

# Cooley

December 12, 2013

In a [prior Alert](#) dated January 13, 2012, we reported on the National Labor Relations Board's (NLRB) controversial decision in *D.R. Horton and Michael Cuda*. In that case, the NLRB held that certain class waivers in mandatory employment arbitration agreements violate the National Labor Relations Act (NLRA). Since *D.R. Horton*, virtually every court to consider the question has declined to adopt the NLRB's position.

Now, a panel of the U.S. Court of Appeals for the Fifth Circuit has reversed the *D.R. Horton* decision. The Fifth Circuit adopted the same reasoning as the other Courts of Appeals that have examined the issue, holding that the NLRB's requirement that employees must be able to pursue class claims is an impediment to arbitration that violates the Federal Arbitration Act (FAA). The Fifth Circuit rejected the NLRB's position that pursuing a class action is a substantive legal right, and held that, regardless of whether class actions are protected concerted activities under Section 7 of NLRA, the NLRA does not take precedence over the FAA and its fundamental policy goal of favoring arbitration. In reaching its conclusion, the Fifth Circuit noted that "every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable."

Notably, the Fifth Circuit did agree with the NLRB that the arbitration agreement at issue violates the NLRA by including language that suggests employees must arbitrate unfair labor practice charges rather than file such claims with the NLRB. Thus, the Court affirmed the NLRB's order that the employer must revise that language.

There is a strong likelihood that the NLRB will ask for a rehearing before the full Fifth Circuit or appeal directly to the United States Supreme Court. We continue to recommend that any current arbitration agreements (particularly those that include class, collective and/or representative action waivers) be reviewed for enforceability.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our [legal notices](#).

---

## Key Contacts

Lois Voelz Palo Alto	lvoelz@cooley.com +1 650 843 5058
-------------------------	--------------------------------------

Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Frederick Baron Palo Alto	fbaron@cooley.com +1 650 843 5020
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330

---

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.