with that intent.

Therefore, the Ninth Circuit determined that the NLRB's interpretation of the NLRA, as set forth in *D.R. Horton*, was reasonable—class and collective action waivers in employment arbitration agreements violate the NLRA. The Ninth Circuit found that the "separate proceedings" clause at issue in *Morris* defied this interpretation of the NLRA because it prevented employees from pursuing class or collective claims in any forum. Accordingly, the Ninth Circuit held that the "separate proceedings" clause was unenforceable.

The implications of the *Morris* decision are significant. Within the Ninth Circuit, any class action waiver contained within a mandatory employment arbitration agreement violates the NLRA. This marks a sharp change in the law for employers in California, considering that previous Ninth Circuit panels (and the California Supreme Court) have recently upheld the validity of class action waivers. Moreover, the *Morris* decision deepens an existing split among the Courts of Appeal with respect the NLRB's interpretation of the NLRA—with the Second, Fifth, and Eighth Circuits holding that the NLRB's interpretation in *D.R. Horton* is not entitled to deference, while the Seventh and now Ninth Circuits holding to the contrary. With such division among the circuit courts, it is almost certain that the U.S. Supreme Court will step in to provide much needed guidance on this issue.

All is not lost for employers, however. The Ninth Circuit specifically noted that, where an arbitration agreement (1) contains a class action waiver and (2) permits employees the opportunity to "opt out" of the agreement, there is no NLRA violation—employees who fail to opt out are still bound by the class waiver. Only where the employee has no choice but to waive class claims is the NLRA violated. In light of this holding, employers may wish to review their existing arbitration agreements and add an "opt out" provision.

California

Court of Appeal Holds Disability Protections Expanded Where Employee Requests Accommodations to Care for Disabled Family Member

In *Luis Castro-Ramirez v. Dependable Highway Express, Inc.* a California Court of Appeal reversed a summary judgment for the employer, finding that the plaintiff had shown a triable issue of fact with respect to his causes of action for associational disability discrimination, failure to prevent discrimination, retaliation, and wrongful termination in violation of public policy.

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Dependable Highway Express, Inc. ("DHE") hired Luis Castro-Ramirez ("Plaintiff") in 2010 to work as a truck delivery driver. At the time of his hiring, Plaintiff told DHE he had a disabled son who required dialysis on a daily basis, and that he was the only person in his family trained to administer the dialysis. Though his son's dialysis schedule varied day by day, Plaintiff was generally able to start an early shift around 8 a.m. so as to be home in the evening between 7 p.m. and 12 a.m. for the dialysis. Plaintiff routinely requested these work schedule accommodations, which his supervisor granted. In 2013, a new supervisor changed Plaintiff's work schedule, assigning Plaintiff a later shift. Plaintiff objected to this assignment, explaining that the previous supervisor had always assigned the earlier shift to Plaintiff due to his son's dialysis. Plaintiff's new supervisor refused to assign Plaintiff the earlier shift and terminated Plaintiff's employment when Plaintiff stated he could not work the later shift.

Plaintiff sued for disability discrimination, failure to prevent discrimination, and retaliation under the Fair Employment and Housing Act ("FEHA"). DHE filed a motion for summary judgment as to these claims, alleging it had no duty to accommodate Plaintiff for his son's illness, that Plaintiff's association with his son did not motivate his termination, and that DHE's legitimate, non-discriminatory reason for discharging Plaintiff was not pretextual. The trial court granted DHE's motion.

The Court of Appeal reversed, finding that the definition of "physical disability" embraces association with a physically disabled person. Pursuant to the FEHA, a physical disability includes "a perception that the person is associated with a person who has, or is perceived to have a physical disability." Moreover, the Court found that a triable issue of material fact existed as to discriminatory motive and pretext, where the evidence showed that the month after the new supervisor started, he scheduled Plaintiff for the later shifts despite having knowledge of Plaintiff's disabled son and of Plaintiff's prior requests for the earlier shifts. There was no apparent reason for the supervisor's decision to assign Plaintiff the later shifts, and he lied to Plaintiff when he told Plaintiff a customer was unhappy with Plaintiff's work. Plaintiff had never had any performance issues while at DHE.

There are now two published California cases recognizing a claim for associational disability under FEHA (this case and *Rope v. AutoChlor*), and this is an area that will likely see further litigation. In the meantime, employers should revise their reasonable accommodation policies to state that reasonable accommodations will be considered for employees who provide care to a person with a physical or mental disability.

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presents
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Employment Law Symposium
December 1, 2016
8:00 a.m. – 4:30 p.m.
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This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Ryan Nell, Lauren Bates, Jennifer Suberlak, Shannon Finley, or Cameron Flynn at (858) 755-8500; or Jennifer Weidinger, Tristan Mullis or Andrew Chung at (310) 649-5772.