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## The Fifth Circuit's Rejection of the NLRB's Ban on Class Waivers - a Victory for Employers

Earlier this week, the Fifth Circuit Court of Appeals ruled in [D.R. Horton, Inc. v. National Labor Relations Board](#), that arbitration agreements which bar employees from pursuing class actions do not violate federal labor law. In so doing, the court rejected the National Labor Relations Board's (NLRB) prior decision in [D.R. Horton, Inc.](#) banning such class waivers.

The NLRB's decision arose from an unfair labor practice charge which was filed by Michael Cuda against his employer, homebuilder D.R. Horton, Inc. Cuda had attempted to launch a class action accusing D.R. Horton of misclassifying himself and other superintendents as exempt from the Fair Labor Standards Act's (FLSA) overtime requirements. D.R. Horton required that all of its employees sign a mandatory arbitration agreement. When Cuda tried to initiate class-wide arbitration regarding his FLSA claim, D.R. Horton objected, pointing to a provision in its arbitration agreement that barred the arbitration of collective or class claims. The agreement expressly provided that employment-related disputes were to be resolved only through individual arbitration. Cuda responded by filing a charge with the NLRB, claiming that the agreement's bar of collective or class claims violated the National Labor Relations Act (NLRA).

The NLRB agreed with Cuda, holding that such agreement terms violate employee rights to act collectively under the NLRA by requiring them to waive the right to pursue employment-related claims in a collective or class manner in any arbitral or judicial forum.

D.R. Horton appealed the Board's decision to the federal Fifth Circuit Court of Appeals.

The Fifth Circuit rejected the NLRB's decision, finding that the Board did not give proper weight to the Federal Arbitration Act (FAA), which generally requires that arbitration agreements be enforced according to their express terms.

The Fifth Circuit did uphold a portion of the NLRB's ruling, which requires D.R. Horton to clarify with its employees that its arbitration agreement does not eliminate their right to pursue claims of unfair labor practices with the Board.

In rejecting the NLRB's ban on class waivers, the Fifth Circuit joined the Eighth Circuit Court of Appeals and numerous district courts which also have declined to follow the Board's reasoning. This is the first time a court has had the opportunity to say the Board was wrong in a case which was directly on appeal from the Board, however.

The decision thus marks a victory for employers who may wish to have their employees sign arbitration agreements like D.R. Horton did which include a provision prohibiting the arbitration of collective or class actions (with the clarifying language regarding the fact that Board charges are still permissible, as noted above).

However, since the Board's authority to apply and enforce the NLRA is nationwide, and each circuit court of appeals decision is technically only binding in the circuit over which it has jurisdiction, the Board has not in the past, and is not expected regarding this point, to change its approach based on federal court disagreement. Such conformity would only be expected when the current political make-up of the Board changes, or if a split develops among the circuits such that the Supreme Court is asked to weigh-in on this issue in order to resolve it on a national level.

'Tis the season to consider whether an employee arbitration agreement could be an effective means of reducing your employment and other litigation costs.

Should you have any questions about this or any other employment-related issue, please feel free to contact Jimmy Daniel, Jennifer Terry, or any other member of our Labor and Employment Law Practice Group.

*The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.*

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