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CLIENT BULLETIN





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# NON-UNION ARBITRATION AGREEMENT VIOLATES EMPLOYEE RIGHTS, NLRB SAYS

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In the first week of the new year, a two-member panel of the National Labor Relations Board, in ***D.R. Horton, Inc.***, concluded that mandatory arbitration agreements which required employees individually to waive the right to pursue claims on a class basis interfered with employees' rights to engage in concerted activity under Section 7 of the National Labor Relations Act. The decision is significant for a number of reasons, not the least of which is the fact that the employer was non-union.

According to the Board panel consisting of Chairman Mark Gaston Pearce (D) and Member Craig Becker (D), who was in his last day of a recess appointment (the decision was not actually *issued* until after Becker was gone), an employee's right to join in the concerted activity of filing a class lawsuit or claim was a substantive right within the Act's protection. The Board panel found that nothing in the Federal Arbitration Act insulated arbitration agreements from established principles under the NLRA. The Board's sole Republican member on the date of the decision, Brian Hayes, was recused and did not participate.

***Background***

Section 7 of the NLRA provides that "Employees shall have the right to self-organization, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .." This "protected concerted activity" provision of the NLRA applies to non-union as well as union employees. Most recently, it has been the basis for the **high-profile "social media" cases** involving action taken against employees for anti-employer "rants" on platforms such as Facebook and Twitter.

D.R. Horton, Inc., a non-union homebuilder based in Florida, required its employees to sign arbitration agreements. The agreement provided that an arbitrator could "hear only Employee's individual claims 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."

A superintendent of the company tried to arbitrate class claims under the Fair Labor Standards Act, and the employer blocked the effort based on the prohibition on

class claims in the arbitration agreement. The superintendent then filed an unfair labor practice charge asserting, among other things, that the agreement interfered with his Section 7 right to file a class claim and to file an unfair labor practice charge with the Board. The Board issued a complaint. An administrative law judge found that the prohibition of class claims did not violate the NLRA, although he found that the agreement unlawfully led employees to believe that they could not file charges with the Board. The Board's Acting General Counsel, Lafe Solomon, filed exceptions to the class claim finding, and Pearce and Becker found that the class claim prohibition violated the NLRA.

***The Decision***

In straightforward fashion, the two-member Board panel noted that the Supreme Court had determined that the Section 7 right to engage in protected activity included the right to file proceedings in court or in an administrative forum. The panel said the same applied to arbitration. According to the panel, class or collective actions "are at the core of what Congress intended to protect by adopting the broad language of Section 7." The panel noted that the Board had held in the past that employers could not secure agreements to waive Section 7 rights on an "individualized" basis but could do so only through collective bargaining. The panel also noted that, where an employee was required to execute a waiver as a condition of employment, there was an implicit threat that the employee would be fired or not hired if he or she refused to sign.

Applying those principles to this case, the panel found that the arbitration agreement waived the employees' right to bring class or collective actions in *any* forum. Because the employer was non-union, the agreements were not entered into through collective bargaining. The agreements were also required as a condition of employment. Accordingly the panel, reversing the ALJ's decision, found that the agreements were unlawful and that the employer, in mandating the agreements, violated Section 8(a)(1) of the NLRA because the agreements restricted Section 7 activity by prohibiting a class or collective action in any forum. The panel made no mention of the Section 7 right of employees "to refrain" from collective activity, a right potentially affected by a class or collective action. (Although it should be noted that an employee has the right to "opt out" of a class action, and must affirmatively "opt in" to be part of a collective action.)

***Conflict with FAA and Supreme Court?***

As our readers know, the Supreme Court has taken an expansive view of the Federal Arbitration Act in two strongly pro-arbitration recent cases, ***14 Penn Plaza v. Pyett*** and ***AT&T Mobility v. Concepcion***. Although the NLRB decision seems to conflict with the broad policy underlying the FAA and these Supreme Court decisions, Pearce and Becker found that there was no conflict. They said that the NLRA applied to arbitration agreements, just as it did to other contracts, and noted that no individual contract required as a condition of employment for an employee covered by the Act could waive the Section 7 right to pursue claims on a class or collective basis. On the other hand, the panel noted that a collectively-bargained waiver could be valid because the involvement of the union in that situation stemmed from an exercise of Section 7 rights (that is, the collective-bargaining process).

Pearce and Becker said that their ruling was limited:

> …we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without the availability of classwide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis.

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***The Impact***

In recent years many non-union employers have turned to mandatory arbitration agreements with employees as a way to stem litigation and lessen the cost of resolving disputes. Although state laws often restricted arbitration, the recent Supreme Court decisions to a large extent have cleared those out of the way. In particular, after *Concepcion*, many non-union employers added express waivers of class or collective actions to their arbitration agreements while also barring employees from bringing those actions in court. These agreements now are at odds with the Board panel's recent decision.

***Can They Even Do This?***

There are questions about the timing of the decision, made on Becker's last business day after his recess appointment expired and not issued until January 6, three days after the Board had lost the three-member quorum required for Board action under the Supreme Court's recent decision in ***New Process Steel***. A newly-constituted Board would be free to change course and create a new rule, but political observers see no chance of that as long as President Obama controls the nominations and appointments to the five seats on the Board. **As we have previously reported**, the President's authority to make his latest "recess" appointments is in question. In a related development, the U.S. Department of Justice released its **internal memorandum** taking the position that the President did have such authority because all Congress did was convene "*pro forma* sessions in which no business was conducted." The DOJ concluded that this was not enough to keep Congress technically "in session," and therefore the President was entitled to make the recess appointments. Notwithstanding the DOJ's position, we expect these recess appointments to be challenged in court, and if they succeed, the Board will have been without a quorum since Becker's term expired.

***Conclusion***

In short, the employer in *D. R. Horton* will have ample grounds to appeal. The next step would be to take the case to a federal court of appeals, and then (possibly) to the Supreme Court. However, the process could take years, and in the meantime, employers are left with uncertainty. Until further clarity can be obtained, employers will need to balance the benefits of arbitration agreements containing class and collective action waivers against the risks associated with a potential NLRA violation.

If you have any questions about these developments, please contact the Constangy attorney of your choice.