Las Vegas

Swen Prior
702.784.5262
sprior@swlaw.com
vCard

Orange County

Christy D. Joseph
714.427.7028
cjoseph@swlaw.com
vCard

Kevin Jackson
714.427.7404
kjackson@swlaw.com
vCard

Phoenix

Gerard Morales
602.382.6362
jmorales@swlaw.com
vCard

Salt Lake City

Mark O. Morris
801.257.1904
mmorris@swlaw.com
vCard

Tucson

John A. Robertson
520.882.1206
jrobertson@swlaw.com
vCard

Snell & Wilmer

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The NLRB Takes the Position that Class Action Waivers in Arbitration Agreements — Even for Non-Union Employers — is an Unfair Labor Practice

by Christy Joseph and Kevin Jackson

Arbitration Agreements Are Used With Increasing Frequency by Employers

Those running a business know the challenges, perils and pitfalls of attempting to comply with the complex expanse of state and federal laws protecting employees from employers, from large corporations to ma-and-pa shops. There is little to no recourse for the employer once he, she, or it has been dragged into a dispute and forced to go on the defensive. Against this hostile background, more and more employers have sought ways to address employee complaints in a fair forum, with less costs and uncertainty than traditionally afforded in many courts with the unknown specter of a jury trial. Arbitration agreements are an instrument of choice in employers' attempts to reduce frivolous claims and provide a fair resolution for disputes with employees.

The Supreme Law of the Land

The U.S. Supreme Court has provided clear authority to the courts that arbitration agreements are a favored mechanism for addressing many types of complaints, including those between an employee and employer. For example, in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991), the Court allowed arbitration of claims arising under the Age Discrimination in Employment Act, despite the plaintiff's allegations of unequal bargaining power between employers and employees. In *Rent-A-Center, West, Inc. v. Jackson*, 131 S. Ct. 2722 (2010), which involved an arbitration agreement that was required as a condition of employment, the Court held that arbitrators, rather than courts, have jurisdiction to determine challenges to the validity of arbitration clauses where questions of arbitrability are delegated to the arbitrator. These cases leave no question that the U.S. Supreme Court recognizes that arbitration agreements are perfectly acceptable for dealing with employment disputes.

D.R. Horton, Inc.: The NLRB's Latest Attack on Arbitration and Class Action Waivers

Over a decade ago, wage-and-hour class actions became a popular vehicle for extracting large sums of money from employers. Most are brought by one or two former — and often disgruntled — employees. They are expensive cases to defend and even more expensive to resolve. Thus many employers sought to put a stop to this particular type of abuse by including class action waivers in their arbitration agreements. Once again, the U.S. Supreme Court gave clear guidance upholding the validity of class action waivers in arbitration agreements. *See AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). Despite this clear, and binding, precedent, two members of the National Labor Relations Board (NLRB) issued a decision in *D.R. Horton, Inc.* espousing their view that ALL class action waivers are an unfair labor practice — whether or not the employer is a union employer. 357 N.L.R.B. No. 184. We specifically note that the decision was issued by only two members, which means they arguably lacked the authority to issue it in the first place.

As a brief history lesson, the NLRB was created by Executive Order in 1934, and then received congressional approval with the passing of the Taft-Hartley Act in 1947, which increased the size of the board from three members to five and raised the quorum needed to exercise authority from two to three. In 2007, when three of the five members' terms were set to expire, President Bush nominated new members, whose nominations were then blocked by Senate democrats. In response, the board delegated its powers to the two remaining members, who went on to issue nearly 600 rulings in the next two years. One employer, New Process Steel, finally stood up to this abuse of authority and brought suit against the NLRB after the NLRB had initiated charges of unfair labor practices against the employer. *New Process Steel v. NLRB,* 130 S. Ct. 2635 (2010). After going through numerous appeals, the case finally reached the U.S. Supreme Court, which held that the NLRB had no power to issue that, or any, decision without the proper quorum of three members.

Thus, the NRLB two-man indictment of class action waivers not only appears to be in violation of *New Process Steel*, as well as *Concepcion*, but begs the question: is the NLRB thumbing its nose at the U.S. Supreme Court? In *DR Horton,* the duo engages in a tortured analysis of why class-wide arbitrations really aren't so complicated because the "average number of employees employed by a single employer . . . is 20 and most class-wide employment litigation, like the case at issue here, involves only a specific subset of employer's employees. A class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration proceeding. . . ." *DR Horton* at 11-12. The NLRB's conclusions do not, however, describe the typical wage and hour class action. In the last 15 years, we have not litigated one case with their cited average of 20 employees — hundreds and thousands are the norm, not several dozen. It is perhaps this misconception that has caused the two-man panel to be so quick to brand class action waivers as unfair labor practices.

They go on to express a concern that class action waivers prevent employees from participating in concerted activities. This seems an unenlightened view given the realities of social media. Employees today have more avenues to discuss, express and organize than ever before — they just aren't for the most part choosing to give up their voice to a union and monthly dues. Either

way, class action waivers have nothing to do with employees' concerted activities. In fact, it could be argued that employees who bring individual claims — whether in court or arbitration — have larger recoveries than those who resolve their claims through class resolutions. This is perhaps because most employees who are eligible to receive a class settlement don't even believe they've been wronged by their employer. While the NRLB may not be receptive to this, it is worth noting that the U.S. Supreme Court struck down the massive class action in *Dukes v. Wal-Mart* and stated there should be "no trial by formula," but that is exactly what most class actions are.

What Does this Mean for Employers?

Obviously this is an area that is going to continue to be litigated. It is important to remember that both union and non-union employers are subject to the National Labor Relations Act and, thus, the authority of the National Labor Relations Board. As such, non-union employers who have arbitration agreements with class action waivers risk being subject to a charge initiated by a disgruntled employee. Once this occurs, the costs can quickly pile up. First, an NLRB agent will investigate and determine if the charge is appropriate. If the investigation reveals that a violation has occurred, then the NLRB will ask the charged employer to remedy the violation through a voluntary settlement. With the increasingly onerous terms and conditions that the NLRB is insisting upon in settlements, however, employers may find settling such disputes more difficult and risky than before. If there is no settlement, then the NLRB will issue a formal complaint and the employer will be forced to defend itself before an NLRB Administrative Law Judge (ALJ). From there, the ALJ will issue findings and recommendations to the NLRB in Washington, D.C., which will then either affirm or reverse the ALJ's decision. Even then, appeals can proceed to the U.S. Court of Appeals and eventually the U.S. Supreme Court. Once a charge is filed, an employer may be tied up in a legal battle for years.

As a result of the NLRB's unsettling decision, non-union employers who should feel free to include class action waivers in arbitration agreements must now give pause to assess the possible risk of an unfair labor claim. Experienced employment counsel, however, can help any employer navigate through this increasingly vast sea of uncertainty.

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