SIXTH CIRCUIT AGREES WITH NLRB THAT EMPLOYMENT ARBITRATION CLAUSE PROHIBITING CLASS ACTION ARBITRATIONS IS UNENFORCEABLE

On May 26, 2017, the U.S. Court of Appeals for the Sixth Circuit issued a decision (NLRB v AEI) holding that an employment agreement provision requiring arbitration of employment disputes, but prohibiting class action or other multiple-employee arbitrations, is unlawful. The court upheld a National Labor Relations Board order striking down the provision. Employees were asked to sign a document requiring arbitration of employment-related disputes and further stating, "By signing this policy, you and AEI also agree that a claim may not be arbitrated as a class action, also called 'representative' or 'collective' actions, and that a claim may not otherwise be consolidated or joined with the claims of others." The employees involved were not in a union.

WHY?

Under Section 7 of the National Labor Relations Act ("NLRA"), employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157 (emphasis added). According to the court, arbitration provisions barring "collective or class action suits" are illegal "because they interfere with employees' right to engage in concerted activity" (i.e., the right to join with other employees in a lawsuit against their employer). Specifically, the court concluded that "[m]andatory arbitration provisions which permit only individual arbitration of employment-related claims are illegal pursuant to the NLRA..."

OTHER CIRCUITS

The Sixth Circuit joins the Seventh and Ninth Circuits in holding that it is unlawful to have an arbitration provision that compels employees covered by the NLRA to forego their right to join with other employees in employment-related claims against their employer. The Fifth and Eighth Circuit Courts of Appeals have held that such provisions are enforceable and not in violation of the NLRA.

PRACTICAL TAKEAWAY

The NLRA applies to most employees who are not supervisors or executives. This includes, for example, employed physicians, mid-level providers and nurses. We encourage you to review any arbitration provisions in your employment contracts, particularly if you are under the jurisdiction of the Sixth, Seventh or Ninth Circuit Courts of Appeal.

If you have questions regarding this topic, please contact Bruce Bagdady at (248) 457-7839 or bbagdady@hallrender.com or your regular Hall Render attorney.

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