Employment Law Daily Wrap Up, SUPREME COURT NEWS—DOJ switches sides in NLRB class action waiver cases, (Jun. 19, 2017)

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By Pamela Wolf, J.D.

The National Labor Relations Board, an independent federal agency, has been authorized to represent itself on its writ of certiorari challenging class action waivers in employment arbitration agreements. Not only is the NLRB on its own in the case, but the Department of Justice's Office of the Solicitor General is taking an opposing position in an *amicus curiae*brief filed on June 16.

In *NLRB v. Murphy Oil USA, Inc*. (No. 16-307), along with two other cases, *Epic Systems Corporation v. Lewis* (No. 16-285) and *Ernst and Young LLP v. Morris* (No. 16-300), the Justices will resolve the question of whether arbitration agreements that bar employees from pursuing work-related claims on a collective or class basis in any forum violate the National Labor Relations Act.

NLRA-FAA interaction. The three cases explore the territory where the NLRA and the Federal Arbitration Act, which favors enforcement of arbitration agreements, meet. The *Murphy Oil* case seeks review of a Fifth Circuit ruling, consistent with the appeals court's own precedent in *D.R. Horton*, that an arbitration agreement was enforceable and not unlawful to the extent it required employees to resolve employment-related claims through individual arbitration, not through class or collective actions.

The earlier *D.R. Horton* decision itself rejected the Board's analysis of arbitration agreements. The Fifth Circuit held: (1) the NLRA does not contain a "congressional command overriding" the FAA; and (2) the "use of class action procedures ... is not a substantive right" under Section 7 of the NLRA. This holding meant that an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration.

In *Ernst & Young*, the Court will scrutinize a Ninth Circuit holding that agreed with the rationale of the NLRB's position in *D.R. Horton* and held that under the unambiguous language of the NLRA, it is unlawful to require employees to sign agreements precluding them from bringing, in any forum, concerted legal claims regarding wages, hours, or other terms and conditions of employment.

In the *Epic Systems* case, the Justices will review the Seventh Circuit's similar conclusion ruling that a software company violated the NLRA by imposing a mandatory arbitration agreement that barred employees from seeking class, collective, or representative remedies to wage-and-hour disputes. The class waiver interfered with employees' protected Section 7 rights to engage in concerted activity, and nothing in the FAA justified enforcing the arbitration agreement in the face of its illegality.

DOJ flip-flop. The Solicitor General represented the NLRB on its petition for certiorari and its reply to Murphy Oil's response, arguing in favor of the Board's position on arbitration agreements. The High Court granted certiorari in the case on January 13, 2017.

In its *amicus* brief, however, the Solicitor General, on behalf of the United Sates, is now arguing against the board in the *Murphy Oil* case, and in support of the employers in *Ernst & Young* and *Epic Systems*. On June 16, the same day the DOJ filed its amicus brief, the Board announced that the Acting Solicitor General had authorized the NLRB to represent itself in the *Murphy Oil* case.

Companies: Murphy Oil USA, Inc.; Epic Systems Corporation; Ernst and Young LLP

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