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# NLRB Holds That Class Action Waivers in Mandatory Arbitration Agreements are Unlawful

Arbitration agreements are a common tool that employers use to manage EEO and wage/hour litigation risk. Those agreements often include a provision that an employee who wishes to submit an employment-related claim to arbitration may do so only on behalf of himself or herself, and may not do so as part of a class or collective action. On January 3, 2012, Member Becker's last day on the National Labor Relations Board ("NLRB"), Members Becker and Pearce dealt a blow to employers seeking to create or expand arbitration agreements that employees are required to sign as a condition of employment. In *D.R. Horton, Inc.*, the NLRB held that mandatory arbitration agreements that include a class action waiver are unlawful under the National Labor Relations Act ("NLRA").

In *D.R. Horton, Inc.*, the employer (a home builder with operations in more than 20 states) instituted a corporate-wide policy that required new and current employees, as a condition of employment, to sign an arbitration agreement. The agreement required all disputes arising from each employee's employment to be resolved by an arbitrator, rather than in a judicial forum. The agreement further provided that the arbitrator had no authority to consolidate the claims of other employees, to hear any class or collective action, or to award relief to a class or group of employees.

The charging party, Michael Cuda, was a superintendent with the home building company. Cuda's attorney notified the company that his firm represented Cuda and a nationwide class of similarly situated employees. He asserted that the company was misclassifying the superintendents as exempt under the Fair Labor Standards Act ("FLSA") and gave notice that he intended to initiate an arbitration proceeding on behalf of the class of superintendents. The company responded that such a collective action was prohibited under the arbitration agreement that Cuda and other employees signed.

Cuda then filed an unfair labor practice charge with the NLRB, alleging, among other things, that the arbitration agreement violated Section 8(a)(1) of the NLRA as it prohibited employees from engaging in concerted activity for their mutual aid and protection.

The NLRB agreed with Cuda that the arbitration agreement violated Section 8(a)(1) of the NLRA. The NLRB held that employees have the right to attempt to improve their working conditions through judicial, administrative, and arbitral proceedings. The NLRB further held that employees' collective efforts to pursue rights or improve working conditions are "at the core of what Congress intended to protect" in Section 7 of the NLRA. The Board concluded that, because the arbitration agreement at issue prohibited employees from pursuing class or collective actions in either an arbitral or judicial forum, it violated Section 8(a)(1) of the NLRA.

The company argued that a decision holding its arbitration agreement to be unlawful would conflict with the provisions of the Federal Arbitration Act ("FAA") and the Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*. However, the NLRB rejected these arguments.

The FAA was enacted to prevent courts from treating arbitration agreements less favorably than other private contracts. The NLRB reasoned that its decision was not in conflict with the FAA because it was treating the arbitration agreement no worse than any other private agreement. The NLRB stated that it would have reached the same conclusion had the agreement not mentioned arbitration, but required employees to pursue only individual claims – rather than collective claims – in a judicial or other type of forum.

In *AT&T Mobility*, a class action was brought against AT&T by a group of customers who alleged that AT&T's offer of a "free" telephone to anyone who signed up for its service was fraudulent to the extent that AT&T still charged new subscribers sales tax on the retail value of the "free" telephone. AT&T demanded that each plaintiff's claim be submitted to individual arbitration because its arbitration agreement with its customers barred class actions. The plaintiffs argued that such a class action waiver was unconscionable under California law. The Supreme Court rejected the plaintiffs' argument, and held that the class action waiver contained in the arbitration agreement was enforceable. The NLRB distinguished the Supreme Court's *AT&T Mobility* decision, principally on the basis that the arbitration agreement at issue in that case involved customers of AT&T rather than employees, and therefore, the issue of whether the arbitration agreement violated the NLRA was not presented.

The *D.R. Horton* case will likely be appealed to a U.S. Circuit Court of Appeals, and may eventually be heard by the Supreme Court. However, in the meantime, employers looking to create or expand an arbitration agreement that employees must sign as a condition of employment should be cautious not to prohibit employees from pursuing class or collective actions in an arbitral forum.

If you have any questions about a mandatory arbitration agreement that you have either implemented or are considering implementing, please contact:

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