NLRB Rules that Class Action Waivers in Mandatory Arbitration Agreements Are Unlawful

January 13, 2012

By Jennifer Dunn

In a case involving issues of first impression, the National Labor Relations Board (NLRB) recently held that a mandatory arbitration agreement that waived employees' rights to participate in class or collective actions was unlawful under the National Labor Relations Act (NLRA). *D. R. Horton, Inc.*, Case 12-CA-25764 (1/3/12; released 1/6/12).

Facts

Beginning in 2006, the non-union Employer required all new and current employees to execute a Mutual Arbitration Agreement (MMA) as a condition of employment. The MMA provided, in relevant part, the following:

- All disputes and claims relating to an employee's employment would be determined exclusively by final and binding arbitration;
- An arbitrator could hear only an individual employee's claims, would not have the authority to consolidate the claims of other employees, and did not have authority to consider a proceeding as a class or collective action or to award relief to a group or class of employees; and
- The signatory employee waived the following rights: to file a lawsuit or other civil proceeding relating to his or her employment and to resolve employment-related disputes in a proceeding before a judge or jury.

In 2008, an attorney notified the Employer that it was pursuing arbitration of certain Fair Labor Standards Act (FLSA) claims on behalf of Michael Cuda, a former employee, and a nationwide class of similarly situated employees. The Employer objected, pointing to the MMA's prohibition on arbitration of class actions. Cuda thereafter filed an unfair labor practice charge with the NLRB.

NLRB Decision

The NLRB found the MMA unlawful. It initially held that the MMA's mandatory arbitration provision, which required that all disputes "be determined exclusively by final and binding arbitration," violated the NLRA because it would lead employees reasonably to believe that they could not file unfair labor practice charges with the NLRB.

The NLRB likewise held that the MMA's class action waiver was unlawful. Observing that Section 7 of the NLRA protects employees' rights to improve their working conditions through proceedings in court and administrative forums, the NLRB found that collective pursuit of a workplace grievance in arbitration is equally

protected under Section 7. In the NLRB's view, pursuing employee rights through class actions or collective procedures lies at the "core" of what Congress intended to protect under federal labor law. By requiring that employees refrain from bringing collective or class actions in any forum, including arbitration, the MMA clearly and expressly barred employees from exercising their substantive rights under Section 7. Accordingly, the NLRB concluded that the MMA's class-action waiver provision was invalid.

The Federal Arbitration Act and Supreme Court Precedent Distinguished

The NLRB found no conflict between its holding and the Federal Arbitration Act (FAA). First, the NLRB recognized that the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts. Its finding that an arbitration agreement like the MAA must yield to the NLRA treated that agreement "no worse" than any other private contract that conflicts with federal labor law. Second, the NLRB distinguished the Supreme Court's recent jurisprudence under the FAA that permits enforcement of agreements to arbitrate statutory employment claims. It found those cases inapposite because, in its view, the question presented by the MMA was solely limited to whether the MMA violates employees' right to engage in collective action under the NLRA—and not whether the MMA infringed upon their rights under the FLSA, or other employment statutes.

The NLRB also distinguished the Supreme Court's recent decision in *14 Penn Plaza*, where the Court upheld a union's ability to waive employees' individual rights to bring court actions alleging statutory employment discrimination claims. The NLRB found that the MMA was "not on the same footing" with an arbitration clause "freely and collectively bargained between an employer and a union." It also emphasized that *14 Penn Plaza* addressed solely whether an arbitration clause to which only the union was a party could properly waive employees' individual rights under statutes like Title VII— rather than their right to engage in concerted activity under the NLRA.

Finally, the NLRB found that the Supreme Court's restriction on agreements that compel class arbitration was not implicated by its holding. In both *Stolt-Nielsen* and *AT&T Mobility*, the Supreme Court recently held that a party cannot be required, without his or her consent, to submit to arbitration on a class-wide basis. The NRLB found that neither case controlled in this instance because neither involved the waiver of rights protected by the NLRA. In any event, the NLRB concluded, nothing in its holding required employers to participate in or be bound by a class action.

Impact of the NLRB's Decision

At the conclusion of its decision, the NLRB emphasized that employers remain free to insist that arbitral proceedings be conducted on an individual basis, and that, so long as employers leave open a judicial forum for class and collective claims, they do not run afoul of the NLRA. However, employers—in both unionized and non-unionized settings—cannot compel employees to waive their NLRA rights to collectively pursue litigation in all forums.

The NLRB's ordered remedy reflects the necessary steps employers will have to take to comply with this decision—namely, rescind or revise mandatory arbitration agreements to make it clear to employees that the agreements do not constitute a waiver in all forums of their rights to maintain employment-related class actions, and do not restrict their rights to file charges with the NLRB.

Chairman Mark Gaston Pearce and Member Craig Becker joined in the opinion—Member Brian Hayes recused himself, without any stated reasons. Thus, the decision issued by only two members of the NLRB, which may violate the Supreme Court's decision in *New Process Steel v. NLRB*. The decision also has been called into question by the Supreme Court's January 10th decision in *CompuCredit Corp. v. Greenwood*, in which the Court held that a consumer credit law does not prohibit enforcement of a credit card arbitration agreement that, like the MMA, barred class actions.

More Information

Jennifer A. Dunn
jad@franczek.com
312.786.6585

Related Practices

Labor & Employment
Union-Related Matters
Labor Relations Board Practice