

# Employer's Right to Compel Arbitration, even Where Demand Is Delayed, Affirmed By Ninth Circuit

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In *Richards v. Ernst & Young*, The Ninth Circuit reversed the District Court's denial of defendant's motion to compel arbitration of state wage and hour claims asserted by a former employee.

The District Court had determined that defendant had waived its right to arbitration by failing to assert that right as a defense. The Ninth Circuit reversed the judgment on the following grounds.

As the Court noted preliminarily, waiver of the contractual right to arbitration is not favored and, therefore, any party arguing waiver of a contractual right to arbitration bears a heavy burden.

In particular, a party seeking to prove waiver of the right to arbitration must demonstrate:

1. knowledge of an existing right to compel arbitration;
2. acts inconsistent with that existing right; and
3. prejudice to the party opposing arbitration resulting from such inconsistent acts.

Here, the panel ruled, prejudice was missing.

Plaintiff argued that she was prejudiced because there was litigation on the merits and, as a result, some of her claims were dismissed. The panel rejected this argument, noting that one of the claims was dismissed without prejudice, which does not constitute a decision on the merits. The other claim on which the District Court ruled, the claim for injunctive relief, was resolved by the District Court on the basis of standing — and standing precedes, and does not require, analysis of the merits.

Plaintiff also maintained that she was prejudiced because defendant conducted discovery that caused her to incur expenses during the years of litigation prior to the motion to compel. However, the panel noted, she did not contend that defendant used discovery to gain information about her case that could not of been gained an arbitration. Moreover, any expense incurred as result of plaintiff's deliberate choice of an improper forum, in contravention of her contract, could not be charged to defendant.

Plaintiff alternatively urged the panel to rely on the decision of the National Labor Relations Board (NLRB) in *D.R. Horton*, 357 N.L.R.B. No. 184, which declared invalid an arbitration agreement that did not allow employees to file joint, class, or collective employment-related claims in any form.

The panel rejected this argument because plaintiff had failed to raise this argument until after the parties had briefed, and the District Court had denied, the motion to compel. Furthermore, the panel noted, most courts of appeal and district courts to have considered this issue have not adopted the reasoning of the NLRB because it conflicts with explicit pronouncements of the Supreme Court.

Please contact the author if you have any questions regarding the above opinion, or in general about arbitration agreements in employment contracts.

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