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LEGAL ALERT

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New NLRB Ruling Curbs Arbitration Agreements, Raises Tensions with Supreme Court Precedent

In a decision certain to invite legal challenge, the National Labor Relations Board (NLRB) recently held that employment arbitration agreements that require employees to waive their rights to collective or class actions violate Section 7 of the National Labor Relations Act (NLRA).

In a much-anticipated decision, *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, the NLRB focused on the validity of a mandatory arbitration agreement that required the arbitration of all claims on an individual basis, thus foreclosing the pursuit of any collective or class action suit. Such arbitration agreements are used regularly in certain industries as a condition of employment, as employers continue to seek additional certainty and control over their litigation risks.

The plurality opinion, joined by Board Chairman Mark Pearce and Member Craig Becker, held that an agreement that precludes employees from filing class or collective claims in any arbitration or judicial forum violates Section 7 of the NLRA, which grants employees the substantive right to engage in various forms of concerted activity, mutual aid and self-protection. According to the plurality, "[t]he board has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation." The plurality held that a mandatory waiver of any collective or class action contravened this protection. The third member, Brian Hayes, recused himself without comment.

The opinion emphasized that employers may still enforce an agreement that any non-collective or class action complaint be handled through arbitration, but such agreements must provide a way for workers to bring collective or class claims in court or in arbitration. Nevertheless, the opinion is likely to force employers into court despite their efforts to require arbitration, in light of the refusal by many arbitration forums to hear collective or class claims. Just last week, the Securities and Exchange Commission published a rule change proposed by the Financial Industry Regulatory Authority, Inc. (FINRA) "to preclude collective action claims by employees of FINRA members . . . from being arbitrated under the Industry Code." *See* Proposed Rule Change to Preclude Collective Action Claims from Being Arbitrated, Exchange Act Release No. 34-66109, 77 Fed. Reg. 1773 (January 15, 2012).

By effectively forcing employers into court despite their efforts to mandate arbitration, the *D.R. Horton* decision may be in significant tension with recent U.S. Supreme Court cases that strongly endorse the use of arbitration as an alternative to litigation. In *CompuCredit Corp. v. Greenwood*, published just days after the *D.R. Horton* decision, an 8-1 majority held that the federal policy expressed in the Federal Arbitration Act (FAA) favoring arbitration "requires courts to enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by contrary congressional command.'" See Sutherland's January 12, 2012 Legal Alert.

The *CompuCredit* decision endorsed and expanded the Court's recent decisions in *Stolt-Nielsen, S.A., et al. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), *Rent-A-Center, West v. Jackson*, 130 S. Ct. 2772 (2010) and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which articulated an expansive interpretation of the FAA in favor of private, binding dispute resolution under employment and consumer contracts. The plurality in *D.R. Horton* distinguished *AT&T Mobility* on the grounds that it contained a conflict between the FAA and state law, whereas the dispute in *D.R. Horton* involved a potential conflict between the FAA and the NLRA. It is unclear whether this distinction survives in light of

the *CompuCredit* decision, which dealt with a potential conflict between the FAA and another federal statute, the Credit Repair Organizations Act, and strongly sided with the FAA's presumption in favor of enforcement of pre-dispute arbitration agreements.

If the courts do view the *D.R. Horton* opinion as infringing upon the federal policy in favor of arbitration, the *CompuCredit* decision tells the courts to inquire whether that policy has been "overridden by contrary congressional command." Seemingly anticipating the *CompuCredit* ruling, the *D.R. Horton* plurality emphasized that by enacting the NLRA, Congress expressly recognized and targeted "the inequality of bargaining power between employees who do not possess full freedom of association . . . and employers who are organized in the corporate form or other forms of ownership association." It remains to be seen whether the courts will view this case as a sufficiently explicit "contrary congressional command" to counter the FAA-mandated preference for arbitration, a preference that has been repeatedly emphasized and articulated by the Supreme Court over the past two years.

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