RECENT RULING THAT CLASS ACTION WAIVERS ARE ILLEGAL SHOWS NLRB REMAINS ACTIVE

On January 3, 2012, the National Labor Relations Board (NLRB) ruled that a class action waiver in a mandatory employment arbitration agreement is illegal. *D.R. Horton, Inc. and Michael Cuda*, 357 NLRB No. 184 (2012). This decision comes less than a year after the U.S. Supreme Court upheld such a waiver in a consumer arbitration agreement. *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011). Further, in the days since the D.R. Horton decision was published, the Supreme Court again has upheld a consumer arbitration agreement that contained a class action waiver. *CompuCredit Corp. v. Greenwood*, No. 10-948 (Jan. 10, 2012).

In *D.R. Horton*, the respondent company required its employees to execute mandatory arbitration agreements covering employment-related claims. Part of the agreement required the employees to pursue any such claims individually and not as a part of any class or collective action. Company employee Michael Cuda disregarded this portion of the agreement and filed a collective action in arbitration, which was rejected in accordance with the language of the agreement. Cuda then filed an unfair labor practice charge with the NLRB, claiming that his collective action claim was protected "concerted activity" under the National Labor Relations Act (NLRA), and that by disallowing the claim, the company violated the act.

In a lengthy opinion, the NLRB distinguished the case from *AT&T Mobility* and, although acknowledging that the NLRB's most recent general counsel had written a memorandum to the contrary in 2010, held that the company had committed an unfair labor practice by requiring its employees to arbitrate claims individually. In support of its decision, the NLRB cited its history of upholding employees' rights to sue collectively and likened the arbitration agreement in *D.R. Horton* to "yellow dog" contracts from the early days of modern labor law, when employers attempted to have employees waive their rights under the NLRA as a condition of employment. In so deciding, the NLRB found no conflict between its decision and the Federal Arbitration Act, which was discussed in detail in *AT&T Mobility* and which requires that arbitration agreements be treated no less favorably than any other contracts.

D.R. Horton represents another recent example of the NLRB "flexing its muscles," and applies equally to union and non-union employers. The agency has made headlines over the past year for actively pursuing litigation and for its new posting requirement for covered employers, the effective date of which has been postponed to April 30, 2012. Nevertheless, companies using mandatory arbitration agreements will watch *D.R. Horton's* inevitable appeal closely. (*CompuCredit*, although not an employment case, may be used to attack the viability of *D.R. Horton* going forward. It can be argued that *CompuCredit* requires that

an arbitration agreement be enforced according to its terms unless specific congressional intent otherwise is discerned as to the underlying statute.)

Until that time, the best practice in implementing arbitration agreements appears to be the same as it was after the Supreme Court's 2010 decision in *Stolt-Nielsen S.A., et al. v. Animal Feeds Int'l Corp.* 130 S.Ct. 1758 (2010), to not mention class actions or collective actions in mandatory employment arbitration agreements.

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N|P Employment and Labor Law Group

CHARLESTON
843.577.9440
Cherie Blackburn
Molly Hughes Cherry
Josh Ellis

CHARLOTTE
704.339.0304
John Cole
Deidra Harper
Sean Phelan
Grainger Pierce

COLUMBIA
803.771.8900
Mike Brittingham
Jimmy Byars
Jennie Cluverius
David Dubberly
Vickie Eslinger
William Floyd
Joan Hartley
Angus Macaulay
Susi McWilliams
Nikole Mergo
Sue Odom

GREENSBORO
336.373.1600
Peter Pappas
Bill Wilcox

GREENVILLE
864.370.2211
Grant Burns
Leon Harmon
Jamie Hedgepath
Rusty Infinger
Tom Stephenson

HILTON HEAD
843.689.6277
Melissa Azallion

MYRTLE BEACH
843.213.5400
Cherie Blackburn
Molly Hughes Cherry

RALEIGH
919.755.1800
David Garrett
Ernie Pearson
David Robinson

NEXSEN | PRUET