WSGR ALERT

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NLRB STRIKES DOWN CLASS ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS

In a recent decision with far-reaching significance for both unionized and non-unionized employers that use mandatory arbitration agreements with their employees, the National Labor Relations Board (NLRB) held that employment arbitration agreements containing class action waivers violate federal labor law. Specifically, in *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, the board found that an agreement imposed as a condition of employment requiring arbitration but precluding employees from filing joint, class, or collective claims addressing their wages, hours, or other working conditions violates Section 8(a)(1) of the National Labor Relations Act (NLRA). This decision has the potential to invalidate all such provisions contained in employment agreements, notwithstanding the Supreme Court's recent *AT&T Mobility v. Concepcion* decision specifically endorsing class action waivers in arbitration agreements.

Background

The 2-0 decision focused on an arbitration agreement used by the national home builder D.R. Horton.[1] Under D.R. Horton's standard employment agreement, both the employees and the company waived their rights to have any claims heard by a judge or jury and instead agreed to bring all claims to an arbitrator. In addition, the agreement provided that the arbitrator could only hear claims on an individual basis, thereby waiving the employees' rights to bring class or collective action on behalf of similarly situated employees in court or in arbitration.

The NLRB's Rationale

The NLRB found that the agreement effectively prohibited the exercise of substantive rights protected by Section 7 of the NLRA. The board pointed to precedent suggesting that concerted legal action addressing wages, hours, or working conditions exercises core Section 7 rights. Because D. R. Horton's agreement waives employees' rights to a judicial forum and precludes them from bringing a class or collective action in arbitration, the board reasoned that the agreement expressly bars employees from exercising their substantive Section 7 rights to concerted *legal* action. Thus, in the board's view, the agreement violates Section 8(a)(1) by expressly restricting protected activity.

The board's decision stands in stark contrast to the Supreme Court's recent decision in *AT&T Mobility v. Concepcion*.[2] In *AT&T Mobility*, the Supreme Court held that state laws invalidating class action waivers violated the Federal Arbitration Act (FAA). In addition, the Supreme Court underscored that the "principal purpose" of the FAA "is to 'ensur[e] that private arbitration agreements are enforced according to their terms,'" and that the parties could limit the issues subject to arbitration in addition to limiting with whom a party will arbitrate its disputes. The Court further noted that "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."

The *D.R. Horton* board went to great lengths to explain why its decision (and the NLRA) did not conflict with the FAA, and further attempted to distinguish the *AT&T Mobility* decision's ramifications for the case before it. How well the board did in this regard likely will be addressed in future litigation. The Supreme Court's *AT&T Mobility* decision, as well as its recent decision in *Compucredit Corp. v. Greenwood*, provides strong support for a broad reading of the FAA and further emphasizes that opponents of arbitration "bear the burden of showing that Congress disallowed arbitration of their claims." As a result, the NLRB's *D.R. Horton* decision almost surely will be challenged.

Implications

It is important to note that the board's decision applies only to employers covered by the NLRA. That said, the NLRA covers most private-sector employers that meet fairly minimal standards for involvement in interstate commerce. For instance, non-retail enterprises with gross inflows and outflows of revenue in excess of $50,000 and retail and manufacturing businesses with a gross

[1] At the time the decision was issued, the board had only three members, including one member whose term expired the day after the decision. The sole Republican member of the board recused himself from the decision, leaving the two Democratic members of the board to decide the issue.

[2] A WSGR Alert on the *AT&T Mobility* decision can be found at http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_class_action_litigation.htm.

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business volume exceeding $500,000 are covered by the NLRA, irrespective of their numbers of employees. Excluded from coverage are public-sector employers, agricultural and domestic employers, employers covered by the Railway Labor Act, and certain small businesses that are exempt based upon their annual volume of business.

Furthermore, the board's decision is limited to agreements with "employees" under the NLRA, which specifically excludes "supervisors" from its coverage. The NLRA defines a "supervisor" as anyone who has authority to, among other things, assign work to other employees, or who must "responsibly direct" other employees as long as they use "independent judgment" in doing so.

What Should Employers Be Doing in Response?

While there are many uncertainties surrounding the decision, one thing is clear—the decision has been made and employers are going to have to live with it, at least for the near term. Even with new recess appointments to the board, it is difficult to imagine the new appointees having the inclination to find a case to reverse this ruling any time soon. Because the NLRB only follows NLRB or Supreme Court precedent, as a practical matter employers will have to contend with the board's *D.R. Horton* decision for some time.

Undoubtedly, the decision hands the plaintiffs' bar a new weapon with which to attack mandatory arbitration claims with explicit class action waivers just as some employers were, with reason, moving to adopt such clauses in light of the Supreme Court's decision in *AT&T Mobility*. Employers with explicit class action waiver clauses in their arbitration agreements should expect the plaintiffs' bar to either file unfair labor practice charges with the NLRB when they encounter them, or to argue that state courts cannot compel arbitration under a clause that, under *D.R. Horton*, arguably violates the NLRA. Including such waivers similarly may result in claims that doing so constitutes "unfair competition" under applicable state law.

Because of the uncertainty caused by the *D.R. Horton* case, employers should undertake a comprehensive review of any employee agreements containing arbitration class action waiver provisions. Moving forward, employers considering the inclusion of such class action waiver provisions in their employee arbitration agreements should reconsider that approach.

As always, employment law attorneys at Wilson Sonsini Goodrich & Rosati are available to assist employers in addressing any of the issues raised by the new decision. For more information, please contact a member of the firm's employment law practice.

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650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsgr_resource@wsgr.com

www.wsgr.com