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NLRB Rules Class Action Waivers Imposed as Condition of Employment In Mandatory Pre-Dispute Arbitration Procedure Are Unlawful

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The National Labor Relations Board (the "Board") has held that it is an unfair labor practice under the National Labor Relations Act ("NLRA" or "Act") for employers to mandate pre-dispute arbitration agreements barring employees from bringing class or collective action statutory claims in court and in arbitration. Such a provision, the Board reasoned, interferes with the employee's statutory right under Section 8(a)(1) of the NLRA to engage in concerted activities for mutual aid and protection as protected under Section 7 of the Act. In this regard, even non-union employees enjoy Section 7 rights so long as they are not supervisors, managerial employees, or independent contractors, categories of workers excluded from the NLRA's protections. *D.R. Horton, Inc.,* 357 NLRB No. 184 (January 3, 2012).

Clearly, the Board's decision has important implications for both unionized and non-union employers, and serves as a reminder that protected, concerted activity under the NLRA is not limited to union-related activity, but also may include the right to improve working conditions through class and collective litigation whether in court, before an administrative agency, or in arbitration. Section 7 of the NLRA states, in relevant part, that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 USC § 157 (emphasis added). Thus, Section 7 gives covered employees the right to engage in concerted activities even though no union activity or collective bargaining is contemplated by the employees. Section 8 of the NLRA (29 USC § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]."

Notably, the arbitration clause at issue in *D.R. Horton* was *not* found in a collective bargaining agreement ("CBA"). Rather, the clause was contained in what D.R. Horton called a Mutual Arbitration Agreement ("MAA"), which the Company imposed unilaterally as a condition of employment. Under D.R. Horton's MAA, as a condition of employment, all employees were barred from pursuing class or collective actions in any forum, judicial or arbitral. In a plurality decision authored by Board Members Pearce and Becker, the NLRB held that employees' ability to join together as a class for purposes of bringing a claim against their employer constitutes "concerted activity" for purposes of "mutual aid or protection" under Section 7. As such, D.R. Horton's mandatory arbitration provision was an unlawful restraint of statutorily protected rights.

The Board's Decision

Charging Party, Michael Cuda, was employed by D.R. Horton as a superintendent from July 2005 to April 2006. Cuda's continued employment was conditioned on his signing the MAA, which he did. In 2008, Cuda attempted to file a collective action on behalf of himself and those "similarly situated" under the Fair Labor Standards Act, alleging that they had been improperly classified as overtime-exempt employees. D.R. Horton replied that Cuda had failed to give an effective notice of intent to arbitrate, citing the language in the MAA that barred arbitration of collective claims. Cuda filed an unfair labor practice charge and an Administrative Law Judge determined that the class action waiver was permissible. Cuda appealed to the Board, which reversed.

The decision, which was one of the Board's last rulings before Member Craig Becker's recess appointment ended, hinged on four principal factors. *First*, the Board cited its long-established precedent holding that an employee's participation in a collective legal challenge – whether through grievance arbitration or litigation – constitutes protected activity under Section 7 of the Act. "[C]ollective efforts to redress workplace wrongs or improve workplace conditions," the Board stated, "are at the core of what Congress intended to protect by adopting the broad language of Section 7 . . . [and are] central to the [NLRA]'s purposes."

Second, the Board held that the maintenance of the MAA is unlawful under the standards set out in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), because the MAA explicitly restricted activities protected by Section 7.

Third, the Board cited Supreme Court cases – notably *National Licorice Co. v. NLRB,* 309 U.S. 350 (1940), and *J.I. Case Co. v. NLRB,* 321 U.S. 332 (1944) – for the proposition that individual employment contracts cannot waive rights guaranteed by the NLRA. Thus, according to the Board, it "makes no difference" that the restriction here was embodied in an agreement between the employee and the employer.

Fourth, the Board cited the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq. ("N-LG Act"), which declared a public policy against interference with "concerted activities for the purpose of . . . mutual aid or protection" (N-LG Act § 102), and its provision that "any . . . undertaking or promise in conflict with [that] public policy . . . shall not be enforceable in any court of the United States" (N-LG Act § 103). This public policy champions the "full freedom of association" to engage in concerted activities to improve wages, hours, and working conditions through group litigation or arbitration, the Board plurality reasoned in finding the MAA illegal.

The Board rejected any contention that the circumstances presented brought the NLRA into conflict with the Federal Arbitration Act ("FAA") as interpreted and applied in the U.S. Supreme Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991), and its progeny. In *Gilmer,* the Supreme Court held that an individual arbitration agreement may not lawfully require that a party forgo substantive rights afforded by statute.

Here, the Board reasoned, its ruling was consistent with *Gilmer* and the FAA, because the MAA required employees to forgo the NLRA Section 7 substantive right to engage in the concerted activity of filing a class or collective action. Accordingly, the FAA's policy favoring private arbitration agreements could not trump the NLRA's protection of concerted activity.

Departure from Supreme Court Precedent

Notably, the Board distinguished the Supreme Court's ruling in *14 Penn Plaza LLC v. Pyett,* 356 U.S. 247 (2009), where the Court held that in exchange for other collectively bargained concessions by the Employer, a union could lawfully negotiate an arbitration clause requiring that employees arbitrate their statutory age discrimination claims. While recognizing that a union may waive certain Section 7 rights in exchange for employer concessions, here, the MAA was not a collectively bargained provision but rather was imposed by the employer as a condition of employment.

The Board carefully tried to sidestep the Supreme Court's recent decisions in *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758 (2010). In *Stolt-Nielsen S.A.*, the high Court considered whether parties to a commercial shipping agreement could be required to submit to class arbitration when the agreement's arbitration clause was silent on this issue. Although finding no basis to permit class arbitration in *Stolt-Nielsen*, the Supreme Court ruled that so long as there is a contractual basis for concluding the parties agreed to class arbitration, it would defer to those wishes. The Board distinguished this holding, explaining that *Stolt-Nielsen S.A.* involved a commercial agreement, not an employment agreement, anddid not involve a waiver of substantive rights protected by the NLRA.

In *AT&T Mobility*, the Court addressed whether a class action waiver found in an consumer arbitration agreement, signed in exchange for wireless cell phone services, was permissible under the FAA, despite a California law holding such class action waiver to be unconscionable and thereby unenforceable. The Supreme Court held that the FAA preempted California state law and such a waiver was permitted. *AT&T Mobility*, the NLRB reasoned, was a case about consumer class actions, whereas *D.R. Horton* involved the workplace and substantive rights granted all employees under the NLRA. Furthermore, *AT&T Mobility* involved a conflict between the FAA and state law, which was governed by the Supremacy Clause, whereas *D.R. Horton* addressed the interaction of two federal statutes (the FLSA and FAA), a key distinction, said the Board.

"*Limits*" *of the Decision*

In closing, the Board opined that its holding was limited. For example, the NLRA only covers certain classes of "employees" – excluding supervisors, government employees, and independent contractors – and only protects "concerted activity." Accordingly, employer policies which do not entirely foreclose class and collective actions by employees are unlikely to implicate the NLRA. Moreover, the Board's discussion of *Pyett* and similar cases involving union agreements to waive certain employee rights suggests that the result might have been different had the MAA been the product of a collectively bargained agreement. In addition, the Board explicitly acknowledged that it was not reaching the difficult questions of (1) whether an employer could require the waiver of employee rights to pursue class or collective actions in court while maintaining class arbitration as an option; and (2) whether an employer could lawfully agree with an employee to resolve employment disputes through non-class arbitration rather than in court where such an agreement was not a condition of employment.

Given the tangled web of federal, state and local statutes – as well as decisional law – that this ruling implicates, appellate review is almost certain to occur and it is possible that the Supreme Court will address this issue in the not too distant future. Whether it will endorse the Board's view remains to be seen.

What D.H. Horton Means for Employers

Many employers have chosen not to require mandatory pre-dispute arbitration agreements for reasons of public policy. Others have concluded that providing mandatory pre-dispute arbitration procedures encourages employees to utilize the forum when they might otherwise simply accept the employer's "position" rather than litigate the point in court. For those employers who have adopted, or are considering adopting, a pre-dispute mandatory arbitration procedure covering employee statutory claims while barring resort to a judicial forum, the viability of such agreements is now uncertain in the wake of *D.R. Horton*. Given this decision, from the Board's perspective, whether employers can mandate as a condition of employment that individuals waive their own substantive statutory rights, if those rights are protected under the NLRA, is an open question.

Accordingly, pending appellate review, employers should "let the dust settle," but certainly consider the following.

- Employers who currently have in place mandatory arbitration agreements withclass action waivers should immediately examine the language of their agreements to evaluate whether such agreements can survive the Board's decision. *D.R. Horton* informs that claims brought by employees under federal, state and local employment laws, such as Title VII, the FLSA or state human rights laws, can no longer be subject to total class action waivers *unless* they are collectively bargained.
- Employers with class action waivers in their pre-dispute mandatory arbitration agreements must now consider how they wish to address potential class action claims. The Board did not address whether an agreement permitting class claims in arbitration but barring resort to a judicial forum would violate the NLRA. Employers, therefore, may have the option of requiring employees to forgo class claims in court so long as class/collective claims may be brought in arbitration. This decision requires weighing the pros and cons of the arbitration forum, and deciding which dispute resolution avenue best suits the business's needs.
- The Board noted that waiver of class action rights reached through collective bargaining is not on the same footing as a waiver of such rights by an individual employee that is imposed as a condition of employment. As such, unionized employers may wish to consider pursuing concessions during contract negotiations in exchange for the union's agreement barring class/collective actions in arbitration.
- While not altogether clear, the Board's plurality decision does not appear to outlaw pre-dispute mandatory arbitration procedures limited to individual statutory claims so long as they are supported by adequate consideration such as employment or continued employment.
- While this issue requires continued monitoring, it is possible that individually negotiated class action waivers, which are not made a mandatory term or condition of employment but are obtained in exchange for valuable consideration, might possibly survive the Board's scrutiny.
- Finally, before entering into any pre-dispute mandatory arbitration procedure covering statutory employment claims, barring resort to a judicial forum, the employer should consult with counsel.

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