

## **Labor and Employment Law Update** **Lawyers for Employers®**

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### **NLRB Strikes Down Arbitration Agreement Containing Class Action Waiver**

A recent decision from the National Labor Relations Board (the “NLRB”) will likely make it more difficult for employers to obtain and enforce class action waivers in arbitration agreements. The NLRB’s decision in *D.H. Horton, Inc.* invalidated an arbitration agreement that prevented employees from filing claims with the NLRB or pursuing collective or class action claims in either arbitration or court. In the short term, the NLRB’s decision may provide employee-side attorneys with additional ammunition to prevent arbitration agreements from being enforced. Employers with arbitration agreements should carefully evaluate this decision, and other recent legal developments, to determine whether their agreements remain enforceable.

#### **Why is this decision important to employers with non-unionized workplaces?**

The *D.H. Horton* decision is an example of the NLRB’s recent efforts to reach into non-unionized workplaces. Most private sector employees are covered by the National Labor Relations Act (“NLRA”), even if they are not represented by a union. Supervisors, managerial employees and independent contractors are among the few individuals excluded from the protections of the NLRA. Section 7 of the NLRA grants covered employees the right to engage in “concerted activities for the purpose of . . . mutual aid or protection.” In other words, while Section 7 does not protect activities that an employee takes solely on his or her own behalf, the NLRA protects an employee’s actions when they are with or on behalf of at least one other employee, or on the authority of other employees that relate to their terms and conditions of employment.

In *D.H. Horton*, the NLRB determined that pursuit of joint, collective or class claims are “concerted activities” protected by the NLRA. Any acts by an employer that prohibit employees from pursuing such claims, therefore, would be a violation of the NLRA. The decision follows on the heels of a memorandum issued last year by the Acting General Counsel of the NLRB signaling the NLRB’s view that certain social media activities, such as Facebook conversations between employees that criticize their employer’s workplace conditions, are “concerted activity” protected by the NLRA. [See Lane Powell’s discussion on social media for more information.](#)

## **What limitations does the *D.H. Horton* decision place on arbitration agreements?**

Under the NLRB's decision in *D.H. Horton, Inc.*, an employer cannot require employees as a condition of employment to waive their right to file joint, collective or class action claims. D.H. Horton's mandatory arbitration agreement obligated employees to raise employment disputes through arbitration and to assert their claims on an individual, rather than a joint or collective basis. Because the arbitration agreement prohibited employees from pursuing joint, collective or class action claims, the NLRB held that the agreement stripped employees of their right to engage in "concerted activities."

The NLRB further determined that a mandatory arbitration agreement that requires employees to raise individual claims through arbitration, but allows employees to file class actions in a judicial forum, would comport with the NLRA. The NLRB opted not to consider whether employers could lawfully require employees to pursue joint or collective claims, as well as individual claims, through arbitration alone. The NLRB also refrained from deciding whether the NLRA would be violated by an arbitration agreement not required as a condition of employment that eliminated all avenues for filing joint, collective or class action claims. D.H. Horton was ordered to rescind or revise its arbitration agreements to make it clear to employees that the agreement does not foreclose all avenues for asserting collective or class action claims against the employer; however, D.H. Horton was not required to allow employees to file class action claims in judicial forums specifically.

The NLRB also reaffirmed its previous rulings that arbitration agreements must make clear that employees can file complaints with the NLRB. This is not new "law," and is in line with court decisions holding that employers cannot prevent employees from filing claims with the Equal Employment Opportunity Commission and various other governmental entities, including the NLRB.

## **Is it probable that *D.H Horton* will be overturned?**

The NLRB's decision in *D.H. Horton* will likely be appealed to the Court of Appeals, and then make its way to the U.S. Supreme Court. By requiring employers to provide an avenue for employees to file class action claims, the *D.H. Horton* decision appears to run contrary to the Supreme Court's ruling last year in *AT&T Mobility v. Concepcion*, where the Court determined that "[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration, and is inconsistent with the Federal Arbitration Act." The NLRB, however, distinguished the *AT&T Mobility* decision. The NLRB reasoned that *AT&T Mobility* is inapplicable to arbitration agreements involving employees and employers covered by the NLRA because the NLRA grants employees a substantive right to engage in concerted activities, which includes filing collective or class action claims, and that the Federal Arbitration Act cannot supersede a substantive right.

The appeal process could take years, so it will not be known for some time whether the NLRB's decision will be overturned by the Court of Appeals or the U.S. Supreme Court. In addition, the NLRB could change course if members are appointed who are more sympathetic to employers, and the NLRB overrules its decision.

## **What, if anything, should employers do in light of the *D.H. Horton* decision?**

Pending a definitive determination by the courts concerning the viability of the *D.H. Horton* decision, employers should determine, in consultation with competent counsel, whether to change their arbitration agreements, and if so, how to meet the requirements of the decision. Among the factors to consider are:

- Employers can continue to require individuals not covered by the NLRA, such as supervisors, managerial employees and independent contractors, to pursue all claims through arbitration, whether those claims are individual, collective or class action claims.
- Employers may stay the course if they are using arbitration agreements that do not prohibit collective or class action claims, and do not prevent employees from filing a complaint with the NLRB. However, this may be a good time to evaluate whether the agreement is achieving its desired results, and consult with counsel about the potential for class or collective action claims and how they would be resolved.
- Employers using arbitration agreements that restrict or prohibit collective or class action claims should consult legal counsel who can advise about the risks and options for minimizing those risks.
- Employers using arbitration agreements that could limit employees from filing claims with governmental agencies such as the NLRB should consider modifying their agreements in consultation with counsel.

**For more information, please contact the Labor and Employment Practice Group at Lane Powell: [employlaw@lanepowell.com](mailto:employlaw@lanepowell.com)**

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