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Client Alert

Fifth Circuit Overturns NLRB's *D.R. Horton* Decision

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The United States Court of Appeals for the Fifth Circuit granted employers an important victory this week in the on-going conflict over whether employers can enforce agreements calling for mandatory arbitration of employment disputes and class action waivers. The court overturned the National Labor Relations Board's decision in *D.R. Horton*, which held that employers violate Section 7 of the Labor Management Relations Act by requiring employees to arbitrate all employment-related disputes through individual arbitration. While further appeals appear likely, the Fifth Circuit's decision, for now, removes one more obstacle to the enforcement of mandatory arbitration agreements.

***D.R. Horton*'s History**

In January 2012, the National Labor Relations Board (Board) ruled that mandatory arbitration agreements (MAAs) that bar class or collective actions violate Section 8(a)(1) of the Labor Management Relations Act (LMRA) by preventing employees from exercising their right, under Section 7 of the LMRA, to engage in joint action to protest terms and conditions of employment. *D. R. Horton, Inc.*, 357 N.L.R.B. No. 184 (the Board "has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation"). Separately, the Board held that D.R. Horton's MAA was improperly drafted, and violated Sections 8(a)(1) and (4) of the LMRA, as it could lead employees to believe that they barred from filing unfair labor practice charges with the Board.

The Board explained that its opinion did not conflict with Supreme Court's decision in *AT&T Mobility, LLC. v. Concepcion* – in which the Court found that the Federal Arbitration Act (FAA) preempted a California rule of law banning class action waivers in commercial arbitration agreements – because *Concepcion* involved commercial contracts, not the LMRA, and because it involved a conflict between the FAA and state law, as opposed to a dispute as to how to reconcile two federal statutes.

Following the Board's *D.R. Horton* decision, the agency's administrative law judges applied its central holding in several cases and struck down MAAs that contained class/collective action waivers. *See, e.g., Kmart Corp.,* Case No. 06-CA-091823 (Nov. 19, 2013); *FAA Concord H. Inc.,* Case No. 32-CA- 066979 (Oct. 23, 2013). By contrast, most courts rejected the Board's reasoning and refused to strike down class/collective action waivers. *See, e.g., Richards v. Ernst & Young LLP,* 734 F.3d 871 (9th Cir. 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care Inc.,* 702 F.3d 1050 (8th Cir. 2013).

The Fifth Circuit's Decision

The Fifth Circuit held 2-1 that the Board had erred because it "did not give proper weight to the Federal Arbitration Act." The court rejected the Board's reasoning and held that access to class/collective action procedures "is not a substantive right" under the LMRA and thus can be waived in MAAs. While the Fifth Circuit acknowledged that the Board had authority to interpret the LMRA in a way to protect employees' right to engage in collective action, it concluded that the NLRA was not "the only relevant authority," and that the FAA "has equal importance in our review." Citing the Supreme Court's decision in *Hoffman Plastic Compounds, Inc.,* the court explained that it has "never deferred to the Board's remedial preferences where such preferences potential trench upon federal statutes and policies unrelated to the NLRA."

The court further concluded that the effect of the Board's rule against class action waivers had the effect "to disfavor arbitration" and thus ran afoul of the FAA, unless it fell under one its principal exceptions. The court reviewed both exceptions in detail. *First*, the court examined the FAA's savings clause, which provides that an otherwise-valid MAA may be denied enforcement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The court concluded, based on a detailed application of *Concepcion*, that "the Board rule [against class action waivers] does not fit within the FAA's savings clause."

Second, the court concluded that the LMRA did not contain a "congressional command" that would remove the statute from the reach of the FAA. The court observed that the LMRA does not contain explicit language providing for class/collective actions, and wrote: "The burden [to override the FAA] is with the party opposing arbitration [. . .] and here the Board has not shown that the NLRA's language, legislative history, or purpose support finding the necessary congressional command." Therefore, the court concluded that the Board's *D.R. Horton* decision, like the California state law at issue in *Concepcion*, impeded the application of the FAA and should be overturned.

The Fifth Circuit did affirm a portion of the Board's decision. The D.R. Horton MAA required arbitration of broadly defined claims, and its four specific exemptions did not specifically mention the right to bring unfair labor practice charges before the Board. The court concluded that the D.R. Horton MAA could be read to prevent employees from filing charges in violation of the LMRA and thus upheld the Board's order that the employer revise its agreement.

The Fifth Circuit's decision also examined several challenges to the procedural validity of the Board's decision. In the end, the court sidestepped the on-going fight – now pending before the Supreme Court in the *Noel Canning* case – as to whether President Obama's recess appointments to the Board were constitutional.

Conclusion

The *D.R. Horton* decision constitutes good news for employers seeking to enforce existing MAAs. The decision (for now) removes one of the potential obstacles to MAAs, an obstacle that had loomed large by virtue of the Board's *per se* rule against class/collective action waivers. In addition, the decision provides guidance to employers on how to properly draft their MAAs so as to avoid conveying the impression that employees may not

file administrative charges. The court's decision suggests that existing MAAs should be reviewed to ensure that they are not susceptible of such an interpretation.

The Board has not publicly announced whether it will appeal the court's decision, by seeking *en banc* review or through a petition for *certiorari*. Under its longstanding practice of non-acquiescence, employers should expect that the Board will continue to adhere to the logic underlying its decision, at least in cases brought in other parts of the country not within the Fifth Circuit.

In any case, the battle over the enforcement of MAAs and class action waivers is far from over. The stream of cases involving disputes over the enforceability of MAAs, which typically raise questions of unconscionability and other state law contract defenses, continues to result in varied – and often irreconcilable – decisions in courts across the country.

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