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# BOND INFORMATION MEMO

## Labor and Employment Law

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### Fifth Circuit Court of Appeals Invalidates NLRB's Ruling That Class Action Waivers Violate the NLRA

In *D.R. Horton, Inc.*, the National Labor Relations Board ("NLRB") held that a mandatory arbitration agreement between an employer and an employee that included a class action waiver was unlawful under Section 8(a)(1) of the National Labor Relations Act ("NLRA") because it prohibited the employee from engaging in concerted activity with other employees. The NLRB's *D.R. Horton* ruling dealt a significant blow to employers who sought to manage their litigation risk by requiring employees to sign mandatory arbitration agreements and class action waivers as a condition of employment. The Second Circuit Court of Appeals, in a separate case decided on August 9, 2013 (*Sutherland v. Ernst & Young LLP*), expressly declined to follow the NLRB's *D.R. Horton* ruling and held that a class action waiver in an arbitration agreement was enforceable under the Fair Labor Standards Act ("FLSA"). Recently, the Fifth Circuit Court of Appeals rejected the NLRB's *D.R. Horton* ruling, holding that class action waivers contained in mandatory arbitration agreements do not violate the NLRA and are enforceable under the Federal Arbitration Act ("FAA").

The Fifth Circuit began its analysis by noting that the FAA requires arbitration agreements to be enforced according to their terms, with two exceptions: (1) an arbitration agreement may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract" (commonly referred to as the FAA's "saving clause"); and (2) application of the FAA may be precluded by another statute's contrary congressional command. The Court concluded that neither of these exceptions applied to preclude the enforceability of the class action waiver contained in the mandatory arbitration agreement.

The Court stated that the saving clause "is not a basis for invalidating the waiver of class procedures in the arbitration agreement." The Court then examined whether the NLRA contained a congressional command to override the provisions of the FAA, and found that it did not. The Court found that the "NLRA does not explicitly provide for such a collective action, much less the procedures such an action would employ," and concluded that "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." The Court also looked to the legislative history of the NLRA for evidence of a congressional command to override the FAA, and found no such evidence. Finally, the Court determined that no congressional command to override the FAA could be inferred from the underlying purpose of the NLRA. Accordingly, the Court held that the class action waiver in the mandatory arbitration agreement was valid and enforceable under the FAA.



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The Fifth Circuit recognized that every other Circuit Court of Appeals that considered the issue (including the Second Circuit, as noted above) either suggested or expressly stated that they would not defer to the NLRB's rationale, and held class action waivers in arbitration agreements to be enforceable. The Court stated that it did not want to create a split among the Circuit Courts by enforcing the NLRB's *D.R. Horton* decision.

Although the Court refused to enforce the NLRB's ruling that the class action waiver violated the NLRA, the Court agreed with the NLRB that the mandatory arbitration agreement violated the NLRA to the extent that it would lead an employee to believe that the filing of unfair labor practice charges was prohibited. The employer argued that this was not the intent of the mandatory arbitration agreement, and that employees remained free to file unfair labor practice charges with the NLRB. However, the Court nevertheless enforced the portion of the NLRB's order requiring the employer to clarify the language of the mandatory arbitration agreement to permit the filing of unfair labor practice charges.

It remains to be seen whether the NLRB will ask the U.S. Supreme Court to review the Fifth Circuit's decision. In the meantime, employers should consider whether arbitration agreements with employees containing class action waivers might be a useful tool to limit the risk and cost associated with employment-related litigation.

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