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The Fifth Circuit Court of Appeals Rejects the NLRB's *Horton* Decision on Class Action Arbitration Waivers

On December 3, 2013, the U.S. Court of Appeals for the Fifth Circuit issued its long-awaited decision in *D.R. Horton, Inc. v. National Labor Relations Board*, 2013 U.S. App. LEXIS 24073 (5th Cir. Dec. 3, 2013). The Fifth Circuit rejected the controversial decision of the National Labor Relations Board ("NLRB") in which the NLRB held that an employer violated the National Labor Relations Act ("NLRA") by requiring its employees to sign an arbitration agreement that prohibited an employee from pursuing claims in a collective or class action.

D.R. Horton, Inc. ("Horton") is a home builder, operating in over 20 states. It began requiring its employees to sign a mutual arbitration agreement, which provided that employees could not pursue class or collective claims in an arbitral or judicial forum. In other words, the arbitration agreement required employment-related disputes to be resolved through individual arbitration.

In the underlying decision, the NLRB found the arbitration agreement violated the NLRA because it precluded employees "from filing joint, class, or collective claims" addressing employment-related disputes in any forum. The NLRB further held that the relevant NLRA provisions did not conflict with the Federal Arbitration Act ("FAA").

The NLRB's position already has been rejected in other cases by a number of federal district courts and federal appellate courts, including the Second, Eighth, and Ninth Circuits. The NLRB's decision as to Horton itself, however, remained subject to review by the Fifth Circuit.

The Fifth Circuit began its analysis by avoiding or rejecting procedural and constitutional issues, such as the validity and expiration of a recess appointment of an NLRB member and the authority of the NLRB panel to issue its decision.

The Fifth Circuit then discussed the substance of the NLRB's decision. While the Fifth Circuit recognized that Section 7 of the NLRA may protect the rights of employees to pursue class or collective actions, the court noted that this does not conclude the inquiry. Rather, as the court noted, the FAA has "equal importance" in the court's review.

The court noted that under the FAA, an arbitration agreement must be enforced according to its terms. There are two exceptions to this rule: the court may invalidate an arbitration agreement (1) upon "such grounds as exist at law or in equity for the revocation of any contract" (the "Savings Clause"), or (2) if application of the FAA is precluded by another statute's contrary congressional command.

In its underlying decision, the NLRB relied on the Savings Clause exception, finding that the arbitration agreement violated the protected concerted activity provisions of the NLRA. The Fifth Circuit rejected this analysis. Relying on the U.S. Supreme Court's 2011 decision in *AT&T*

Mobility, LLC v. Concepcion, the court found that the NLRB's interpretation – requiring that employees have access to collective procedures in an arbitral or judicial forum – is "an actual impediment to arbitration and violates the FAA." Therefore, the NLRB's interpretation was at odds with the Supreme Court's mandate in *Concepcion* that otherwise valid arbitration agreements be enforced according to their terms.

Moreover, the Fifth Circuit found that the second exception to application of the FAA likewise did not apply, because "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." Furthermore, the court found that a contrary congressional command could not be inferred from any assertion of an inherent conflict between the FAA and the purpose of the NLRA.

Although the Fifth Circuit rejected the NLRB's decision invalidating the waiver of class procedures in the arbitration agreement, the Fifth Circuit did uphold the NLRB's decision that Horton violated Section 8(a)(1) of the NLRA, because an employee would reasonably interpret the arbitration agreement as prohibiting the filing of a claim *with the NLRB*. Since the arbitration agreement was ambiguous about whether an employee still had the right to file a claim with the NLRB, the agreement could be read as prohibiting an employee from doing so. The Fifth Circuit agreed with the NLRB that this violated the NLRA.

The Fifth Circuit's decision hammers yet another nail into the coffin of the NLRB's *Horton* decision. The decision will certainly be relied upon by employers in federal and state court challenges to the enforcement of arbitration agreements containing class waiver provisions. The recently-reconstituted NLRB, however, likely will not readily accept this judicial repudiation of its position. The Board may try to appeal this decision to the U.S. Supreme Court. The NLRB may also continue asserting its *Horton* arguments in other cases involving arbitration agreements with class waiver provisions, especially cases in parts of the country where a federal court of appeals has not already rejected its arguments. *Stay tuned!*

In the meantime, and at a minimum, employers who use arbitration agreements with their employees may wish to review their agreements to make sure they do not suggest or imply that employees are prohibited from filing administrative claims with agencies such as the NLRB and the EEOC.

For more information, please contact the Employment Law attorneys listed below, or your regular Rutan & Tucker attorney.

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