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# Calif. Appeals Court Refuses To Follow DR Horton

By **Abigail Rubenstein**

Law360, New York (July 19, 2012, 9:18 PM ET) -- A California appeals court on Wednesday refused to heed the National Labor Relations Board's ruling that arbitration agreements containing class waivers can violate federal labor law, saying that a property manager hoping to bring a wage-and-hour class action must pursue individual arbitration.

The First Appellate District found that former Legacy Partners Residential Inc. property manager Lorena Nelsen could not prove that the arbitration agreement in the company's employee handbook was unconscionable or that enforcing it, despite its preclusion of class arbitration, would violate the law or public policy.

The appeals court rejected the claim that the NLRB's ruling in *D.R. Horton Inc. v. Michael Cuda* showed that enforcing the arbitration agreement would violate federal law. In the controversial ruling, the NLRB had held that requiring employees as a condition of employment to waive the option of filing collective claims over wages, hours or working conditions in any forum runs afoul of the National Labor Relations Act.

Noting that it is not bound by the NLRB's decision, the appeals court said there were many factors against finding it persuasive, including that the decision was rendered by only two board members and that its subject matter "falls well outside the board's core expertise." The appeals court also pointed out that several federal courts — as well as the Second Appellate District in *Iskanian v. CLS Transportation Los Angeles LLC* — have rejected the NLRB's decision.

Even if the board's ruling were persuasive, it would not apply to Nelsen's case because she would be excluded from the NLRA's protections as a managerial employee, the First District said.

The appeals court also rejected claims that the arbitration agreement was unconscionable, saying that another California appeals court had upheld a nearly identical agreement.

And it rebuffed the argument that the California Supreme Court's decision in *Gentry v. Superior Court*, which discouraged class action waivers in employment cases, barred the enforcement of the arbitration agreement — though it declined to go as far as to decide that the precedent had been overturned by the U.S. Supreme Court's pro-arbitration ruling in *AT&T Mobility LLC v. Concepcion*, as the court in *Iskanian* did.

“The court essentially said the plaintiff must honor her promise to resolve employment disputes through arbitration,” said Mark J. Payne of Rutan & Tucker LLP, who represents Legacy Partners. “It is significant because the court rejected various creative attacks on these arbitration agreements and said that those arguments can't withstand the strong public policy in favor of arbitration.”

An attorney for Nelsen did not immediately respond to a request for comment Thursday.

Nelsen lodged her suit as a putative class action in July 2010, alleging that Legacy Partners violated state wage laws by failing to pay overtime, provide meal and rest breaks, timely pay wages, pay wages upon termination, provide accurate itemized wage statements maintain payroll records, or reimburse workers for business expenses. Her complaint also alleged a violation of California's Unfair Competition Law.

The company sought to compel individual arbitration based on the arbitration agreement. The trial court granted the employer's request, prompting the appeal.

Nelsen is represented by R. Rex Parris, Alexander R. Wheeler, Jason P. Fowler, Kitty Szeto and Douglas Han of the R. Rex Parris Law Firm and by attorney Edwin Aiwazian.

Legacy Partners is represented by Mark J. Payne and Brandon L. Sylvia of Rutan & Tucker LLP.

The case is *Lorena Nelsen v. Legacy Partners Residential Inc.*, case number A132927, in the Court of Appeal for the State of California, First Appellate District.

--Editing by Kat Laskowski.

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