

Advisory

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NLRB Strikes Down Mandatory Class Action Waivers

The National Labor Relations Board ("NLRB") recently held in *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) that an employer violates the National Labor Relations Act ("NLRA"), and thus commits an unfair labor practice, by requiring its employees "as a condition of employment to sign an agreement that precludes them from filing joint, class or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial." This decision appears to fly in the face of recent pro-arbitration decisions issued by the United States Supreme Court, and has potentially significant implications for employers who require employees to sign such class action waivers as a condition of employment. The NLRB based its decision on Section 7 of the NLRA, which protects the rights of both union and non-union employees alike to "engage in ... concerted activities for the purpose of ... mutual aid or protection", including the right to assert a class action claim pertaining to "wages, hours or other working conditions." In concluding as it did, the Board expressly rejected the position taken by the then General Counsel of the NLRB in a 2010 memorandum (GC Memo 10-06) that a class action waiver was valid provided the employee had the right to collectively challenge the waiver and would not be subject to retaliation for doing so.

The NLRB denied that its ruling conflicted with the Federal Arbitration Act ("FAA"), as the right to file a class action claim under the NLRA is substantive and "the intent of the FAA was to leave substantive rights undisturbed." Nor did the Board see any incompatibility with the United States Supreme Court's recent decision, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that a California law prohibiting class action waivers in consumer arbitration contracts was preempted by the FAA. The critical distinctions, according to the NLRB, are that *AT&T Mobility* did not involve class action waivers in the employment context, and turned on a conflict between the FAA and state law, whereas the NLRA and FAA are both federal laws.

While the decision is certainly troubling, employers can take some comfort in the fact that the NLRB itself acknowledged the limitations of its decision. Specifically, the NLRB stated that: (1) the decision applies only to non-managerial employees; (2) the ruling does not mandate that class actions proceed in court as opposed to in arbitration, nor does it bar agreements mandating arbitration of individual employee claims; rather, (3) a mandatory arbitration provision simply had to leave open the option of either a judicial or arbitral forum to raise class action claims by the employee; and (4) the ruling also leaves unaffected class action waivers entered into between a union and an employer as part of a collective bargaining process.

Given the apparent tension between this decision and the Supreme Court's decision in *AT&T Mobility*, the NLRB is not likely to have the last word on this issue. Instead, the United States Supreme Court may well have the final say. For the time being, though, employers would be well advised to consult with counsel before seeking to enforce any class action waiver provisions already executed by employees or required as a condition of employment. We will continue to monitor this situation and provide updates as developments warrant.

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