

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.

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