Employee Must Arbitrate Individual Wage Hour Claims, California Court Rules, Rejecting NLRB Opinion

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Where the parties' arbitration agreement was neither unconscionable nor in violation of public policy, the employee must arbitrate her individual wage and hour claims against her employer, the California Court of Appeal has ruled, affirming an order compelling arbitration in a class action for California Labor Code violations. *Nelsen v. Legacy Partners Residential, Inc.*, No. A132927 (Cal. Ct. App. Jul. 18, 2012). Significantly, the Court rejected the employee's reliance on the National Labor Relations Board's *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). The Board ruled in *D.R. Horton* that class action waivers in employment arbitration agreements violated the National Labor Relations Act. The Court noted there was no indication in the case before it that the plaintiff was covered by the NLRA. In any event, the Court was not inclined to follow the NLRB decision, declaring it not binding and that it went beyond the scope of the NLRB's expertise.

Background

Lorena Nelsen was a property manager for Legacy Partners Residential, Inc. ("LPI"). When she began working for LPI, among other documents, she signed an arbitration agreement in a handbook acknowledgment form. The arbitration agreement provided that any claim, dispute, or controversy between her and LPI regarding her employment was subject to arbitration.

Subsequently, Nelsen, on behalf of herself and current and former LPI property managers, filed a class action lawsuit against her former employer for violations of the California Labor Code. Based on the arbitration agreement, LPI asked the trial court to order arbitration. Nelsen opposed, arguing the agreement was unconscionable and violated public policy. The trial court rejected Nelsen's arguments and ordered her to submit her individual claims to arbitration. Nelsen appealed.

Applicable Law

In deciding whether to enforce an arbitration agreement, California courts examine whether its terms are both procedurally and substantively unconscionable. *Procedural unconscionability* focuses on oppression or unfair surprise; *substantive unconscionability* focuses on overly harsh or one-sided terms. The two are interrelated and are to be balanced in determining the enforceability of an arbitration provision. A sliding scale is used to assess procedural unconscionability in proportion to substantive unconscionability: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 114 (Cal. 2000).

Not Unconscionable

Nelsen argued the arbitration agreement was unenforceable because it was procedurally and substantively unconscionable. While the Court found the agreement had several characteristics of procedural unconscionability (such as its one-sidedness, its use of legalese, and the fact the arbitration provision was not highlighted), it nevertheless did not find the agreement unenforceable. The California Supreme Court had ruled a nearly identical arbitration agreement was enforceable. Further, Nelsen failed to offer any other evidence demonstrating the enforcement of the agreement would result in harsh or unjustifiably one-sided results.

Did Not Violate Public Policy

Nelsen argued the arbitration agreement was unenforceable because it violated public policy under *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). In *Gentry*, the California Supreme Court held a class action waiver must be invalidated if, after applying various factors, a court determines class arbitration is "likely to be a significantly more effective practical means of vindicating the rights of the affected employees than

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individual litigation or arbitration."

The *Nelsen* court did not find this argument persuasive. Here, the arbitration agreement was silent regarding the issue of class action waivers. The Court concluded the agreement applied only to Nelsen's individual dispute with LPI. As the agreement did not refer to claims asserted by other employees, the Court concluded the agreement did not permit class arbitration. Further, Nelsen offered no evidence demonstrating that classwide arbitration was a more effective practical means of vindicating the rights of the affected employees. The Court decided Nelsen was not entitled to a remand for a second chance to do so.

Finally, *Nelsen* argued the arbitration agreement was unenforceable because it violated federal public policy under the NLRB's decision in *D.R. Horton* (petition for review of this decision is pending in the U.S. Court of Appeals for the Fifth Circuit, No. 12-60031). The Court rejected Nelsen's argument. The Court noted it was not bound to follow *D.R. Horton*, but said that even if it were inclined to consider the decision, several factors "caution[ed] against doing so." The Court noted the subject of *D.R. Horton* — "the interplay of class action litigation, the FAA [Federal Arbitration Act], and section 7 of the NLRA — [fell] well outside the Board's core expertise in collective bargaining and unfair labor practices."

The Court further observed that *D.R. Horton* reflected a "novel interpretation of section 7 and the FAA," and the NLRB cited no precedent supporting its interpretation. The Court also pointed out that at least two federal courts have rejected the NLRB's opinion. In addition, there was no evidence suggesting Nelsen was covered by the NLRA or that *D.R. Horton* had any relevance to Nelsen's arbitration agreement. Accordingly, the Court affirmed the order compelling Nelsen to arbitrate her individual claims against LPI.

Implications

This decision is a positive development for employers using employee arbitration agreements. Moreover, the Court provided a well-reasoned critique of *D.R. Horton*. Nevertheless, arbitration agreements, including those with class action waivers, remain subject to challenge in California and in other forums, including before the NLRB. At present, the NLRB appears committed to enforcing *D.R. Horton* and striking down class action waivers in arbitration agreements under its jurisdiction. Employers should consult with legal counsel when reviewing the enforceability of arbitration agreements.