Labor and Employment ADVISORY

January 13, 2012

NLRB Rules Against Requiring Employees to Sign Mandatory Arbitration Agreements Waiving Class Action Rights

On January 3, 2012, the National Labor Relations Board (NLRB or the "Board") held that an employer committed an unfair labor practice by requiring employees, as a condition of their employment, to sign a mandatory arbitration agreement waiving the right to pursue actions against their employer on a class or collective basis. The Board found that home builder D.R. Horton's required arbitration agreement calling for mandatory arbitration on an individual basis violated § 8(a)(1) of the National Labor Relations Act (NLRA) by denying employees the right to participate in concerted action for their mutual aid or protection.

Background

The dispute began in 2008, when a D.R. Horton superintendent, Michael Cuda, attempted to challenge his classification as an exempt employee under the Fair Labor Standards Act (FLSA). Cuda notified D.R. Horton that he intended to represent a nationwide class of superintendents who claimed to have been misclassified under the FLSA. D.R. Horton responded to the complaint by pointing to the "Mutual Abritration Agreement" (MAA) that all employees were required to sign as a condition of employment. The agreement required all disputes arising out of employment with D.R. Horton to be decided exclusively through arbitration and required arbitrators to hear individual claims only, precluding them from fashioning class or collective proceedings. Thus, functionally, the agreement required employees to waive their right to a judicial forum and instead agree to resolve all employment-related claims through individual arbitration.

When Cuda notified D.R. Horton of his intent to assert the FLSA claims in arbitration on a class-wide basis, D.R. Horton objected, pointing to the MAA language prohibiting class or collective proceedings in arbitration. Cuda responded to such objections by filing an unfair labor practice charge against the company, which resulted in the NLRB issuing a complaint against D.R. Horton.

The NLRB's Decision

The NLRB complaint focused on two issues: (1) whether D.R. Horton interfered with employees' access to the NLRB and violated § 8(a)(4) of the NLRA, the act's anti-retaliation provision, by requiring employees, as a condition of employment, to submit all disputes to arbitration; and (2) whether the

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company's mandatory arbitration agreement precluding arbitration of claims on a class or collective basis violated § 8(a)(1) of the NLRA by restricting employees' right to engage in concerted action for their mutual aid or protection. The Board found that D.R. Horton had violated § 8(a)(4) because the language of the MAA could be understood to prohibit employees from filing complaints with the NLRB. More significantly, the NLRB found that the MAA's requirement that arbitration under the agreement be conducted only on an individual basis violated § 8(a)(1) of the NLRA. The Board's decision was based on the principle that employees have a right to seek to improve their working conditions through judicial or arbitral proceedings, and that participating in these proceedings on a class-wide or collective basis is legally protected concerted action.

The Board also explained that its holding does not conflict with the Federal Arbitration Act (FAA), because the Supreme Court has explained that the FAA does not require a party to relinquish substantive rights afforded by a statute. The Board noted that the NLRA provides employees the substantive right to engage in concerted action, and enforcing D.R. Horton's policy of requiring employees to sign the MAA would directly violate that right.

Implications of the *D.R. Horton* Decision

It is important to note that the NLRB's decision is limited in scope in several important respects. The Board only addressed the narrow circumstances when an employer requires employees to forgo the right to arbitrate on a class or collective basis *as a condition of employment*. The decision does not address whether employers may ask employees voluntarily to forgo the right to proceed on a class or collective basis not as a condition of employment, or whether employers may provide other inducements to obtain such agreement from employees. Additionally, the decision only addresses cases where employers preclude class or collective actions in all forums and thus leaves open the question of whether employers may require employees to sign agreements providing that class or collective actions must proceed in arbitral rather than judicial forums. Lastly, the decision only applies to employees as they are defined under the NLRA, and thus the ruling has no impact on managers, supervisors or independent contractors who properly fall outside of the coverage of the NLRA.

The *D.R. Horton* decision could lead the NLRB to issue more complaints against employers using mandatory arbitration agreements to preclude class and collective actions; however, the decision is widely expected to be appealed to a federal Court of Appeals and ultimately the Supreme Court, and thus, the long-term impact of the decision is uncertain. Employers should consult counsel to discuss specific risks and strategic decisions relating to current or proposed mandatory arbitration agreements.

The NLRB decision can be viewed at: https://www.nlrb.gov/cases-decisions/case-decisions/board-decisions.

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