Employer's Mandatory Arbitration Clause Waiving Employee's Right to Sue in Court Upheld

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A federal appeals court in New Orleans has overturned the National Labor Relations Board (NLRB) ruling that held an employer violated its workers' rights by requiring them, as a condition of employment, to agree to resolve all employment-related disputes individually through arbitration. *D.R. Horton, Inc. v. NLRB*, No. 12-60031 (5th Cir. Dec. 3, 2013). The arbitration agreement prohibited employees from making class action claims against the employer in court or before an arbitrator.

The majority of the U.S. Court of Appeals for the Fifth Circuit concluded the NLRB failed to give "proper weight" to the Federal Arbitration Act (FAA), which, under recent Supreme Court rulings, requires arbitration agreements be enforced "according to their terms," unless Congress has specified otherwise.

However, the Fifth Circuit agreed with the NLRB that the employer's arbitration agreement violated the National Labor Relations Act (NLRA) because it did not state clearly that employees were not prohibited from filing unfair labor practices charges with the NLRB.

The Facts

Employees in D.R. Horton, Inc., who were not represented by a union, were required to sign a "Mutual Arbitration Agreement" ("MAA"). The MAA provided that all employment-related disputes be resolved through individual arbitration and that the right to resort to a judicial forum was waived. In other words, employees could not pursue class or collective litigation of such claims in any forum — arbitral or judicial. The MAA said that:

- all disputes and claims relating to the employee's employment with the company (with some exceptions) would be determined exclusively by final and binding arbitration;
- the arbitrator could "hear only Employee's individual claims," would not have the authority to consolidate the claims of other employees and would not have the authority "to fashion a proceeding as a class or collective action or to award relief to a group of employees in one arbitration proceeding"; and
- the signatory employee would waive "the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Company" and "the right to resolve employment-related disputes in a proceeding before a judge or jury."

NLRB Decision

The NLRB ruled the company's mandatory arbitration agreement violated the NLRA because it required employees to waive their right to join together to challenge company decisions. The NLRA, the Board said, confers on employees the right to pursue discrimination, wage and hour and other workplace-related claims in a joint, class or collective fashion as "protected concerted activity." The Board held "employers may not compel employees to waive their NLRA right collectively to pursue litigation of employment claims in all forums, arbitral and judicial." The Board also concluded the agreement violated the NLRA for the added reason that its language, which barred employees from starting "a lawsuit or other civil proceedings" relating to their employment, would lead employees reasonably to believe they were prohibited from filing unfair labor practice charges with the Board. *D.R. Horton*, 357 NLRB No. 184 (2012).

Appeals Court Decision

The Fifth Circuit, however, denied enforcement to much of the Board's order because the NLRB had failed to give sufficient weight to the FAA's policy of favoring private dispute resolution based on the

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parties' own arbitration agreement — here, the MAA. Neither the NLRA's text nor its legislative history contains a congressional command against application of the FAA, the Court pointed out. Thus, absent a contrary congressional command, the Court held that the MAA should be enforced according to its terms. The possible inequality in bargaining power between an employer and employee, the Court said, did not require a different result.

The NLRB argued that its ruling fell within the "savings clause" of the FAA (stating that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract") because it banned class action waivers in all employment agreements, not only arbitration agreements. The Fifth Circuit rejected this argument based on *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S.Ct. 1740 (2011), where the U.S. Supreme Court struck down a California state law banning class action waivers in consumer arbitration contracts. The Supreme Court held the state law conflicted with the FAA, and therefore had to yield. The FAA's purpose, it said, is to require arbitration agreements be enforced according to their terms. This often was necessary to streamline the dispute resolution process by avoiding the procedural hurdles and delays attending court litigation, especially complex, multi-party litigation. The Fifth Circuit held the NLRB's ruling forbidding class action waivers in employment arbitration agreements had the same effect as the state law involved in *Concepcion*, it would actually discourage the use of individual arbitration agreements to provide streamlined proceedings.

However, the Fifth Circuit agreed with the NLRB that the MAA was impermissibly broad in that it reasonably could be read by employees to bar them from filing charges with the NLRB. The Court's concern was that the MAA's waiver of "the right to file a ... civil proceeding relating to the employee's employment with the Company" could limit employee access to the Board. The employer, it held, must clarify the agreement so it does not appear to prohibit such right.

The Court's decision upholding an employer's arbitration agreement that requires the resolution of workplace controversies by arbitration while banning class actions in any forum is significant. Many employers have implemented mandatory arbitration agreements in response to the rise in employment-related class action lawsuits.

Employers who have implemented class or collective waivers in arbitration agreements should consider reviewing the numerous issues presented by these accords in consultation with counsel to determine whether any modification is indicated in light of this decision.

If you have any questions about this case or other workplace developments, please contact the Jackson Lewis attorney with whom you regularly work.