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Ninth Circuit Rejects Use of Mandatory Class Action Waivers in Employment Agreements

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In a prior alert, we reported on the ongoing debate regarding the enforceability of class action waivers in the employment context following the National Labor Relations Board's ("NLRB") decision in *D.R. Horton and Michael Cuda*. In a decision issued last month, the Ninth Circuit became the second federal appellate court to agree with the NLRB's position that the National Labor Relations Act ("NLRA") prohibits mandatory class action waivers in employment agreements.

In *D.R. Horton*, which we covered on January 13, 2012, the NLRB held that an employer that requires employees as a condition of their employment to 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, has engaged in an unfair labor practice under the NLRA. The Fifth Circuit subsequently reversed that decision, which we covered on December 12, 2013. The Fifth Circuit found that the NLRB's requirement that employees be able to pursue class claims violates the Federal Arbitration Act's ("FAA") mandate to enforce arbitration agreements.

Since that time, courts have come out on both sides of the issue, although most courts have refused to adopt the NLRB's reasoning. Among federal appellate courts, the Seventh Circuit alone agreed with *D.R. Horton*. The Fifth, Eighth, and Second Circuits all disagreed. The California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC*, which we covered in July 30, 2014, approved the use of class action waivers in employment agreements, except to the extent they waive representation actions under California's Private Attorney General Act.

Now, in *Morris v. Ernst & Young*, the Ninth Circuit has widened the divide among courts, holding that Ernst & Young's arbitration agreement – which contained a class action waiver and which Ernest & Young required its employees to sign as a condition of employment – violated the NLRA. The Ninth Circuit found that employees' rights under the NLRA to pursue concerted work-related legal claims are substantive, and cannot be defeated by a class action waiver. The Ninth Circuit further found that, because the legality of the class action waiver "has nothing to do with arbitration as a forum," the FAA did not dictate a contrary result. The court reasoned that "[t]he same infirmity would exist if the contract required disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism if the contract (1) limited resolution to that mechanism and (2) required separate individual proceedings."

Given the clear lines of opposition for and against class action waivers, it is growing increasingly likely that the US Supreme Court will choose to review this issue. In the meantime, we strongly recommend that arbitration agreements be reviewed with counsel. Such review should include consideration of whether, and to what extent, to modify existing agreements and whether to change the approach for future agreements. Our lawyers have deep counseling and litigation experience on these issues. If you would like to discuss these issues further or have questions about this alert, please contact one of the lawyers listed below.

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Key Contacts

Ann Bevitt **London**	**abevitt@cooley.com** **+44 (0) 20 7556 4264**
Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330

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