

## The NLRB Invalidates Complete Class Action Waivers as a Condition of Employment

The National Labor Relations Board (NLRB) has ruled that a non-union employer violates its employees' Section 7 rights under the National Labor Relations Act by maintaining a policy that, as a condition of being hired, and/or, as a condition of remaining employed after being hired, an employee must agree to forego his or her right to bring a class action against the employer over wages, hours, or other terms and conditions of employment *in any forum*. The case is D. R. Horton, Inc., 357 NLRB No. 184, issued on January 3, 2012.

In D.R. Horton, Inc., the employer required all applicants and current employees to sign an agreement that required all employment-related claims to be submitted to arbitration for final and binding decision, restricted the arbitrator from hearing class or collective claims, and waived the employee's right to file a lawsuit or civil proceeding relating to employment with the company and having such claims decided by a judge or jury. The employee filed a request to arbitrate his claim that the employer misclassified him as exempt under the Fair Labor Standards Act (FLSA). He sought to bring the claim as a collective action on his own behalf and on behalf of all similarly-situated employees. The employer responded by denying the right to file a collective action as stipulated in the agreement. The employee then filed a charge with the NLRB alleging that the employer's requirement that an employee waive the right to bring a class or collective-type action unlawfully interfered with the right of employees to engage in protected, concerted activity for mutual aid and protection.

The NLRB agreed and held that employers may not compel employees to waive their Section 7 right to collectively pursue litigation of employment claims in *all* forums, arbitral and/or judicial. Under this holding, employees must have the ability to pursue a collective or class-type claim in *some* forum. An employer may still require all claims to be arbitrated, but it cannot absolutely foreclose an employee's right to bring a class-type claim *somewhere*.

This decision will undoubtedly be appealed, and may eventually find its way to the U.S. Supreme Court. Until that time, however, mandatory arbitration of employment disputes that foreclose *all* avenues of seeking class or collective-type relief will be subject to challenge by the NLRB creating uncertainty. Future case law will further define the nuances of this decision.

For more information concerning this decision or any class/collective action questions, please contact Brad Harvey or any member of our [Class/Collective Action Practice Group](#). For more information about recent developments relating to the NLRB, please contact Bill Trumpeter or any member of our [Labor Relations 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.*

**ATLANTA**  
1170 Peachtree Street N.E.  
Suite 800  
Atlanta, GA 30309

**CHATTANOOGA**  
832 Georgia Avenue  
Suite 1000 Volunteer Building  
Chattanooga, TN 37402

**NASHVILLE**  
150 Fourth Avenue, North  
1200 One Nashville Place  
Nashville, TN 37219