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Labor Board Rules that Class Action Waivers in Arbitration Agreements Violate Rights of Employees to Engage in Concerted Activities

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On January 6, 2012, the NLRB released a decision that could substantially affect employers with pre-dispute arbitration agreements containing class or collective action waivers. *D.R. Horton, Inc.,* 357 NLRB No. 184 (2012). The decision applies to most private sector employees,[1] whether union or non-union. This Alert highlights some of the issues raised by the decision.

Class Action Waivers in Arbitration Agreements May Violate the NLRA

Nationwide homebuilder D.R. Horton required employees to sign a "Mutual Arbitration Agreement" (MAA) as a condition of employment. The agreement provided that all disputes and claims relating to the employee's employment will be determined exclusively by final and binding arbitration; prohibited arbitrators from consolidating claims, fashioning class or collective actions, or awarding relief to a group or class in one arbitration proceeding; and required signatory employees to waive the right to file a lawsuit or other civil proceeding relating to the employee's employment.

An attorney for several employees filed a notice to commence the arbitration process under the MAA alleging that superintendants were misclassified as "exempt" under the Fair Labor Standards Act (FLSA). Citing the language in the MAA that barred arbitration of collective claims, the company denied that the notice constituted an effective notice to arbitrate. One of the employees filed an unfair labor practice charge with the NLRB alleging that the company violated Section 8(a)(1) of the NLRA, amongst others, by maintaining and enforcing a mandatory arbitration agreement that unlawfully prohibits employees from engaging in protected concerted activities, including joint arbitration claims or class action lawsuits.

The NLRB's General Counsel issued a complaint alleging that D.R. Horton violated the NLRA by maintaining the agreements. After a trial, the Administrative Law Judge (ALJ) declined to find a violation of the NLRA in light of the recent pronouncements on the issue by the Supreme Court and the Eleventh Circuit[2] and the absence of direct NLRB precedent. However, on appeal, the NLRB[3] reversed the decision of the ALJ and held that that the agreement violates the employee's substantive right to engage in concerted activity under the NLRA. It reasoned that "employees who join together to bring employment-related claims on a class-wide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA."[4] The arbitration agreement, the Board held, interfered with this right and therefore constituted an unfair labor practice under Section 8(a)(1).

The Board ordered D.R. Horton to cease and desist from maintaining a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial, and to rescind its arbitration agreement or change it to make clear to employees that they were not waiving their right to pursue class or collective actions.

NLRB: The Federal Arbitration Act's Pro-Arbitration Mandate Must Yield to Section 7 of the NLRA

The most troubling aspect of the Labor Board's decision is its analysis of the interplay between the NLRA and the Federal Arbitration Act (FAA). The principal argument made by D.R. Horton and supporting *amici* was that finding the restriction on class or collective actions unlawful under the NLRA would conflict with the FAA.

The Board concluded that Section 7 confers a *substantive* (not just procedural) right to invoke FRCP Rule 23 (class certification) and FLSA Section 216(b) (collective action). Because the FAA does not require parties to forego substantive statutory rights, the Board held that its decision did not offend the FAA. Courts have held that a wide variety of other federal employment statutes, including the FLSA and the Age Discrimination in Employment Act (ADEA), do not confer non-waivable rights to pursue class or collective actions. In *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), the Supreme Court held that under the FAA, an individual's arbitration agreement is enforceable "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." The Board distinguished *Gilmer* because it did not address NLRA rights. However, courts may be reluctant to adopt the Board's position that the NLRA, unlike other federal employment statutes, confers a substantive right to invoke class action procedures that trump the FAA's pro-arbitration mandate.

The Board gave short shrift to the Supreme Court's recent landmark arbitration decision, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). *Concepcion* re-affirmed the FAA's mandate that arbitration agreements — including those with class waivers — are to be enforced "according to their terms." The Court held that California's *Discover Bank* rule, which invalidated many class action waivers in consumer contracts, interfered with, and therefore was preempted by, the FAA. *Id.* at 1753. "Requiring the availability of class-wide arbitration," the Court held, "interferes with fundamental attributes of arbitration" because class arbitration results in heightened formality, additional costs, procedural complexity, extra risks to defendants, and a slower pace of dispute resolution. *Id.* at 1748-52. Just one year before, the Supreme Court held that "the differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010).

In *D.R. Horton*, the Board acknowledged that *Concepcion* was "arguably in tension" with its decision. However, it noted that its decision did not apply to consumer transactions like *Discover Bank.* Rather, its decision applied only in the employment context, where, according to the Board, the disadvantages of class arbitration are less acute (*e.g.*, employment class actions are often smaller than consumer class actions).

Ultimately, the Board held that "even if there were a direct conflict between NLRA and the FAA," the FAA would have to yield because of the Norris-LaGuardia Act. According to the Board, "under the Norris-LaGuardia Act, a private agreement that seeks to prohibit a 'lawful means [of] aiding any person participating or interested in' a lawsuit arising out of a labor dispute (as broadly defined) is unenforceable as contrary to the public policy protecting employees' 'concerted activities for mutual

aid or protection.'" Because Norris-LaGuardia was enacted 7 years *after* the FAA, the Board stated it impliedly repealed any inconsistent provisions.

The reasoning here again is questionable, because the Supreme Court has repeatedly admonished that inferences of "repeals by implication" are strongly disfavored. *E.g.*, *Posadas v. National City Bank*, 296 U.S. 497, 504-05 (1936). The Court has cautioned that "[i]n the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974). Moreover, to constitute an implied repeal, the later-enacted statute must cover the entire field occupied by the earlier one, *United States v. Tynen*, 78 U.S. 88, 92 (1870), which is not the case here.

D.R. Horton's impact on Existing Arbitration Agreements

The immediate result of *D.R. Horton* is that employers with arbitration agreements containing class action waivers are vulnerable to unfair labor practice charges filed with the NLRB and potentially, injunctions requiring them to rescind their agreements.

Employers may attempt to distinguish *D.R. Horton* by arguing that their agreements are voluntary, and therefore, not required as a condition of employment. Indeed, many employers go to great lengths to implement voluntary programs (*e.g.*, giving employees a period of time to "opt out" of the program). The Board in *D.R. Horton* declined to address this issue.[5]

Plaintiffs likely will cite *D.R. Horton* to resist enforcement of arbitration agreements with class and collective action waivers, arguing that they violate the NLRA. Some courts already have rejected this argument. *See Grabowski v. C.H. Robinson Co.*, 2011 U.S. Dist. Lexis 105680, at *20 (S.D. Cal. 2011) ("the NLRA does not operate to invalidate or otherwise render unenforceable" an arbitration agreement with a class-action waiver); *Slawienski v. Nephron Pharmaceutical Corp.*, 2010 WL 5186622, at *2 (N.D. Ga. 2010); *Webster v. Perales*, 2008 WL 282305, at *4 (N.D. Tex. 2008). There is a question whether courts now will defer to *D.R. Horton*. They may choose not to do so for several reasons:

- Board orders are not self-enforcing, but can only be enforced by a United States Court of Appeals. *See* 29 U.S.C. § 160(e)-(f). D.R. Horton almost certainly will appeal the Board's decision.

- While courts may defer to the Board's interpretation of the NLRA, they need not defer to the Board's analysis of the FAA and the conflicts between the federal statutes.

- Three times in the last two years alone, the Supreme Court has upheld arbitration agreements that foreclosed class arbitration in *Concepcion, Stolt-Nielsen* and most recently in *CompuCredit v. Greenwood,* 2012 US Lexis 575 (January 10, 2012). For 20 years (since *Gilmer*) the Court has held that arbitration agreements are enforceable against statutory claims. Employers will argue that none of these decisions would have been possible if the agreements were unenforceable because they violated the NLRA — a statute with which the Supreme Court certainly is familiar.

- Employers can also argue that courts lack jurisdiction to invalidate arbitration agreements based on the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) ("When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . ."); *Garner v. Teamsters Local 776*, 346 U.S. 485, 490 (1953) ("[C]entralized

administration of specially designed procedures was necessary to obtain uniform application of [the NLRA's] substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.").

Conclusion

Concepcion appeared to offer employers the opportunity to foreclose or limit the availability of class actions through arbitration agreements with class waivers. *D.R. Horton* calls this opportunity into question, but the NLRB's decision will not be the last word on the subject. Companies should pay close attention as the courts grapple with the question whether these agreements violate the NLRA, and consult their counsel about what to do in the meantime.

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1 The decision applies to employees protected by the National Labor Relations Act, which generally excludes individuals employed as agricultural laborers, in the domestic service of a family in their home, by an employer covered by the Railway Labor Act, by a governmental entity (except for the Postal Service), independent contractors, supervisors and managerial employees as defined by the NLRA and its case law.

2 Citing Gilmer v. Interstate/Johnson Lane Corp, 500 U.S. 20 (1991), Stolt-Neilsen S.A. v. Animal Feeds, 130 S. Ct 1758 (2010), and Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005), inter alia.

3 Craig Becker joined Board chairman Mark Pearce in the decision. Brian Hayes, the third Board member (and only Republican), recused himself for an unspecified reason. There is no dissenting opinion.

4 Section 7 states: "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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

5 The Board acknowledged that class waivers are lawful if part of collective bargaining agreements because the negotiation of such a waiver stems from an exercise of Section 7 rights, i.e. the collective-bargaining process. *See* 14 *Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).