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NLRB Limits Use of Employment Class Action Waivers

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On January 3, 2012, the National Labor Relations Board (the "NLRB" or the "Board") issued its decision in *D.R. Horton and Michael Cuda*, finding that notwithstanding the Federal Arbitration Act (the "FAA") and *AT&T Mobility v. Concepcion* (the United States Supreme Court's April 27, 2011 opinion which we previously reported on), an employer that requires employees as a condition of their employment to sign an agreement that precludes them from filing joint, class or collective claims addressing their wages, hours or other working conditions against the employer in any forum, has engaged in an unfair labor practice under the National Labor Relations Act (the "Act").

Concepcion previously held that the FAA permits companies to require customers to arbitrate their complaints individually and waive class action claims. Because *Concepcion* arose in a consumer contract context, there has been widespread discussion as to whether its holding should be applied to arbitration agreements in the employment setting.

In *D.R Horton*, the Board made clear that its position is that *Concepcion* does not apply to a large portion of claims arising in the employment setting.

D.R. Horton involved national homebuilder D.R. Horton, which began requiring each new and current employee to execute an arbitration agreement providing that all employment-related disputes must be resolved through individual arbitration and that the employees could not pursue class or collective litigation claims in any forum, arbitral or judicial. Notwithstanding his execution of this agreement, Michael Cuda, who was employed by D.R. Horton from July 2005 to April 2006 as a superintendent, gave notice to D.R. Horton of his intent to initiate arbitration on a nationwide class basis on behalf of himself and similarly situated superintendents, asserting that they were misclassified as exempt from overtime. D.R. Horton informed Cuda's lawyer that Cuda's arbitration agreement barred arbitration of collective claims. In response, Cuda filed an unfair labor practice charge with the NLRB against D.R. Horton under Section 8(a)(1) of the Act.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the Act. Section 7 of the Act provides that employees shall have the right "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Board found that any individual who files a class or collective action regarding wages, hours, or working conditions, whether in court or before an arbitrator, is seeking to initiate or induce group action which is "at the core of what Congress intended to protect by adopting the broad language of Section 7" and that "[s]uch conduct is not peripheral but central to the Act's purposes." Because D.R. Horton's arbitration agreement explicitly restricted such class or collective actions, the Board concluded that the agreement violated Section 8(a)(1) of the Act and was an unfair labor practice.

Applying the principle that when two federal statutes are capable of co-existence, both should be given effect, the Board determined that its decision did not conflict with the FAA for three reasons. First, Supreme Court precedent has made clear that "[w]herever private contracts conflict with the functions of the Act as they do here they obviously must yield or the Act would be reduced to a futility." Second, the right to engage in collective action is the "core substantive right protected by the NLRA" and Supreme Court precedent makes clear that an arbitration agreement may not require a party to forgo substantive rights afforded by

a statute. Third, because the FAA provides that arbitration agreements may be invalidated upon "any grounds as exist at law or in equity for the revocation of any contract," and violation of public policy is a defense to contract enforcement, therefore, arbitration agreements precluding collective actions are unenforceable due to the violation of public policy protected by the Act.

The Board also determined that its decision did not conflict with *Concepcion* because: (a) the consumer contract at issue in *Concepcion* implicated tens of thousands of potential claimants, whereas a potential class of employees would likely be significantly smaller; therefore, the Board reasoned that *Concepcion's* concern that arbitration on a class basis would disturb the advantages of arbitration (*e.g.,* speed, cost and informality) was reduced because the advantages were not as prevalent in the employment setting, (b) *Concepcion* did not involve the waiver of rights protected by the Act, and (c) *Concepcion* involved a conflict between the FAA and state law which is governed by the Supremacy Clause, whereas *D.R. Horton* examined a conflict between two federal statutes.

The Board did put certain limitations on its decision. First, the Board expressly stated that employers are free to require arbitration proceedings to be conducted on an individual basis, provided that the employer allows employees to pursue class and collective claims in a judicial forum. Second, the Board's restriction on class waivers does not apply to government employees, supervisors and independent contractors. Therefore, class or collective action waivers involving these categories of workers would not violate the Act. Third, the Board's decision is limited to class or collective waivers involving "wages, hours or other working conditions," therefore, class waivers outside of these areas would not run afoul of the Act.

The Board left open a number of questions following this decision including: (a) whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration; and (b) whether an employer can enter into an agreement with an employee that is not a condition of employment in order to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

Given the clearly divided lines of opposition for and against class action waivers, and the Supreme Court's recent focus on arbitration-related issues, we anticipate that the NLRB's decision will ultimately be reviewed by the Supreme Court. In the meantime, an employee subject to an arbitration agreement with a class action waiver may attempt to challenge the enforceability of such a waiver under *D.R. Horton*. Litigation of the waiver may arise under the Board's administrative procedures, or be subject to preemption claims if the waiver issue is taken into civil courts. Any current arbitration agreements (particularly those that include class action waivers) should be reviewed for enforceability. The severability provision that allows a court to sever any unenforceable language and enforce the remaining agreement, should also be closely examined.

Our attorneys have deep counseling and litigation experience on these issues. If you would like to discuss them further or have questions about this *Alert*, please contact one of the attorneys listed above.

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