

**The Ninth Circuit has found that employees have a substantive right to file
a concerted action claim**

The Ninth Circuit in *Morris et al. v. Ernst & Young, LLP et al.*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), became the second appellate court to uphold the NLRB's *D.R. Horton* decision holding that the National Labor Relations Act (NLRA) prohibits workers' arbitration agreements from including concerted action waivers. However, the Second, Fifth, and Eighth Circuit hold that pursuant to the Federal Arbitration Act (FAA) these waivers are enforceable.

Plaintiff brought a class action against Ernst & Young alleging that it had misclassified him and similarly situated employees for overtime purposes in violation of the FLSA and California labor laws. Plaintiff had signed an arbitration agreement not to join with other employees in bringing legal claims against the company as a condition of his employment. The concerted action waiver required that he pursue legal claims exclusively through arbitration, and arbitrate only as an individual and in a separate proceeding. The District Court granted Ernst & Young's motion to compel individual arbitration and Plaintiff appealed.

The Ninth Circuit held that the concerted action waiver violates both Section 7 and 8 of the NLRA. Section 7 states that an employee has the right to "engage in other concerted activities for the purpose of ... mutual aid or protection." Section 8 enforces that right by preventing an employer from "interfere[ing] with, restrain[ing], or coerce[ing] employees in their exercise of rights guaranteed in [Section 7]." The Court determined that an employee's Section 7 rights were therefore substantive, meaning that they could not be waived. To allow an employer to limit its employees' Section 7 right as a condition of employment ignores the plain language of the NLRA, making that section superfluous. Further, this would be contrary to the Board's interpretation of the NLRA that Section 7 is a "core right" of the statute.

Previously, in *Lewis v. Epic System Corporation*, 823 F.3d 1147, 1155 (7th Cir. 2016), the Seventh Circuit similarly held that a concerted action waiver is the "antithesis" of Section 7's substantive right to pursue concerted work-related legal claims. Both the Ninth and Seventh Circuits agree that the intent of Congress is clear and unambiguous from the language of the NLRA and was consistent with the Board's interpretation in *D.R. Horton*.

The Ninth Circuit also addressed whether the savings clause of the FAA dictated a contrary result. The FAA requires that courts treat arbitration agreements as contracts. However, the FAA does not mandate the enforcement of contract terms that waive substantive federal rights. Because Section 7 of the NLRA creates a substantive right, the FAA does not mandate enforcement. As a result, the Ninth Circuit vacated and remanded the district court's order compelling arbitration because it was based, in part, on the separate proceedings provision. The lower court will now have to determine whether the separate proceedings provision is severable from the contract.

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