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MORE BAD NEWS FOR EMPLOYERS AND ARBITRATION PROVISIONS

In a 2-1 decision in August 2016, the Ninth Circuit, in *Morris v. Ernst & Young, LLP*, invalidated an arbitration agreement provision which barred employees from filing class actions relating to wages, hours, and employment terms and conditions. The Ninth Circuit based its ruling on the grounds that the arbitration provision violated the National Labor Relations Act and a "substantial" federal right of employees.

The Ninth Circuit's decision highlights the existing split amongst U.S. Circuit Courts of Appeal. The Ninth Circuit's opinion sides with the Seventh Circuit but contradicts previous rulings from the Fifth Circuit which upheld the validity of similar arbitration provisions.

Ernst & Young strongly argued that the Federal Arbitration Act ("FAA") supersedes the National Labor Relations Act. However, the court found that an employee's right to pursue legal claims in a class is a substantive federal right. The court further found the FAA's savings clause broadly validates arbitration agreement provisions, except for provisions that prevent a substantive federal right. Therefore, Ernst & Young's arbitration provision expressly denying employees' substantive federal right to pursue employment-related legal claims as a class, is invalidated by the FAA's savings clause and cannot be enforced.

<u>What This Means For You: The California Employer</u>

If you are an employer in California reading this article you may wonder how this new decision should direct your actions relating to both future and existing arbitration agreements. There are three essential things to consider here.

First, the Ninth Circuit's Opinion is not binding precedent on California State Courts. While the recent decision is certainly influential as persuasive authority, California State Courts are not bound to this decision.

Second, until there is a U.S. Supreme Court ruling on this issue there is uncertainty and therefore, a degree of risk.

Third, the Ninth Circuit's Opinion suggests that non-mandatory arbitration agreements containing the same provisions might be upheld. Thus, one potential option is to provide an "opt-out" window for employees, thereby arguing that the arbitration agreement is not mandatory and giving more credence to the agreement's validity and voluntary nature.

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