Labor and Employment Alert: Seventh Circuit Issues Surprising Ruling Backing NLRB's Prohibition on Class/Collective Action Waivers

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In December 2013, in *D.R. Horton*, the Fifth Circuit Court of Appeals rejected the National Labor Relation Board's (NLRB) prohibition on mandatory arbitration clauses. Since then, the vast majority of federal courts addressing this issue have agreed with the Fifth Circuit, including the U.S. Courts of Appeals for the Second and Eighth Circuits. Despite this string of losses, the NLRB has continued to rule that arbitration agreements with class or collective action waivers violate employees' rights to engage in protected concerted activity under Section 7 of the National Labor Relations Act (NLRA).

Recently, in May 2016, the Seventh Circuit Court of Appeals agreed with the NLRB and held that a company's arbitration agreement that prohibited employees from participating in class or collective actions violated the employees' right to engage in concerted activity under the NLRA. By doing so, the Seventh Circuit became the first federal court of appeals to agree with the NLRB's position. The Court's decision in *Lewis v. Epic Systems Corp.* creates a split among the circuit courts and sets the stage for a potential review by the U.S. Supreme Court.

Factual Background and Decision

The plaintiff in *Lewis* was already employed by Epic Systems when he signed an arbitration agreement that included a class/collective action waiver. He was required to sign the agreement in order to remain employed. He later filed a collective action under the Fair Labor Standards Act (FLSA), alleging that employees were misclassified and not paid overtime. The company asked the trial court to dismiss the lawsuit and compel individual arbitration. The court ruled that the collective/class action waiver could not be enforced because it violated plaintiff's right to engage in concerted activities under the NLRA. The company appealed that decision to the Seventh Circuit.

The Seventh Circuit affirmed the trial court's decision, ruling that "concerted activity" under the NLRA unambiguously includes class and collective actions. But even if the term were ambiguous, the Court said it would defer to the NLRB's interpretation of that term as including

class and collective actions. Notably, the Seventh Circuit rejected an argument that was accepted by every other circuit court ruling on this issue – that the Federal Arbitration Act (FAA) requires enforcement of the arbitration agreement. Indeed, the Court stated that "it is not clear to us that the FAA has anything to do with this case." In addition, the Court found that, even if the FAA were implicated, there was no conflict between its ruling and the FAA's requirement that arbitration agreements be placed on the same footing as other types of contracts. The Court relied on the FAA's savings clause, which states that arbitration agreements are enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." The Court reasoned that, because the class/collective action waiver in this case was unlawful under the NLRA, it was "illegal, and meets the criteria of the FAA's savings clause for non-enforcement."

Impact of Decision

Lewis is surprising because the Seventh Circuit is generally considered to be a business-friendly court. However, the Seventh Circuit decision was issued by a three-judge panel, two of whom are Democratic appointees. While a decision like this is typically followed by a request for a rehearing before the entire Seventh Circuit in the hope of overturning the panel's decision, the Court previously indicated that it would not rehear the case. It is unclear whether the Company plans to request a rehearing anyway or instead plans to petition the Supreme Court for review.

For now, *Lewis'* impact is that a class/collective action waiver that is required as a condition of employment will not be enforced in federal courts within the Seventh Circuit (Illinois, Indiana, and Wisconsin). Such waivers should be enforced by federal courts in the Second, Fifth, and Eighth Circuits. It is unclear how federal courts in the remaining circuits will rule. The *Lewis* court declined to opine on whether an arbitration agreement with a class/collective waiver that provides time for employees to opt out would be enforceable. In contrast, the NLRB has found that all such agreements violate the NLRA, regardless of whether they include an opt-out provision.

A Republican victory in the 2016 presidential election could also impact this issue because the majority of NLRB members would be Republican appointees who – based on the strong dissents written by the current Republican NLRB members – may very well reverse the NLRB's prohibition on class/collective action waivers. The Seventh Circuit's decision was based partially on its deference to the NLRB's interpretation of the NLRA, so it remains to be seen how its decision or future court decisions would be impacted by an NLRB reversal.

For now, employers must decide whether to be aggressive or conservative in enforcing existing arbitration agreements and whether to require employees to sign arbitration agreements with class/collective action waivers. For employers in circuits where the issue has been decided, the answer is fairly straightforward – follow the precedent of the applicable circuit court. For employers in circuits in which the circuit court has not yet ruled on this issue, the road forward is not as clear. The Seventh Circuit's decision further complicates the matter for multi-state employers considering arbitration programs and have been holding back because of the NLRB's position. The fact that the NLRB's position has been upheld by a circuit court may cause such employers to forego implementation until the Supreme Court weighs in, or until there is an NLRB is friendlier to employer interests.

Contact your Vorys lawyer if you have questions about implementing or enforcing arbitration agreements and class/collective action waivers.