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NLRB STEADFAST AGAINST CLASS ACTION WAIVERS IN MANDATORY ARBITRATION AGREEMENTS, BUT WHETHER COURTS WILL FOLLOW SUIT REMAINS UNCLEAR

As noted in our January 2012 FEB, on January 3, 2012 the National Labor Relations Board (the "NLRB" or the "Board") determined in *D. R. Horton, Inc. and Michael Cuda* that requiring, as a condition of employment, arbitration agreements prohibiting employees from pursuing joint, class, or collective claims regarding their wages and hours or working conditions violates the "concerted activity" protections under the National Labor Relations Act (the "NLRA"). The Board's decision came less than one year after the U.S. Supreme Court allowed a similar provision in a consumer arbitration agreement. *See AT&T Mobility v. Concepcion* (reported in Fenwick's April 28, 2011 Litigation Alert).

D. R. Horton – The NLRB's Analysis

D. R. Horton is a home builder operating in many states. In 2006, it implemented a company-wide arbitration policy and required all current and new employees to sign, as a condition of employment, a Mutual Arbitration Agreement ("MAA"). In relevant part, the MAA provided:

- That all disputes and claims related to the employee's employment, with exceptions not relevant here, were subject to exclusive, final, and binding arbitration;
- That the arbitrator "may hear only Employee's individual claims," "will not have the authority to consolidate the claims of other employees," and "does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding"; and
- The employee waives "the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Company" and "the right to resolve employment-related disputes in a proceeding before a judge or jury."

Michael Cuda signed the MAA, but in 2008 he sought to bring class claims for wage and hour violations. D. R. Horton rejected his notice of arbitration as defective due to the MAA's limitations on class claims, and Cuda filed an unfair labor practice charge with the NLRB.

The NLRB first concluded the MAA effected a waiver of the right to pursue joint, class, or collective action in any forum, and this waiver restricted employees' right to engage in concerted activity for their mutual aid and protection, including efforts to improve the terms and conditions of their employment. That right, according the Board, includes seeking redress of wage and hours matters through joint, class, or collective action. The NLRB likened the waiver to "yellow dog" contracts from years ago, which prevented employees from joining unions. The Board thus rejected the reasoning of its own General Counsel who suggested in a 2010 memo that such waivers were not *per se* unlawful provided they recognized the right of employees to concertedly challenge the waiver itself without retaliation. Further, according to the NLRB, the fact that employees could still engage in *some* concerted activity – through mutual discussion, pooling resources to obtain legal advice, or filing similar or coordinated individual claims – was no defense to impermissibly restricting other concerted activities.

Of even greater significance, the NLRB went on to determine that neither the Federal Arbitration Act ("FAA") nor recent U.S. Supreme Court decisions required a different result. Indeed, the NLRB found no conflict between its conclusion that the MAA's waiver was unlawful and the FAA's pro-arbitration policy, and even if such a conflict did exist, the Board found that the result it reached carefully accommodated the policies of both the FAA and the NLRA:

- The NLRB's ruling treated the MAA no worse than any other non-arbitration agreement that restricted concerted activity.
- The MAA resulted in the employees' waiver of a *substantive* right – i.e., to engage in concerted activity by filing joint, class, or collective actions – and the FAA's intent was to leave such rights undisturbed.
- The public policy associated with the NLRA and an employee's right to engage in concerted activity would otherwise serve as grounds to invalidate the MAA's waiver, and any intrusion on the FAA's policy by the Board's decision would be limited.

The NLRB distinguished the U.S. Supreme Court's recent decisions, including *AT&T Mobility*, on several grounds, highlighting their focus on consumer (not employment) arbitration agreements, conflicts with state (and not federal) law, and/or mandating class action (as opposed to restricting class action).

The Board also recognized certain limitations on the reach of its decision. Among other things, it does not apply to arbitration agreements with supervisors (and certain other classes of workers) who do not fall within the applicable NLRA protections or to agreements requiring mandatory arbitration of purely *individual* claims. The decision also left unaddressed several questions, including most notably, whether an employer may mandate that employees bring joint, class, or collective claims through arbitration (as opposed to a judicial forum).

Developments Since D. R. Horton

The NLRB's decision is unlikely to be the final word on employee class action waivers in arbitration agreements. There has been much activity – and disagreement – in the courts on the enforceability of arbitration agreements generally and the use of class action waivers in a variety of contexts including employment. Indeed, only days after *D. R. Horton* was decided, the U.S. Supreme Court issued another pro-arbitration decision, again recognizing the power of the FAA and upholding a consumer arbitration agreement. *See CompuCredit Corp. v. Greenwood*. District courts assessing enforceability of employee arbitration agreements in the wake of *D. R. Horton* have not uniformly adopted its reasoning or its *per se* unlawful approach to class action waivers:

- *Palmer v. Convergys Corporation* (M.D. Ga. Feb. 9, 2012) – addressing a class action waiver in an employment application, the court found the waiver to pertain to procedural rather than substantive rights and dismissed *D. R. Horton* as not meaningful to the assessment.

- *Sutherland v. Ernst & Young* (S.D.N.Y. Jan. 13, 2012) – requiring class actions waivers in employment arbitration agreements to be assessed on a case-by-case basis; here, because cost would prohibit bringing individual claims, the waiver at issue precluded plaintiff from vindicating substantive rights and was thus unlawful.

- *LaVoice v. USB Financial Services* (S.D.N.Y. Jan. 13, 2012) – observing that the court "must read *AT&T Mobility* as standing against any argument that an absolute right to collective action is consistent with the FAA's 'overarching purpose' of 'ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings'" and declining to follow *D. R. Horton* to the extent inconsistent with that reading. Considering the arbitration agreement and plaintiff's proposed claims, damages and costs, the class action waiver did not prevent him from exercising his statutory rights and was thus enforceable.

What's Next

An appeal of the decision has been widely anticipated, given the substantial and differing jurisprudence on this matter and the U.S. Supreme Court's demonstrated interest in arbitration, so employers should stay tuned for further developments. In the meantime, employers who use mandatory arbitration agreements should review such agreements and consult counsel to determine whether class action waivers are the right approach given the potential risks and benefits they present.

NEWSBITES

Recruiters Paid Commissions Based on Adjusted Gross Profit Held Exempt Commissioned Employees

In *Muldrow v. Surrex Solutions Corporation*, a California appellate court recently confirmed, among other things, that a class of current and former employees, who identified and recruited job placement candidates and placed them at client-companies, were exempt commissioned employees and not entitled to any overtime compensation. Under California law, commissioned employees "whose earnings exceed one and one-half (1 1/2) times the minimum wage" are exempt from overtime requirements "if more than half of that employee's compensation represents commissions."

The court held that the employees' job, "reduced to its essence, was to offer a candidate employee's services to a client in exchange for the payment of money from the client to Surrex" and the evidence otherwise demonstrated they engaged in sales-related activity. Further, the court upheld the employer's use of a percentage of "adjusted gross profit" – rather than straight revenue or profit – as the measure for the commission. The employees argued that the commission formula, which subtracted certain service-related business costs from revenue to determine the adjusted gross profit, was "too complex" to fall within the exemption and that commissions, as provided in the relevant regulation, included only those "based strictly, and solely, on a percentage of the price of the product or service rendered." The court rejected that argument observing that Surrex's commissions system, which was based on the service price and other related costs, "fully comport[ed] with the 'essence of a commission,' which is a payment 'base[d] . . . on sales' that 'is decoupled from actual time worked.'"

Competitors Clash Over Alleged Unfair Competition Due To Purported Worker Misclassification

In a novel marriage of wage/hour law and unfair competition, Language Line Services, Inc. recently sued competitor Language Select LLC and its principal Yeun Korman, claiming the competitor allegedly improperly classified its workers as independent contractors, allowing it to offer its services at "artificially low rates." According to the complaint, the alleged misclassification practice allows the competitor to offer "aggressively discounted pricing" and "unfairly undercut" Language Select's pricing because the competitor is not saddled with internal costs of mandatory wage and hour requirements and tax and insurance costs. Language Select seeks injunctive relief to remedy the alleged wrongful conduct and stop such conduct in the future, unspecified damages for lost profits and disgorgement of "ill-gotten gains or profits," enhanced and punitive damages, and costs and attorneys' fees. The matter was filed on January 24, 2012 and is pending in federal court in San Jose, California.

Employer Bound By Written Notice, Cannot Rely on Uncommunicated Method for Calculating FMLA Leave

In *Thom v. American Standard, Ltd.*, former employee Carl Thom, Jr., requested and was granted leave under the federal Family and Medical Leave Act ("FMLA") through June 27, 2005 for shoulder surgery. His initial recovery progress was very quick, and his doctor provided a note indicating he could return to work on June 13 without restriction. When he did not report to work on that date, the employer contacted Thom and he explained that he was having increased pain and would return to work on June 27, as originally agreed. He promised to provide an updated doctor's note, but, due to delays occasioned by the doctor's office, was unable to provide it until June 18. By then the employer had terminated his employment for unexcused absences between June 13 and June17.

At trial, the employer argued that it used a "rolling" method for determining the 12-month period in which the 12-week entitlement occurs; under that method, Thom exhausted his FMLA leave as of June 13. But the employer never communicated that method in writing to Thom and, in fact, provided him written confirmation that his leave would expire on June 27. Thus, Thom was entitled to rely on the calendar method and his written June 27 return-to-work date, and the employer interfered with his FMLA rights by terminating him.

Employee Who Worked Half Of Scheduled Shift Not Entitled To Reporting Time Pay, Even If Scheduled Shift Was Shorter Than Usual

In *Aleman v. Airtouch Cellular*, a California employee lost his effort to recover mandatory reporting time pay from his employer under the California Industrial Welfare Commission's Wage Order 4, which provides that an employer must pay an employee no less than two and no more than four hours, at the employee's regular rate of pay, for "[e]ach workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work . . . ." In rejecting the employee's claims, the court observed that if an employee was scheduled to work for 1.5 hours and worked a total of 1 hour, he would not be entitled to reporting time pay. Finding the language of Wage Order 4 unambiguous, the court focused on the phrase "usual or scheduled" and held that "when an employee is scheduled to work, the minimum two-hour pay requirement applies only if the employee is furnished work for less than half the scheduled time." Because each of the challenged work periods had been scheduled and the employee worked at least half of the scheduled time, the duration of his "usual" work day was irrelevant to determining whether reporting time pay was owed.

California and U.S. Departments of Labor Join Forces to Fight Worker Misclassification

Earlier this month, as part of its Misclassification Initiative, the U.S. Department of Labor's Wage and Hour Division entered into a memorandum of understanding ("MOU") with the California Labor Commissioner providing for cooperation toward new efforts to reduce worker misclassification – in particular misclassifying employees as independent contractors. To date, eleven other states, including Washington, have signed similar MOUs with the U.S. Department of Labor. These efforts are but one example of the significant government resources dedicated, and attention given, to proper classification of workers, and underscore the importance of mindfully classifying workers at the inception of the relationship.

FTC: Marketers of Background Screening Mobile Applications May Be Consumer Reporting Agencies

On February 6, 2012, the Federal Trade Commission ("FTC") issued a sample letter to companies promoting mobile applications warning that they may be considered consumer reporting agencies for purposes of the federal Fair Credit Reporting Act ("FCRA"). Under the FCRA, a consumer reporting agency is an organization that assembles and evaluates consumer information, including about an individual's character, reputation or personal characteristics, for the purpose of providing consumer reports to third parties for employment, housing, credit, and similar purposes. The FCRA imposes certain requirements upon consumer reporting agencies, including taking reasonable steps to ensure the accuracy of the information reported and providing notice to parties who use the consumer reports about the parties' own obligations under the FCRA.

On February 7, the FTC issued a press release that it had, in fact, sent letters to marketers of six mobile applications; each appeared to focus on provision of criminal history reports.

Marketers of mobile applications that gather and report the above-noted information, including criminal histories, and that know or should know such information is being used for employment or other FCRA-restricted purposes should contact counsel regarding this development. Employers who use mobile applications to obtain reports about employees and employment candidates that may be considered consumer reports under the FCRA should also consult counsel about FCRA compliance.

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