

Fifth Circuit to Hear Appeal of National Labor Relations Board Decision That Class Action Waivers Violate Workers' Collective Rights

In its recent decision in *D. R. Horton, Inc. v. Michael Cuda*, available [here](#), the National Labor Relations Board (the "Board") held that employee class action claims, whether in court or in arbitration, constitute "concerted activities" protected by Section 7 of the National Labor Relations Act ("NLRA"). Workers thus have a right under federal law to participate in such class or group litigation, the Board reasoned, meaning that employers who require current and prospective employees to sign arbitration agreements that limit them to bringing arbitration claims individually (that is, not as a class) and that bar court claims altogether violate the NLRA and commit an unfair labor practice.

This Board decision potentially limits the effect for employers of the Supreme Court's 2011 decision in *AT&T v. Concepcion*, which we previously described [here](#). The *Concepcion* decision suggested that agreements mandating arbitration while forbidding class-action claims would survive even rigorous state court review because federal law, namely the Federal Arbitration Act, preempts inconsistent state law. The Board's decision in *D. R. Horton* acknowledged the Supreme Court's *Concepcion* decision, but reasoned that, because the NLRA is a federal, not state, law, the Federal Arbitration Act does not preempt it.

D. R. Horton, Inc. recently filed a notice of appeal with the United States Court of Appeals for the Fifth Circuit, challenging the Board's decision. We will monitor the status of the appeal and keep you updated.

In the wake of the Board's decision, employers should exercise caution and seek out the advice of experienced counsel before asking employees to assent to arbitration agreements containing class-action waivers. For more information on this decision, or on employee rights and employer obligations under the National Labor Relations Act more generally, contact an attorney in Ropes & Gray's [labor and employment](#) department.