

Management Alert



Fifth Circuit Sets Aside NLRB Rule Prohibiting Class Action Waivers

This morning, in a case of cardinal importance to all employers, the U.S. Court of Appeals for the Fifth Circuit issued the long-awaited *decision* in *D.R. Horton, Inc. v. NLRB*, No. 12-60031 (Dec. 3 2013). Viewed as a “win” for employers, the Fifth Circuit set aside the NLRB’s highly controversial January, 2012 opinion, in which the NLRB held that the National Labor Relations Act (“NLRA”) prohibits employers from requiring mandatory arbitration agreements that preclude employees from filing class or collective claims in any forum. The Fifth Circuit held that the NLRB’s decision in *D.R. Horton* conflicted with the Federal Arbitration Act (“FAA”), which requires that arbitration agreements that are otherwise lawful be enforced as written. *D.R. Horton*, a national homebuilder headquartered in Dallas, had instituted a mandatory arbitration agreement that “precluded [employees] from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.” The NLRB viewed this prohibition as a limitation on the right of employees under the NLRA to engage in “protected concerted activity,” a term which the NLRB has interpreted as encompassing virtually any form of group activity related to employees’ terms and conditions of employment.

The Fifth Circuit, while acknowledging its duty as a general matter to defer to the NLRB’s interpretation of its own statute, nevertheless recognized that courts never defer to “the Board’s ... preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.” In this instance, the strong congressional policy contained in the FAA requiring the enforcement of arbitration agreements “as written” was not deemed overcome by the NLRA’s general provisions protecting the rights to organize and to engage in various forms of protected concerted activity. While recognizing the right of employees to commence such litigation, the Fifth Circuit correctly held that nothing in the NLRA prohibits employers from entering into otherwise lawful arbitration agreements that may contain limitations on the right to file class or collective actions. In so holding, the Fifth Circuit noted that the pursuit of a class action, including a collective action under the Fair Labor Standard Act, is not a substantive right, but merely a procedural one.

Although the Fifth Circuit rejected the NLRB’s view on class action waivers, the Fifth Circuit did support the NLRB’s requirement that arbitration agreements permit the filing of administrative claims with the Board. As a result, employers who have implemented or are considering arbitration agreements with class action waivers should include a “carve-out” that permits the filing of administrative charges with the NLRB, among other federal agencies.

This decision is a highly significant victory for employers, particularly those who have chosen to adopt or are pursuing the adoption of mandatory arbitration agreements with class or collective action waivers. For more information on the subject of mandatory arbitration with class action waivers, see our July 3rd *Strategy & Insights* publication.

Fifth Circuit Sidesteps *Noel Canning* Arguments

Before tackling the merits of the NLRB's decision in *D.R. Horton*, the Fifth Circuit also addressed several compelling issues now pending in the courts regarding the NLRB's authority to issue decisions at all during various times in the last two years. First is the issue in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted* 133 S. Ct. 2861 (U.S. June 24, 2013) (No. 12-1281) regarding the authority of the President to make recess appointments under the Constitution during those times when the Senate is in pro forma session. The D.C. Circuit held in *Noel Canning* that the President lacked the authority to make recess appointments to the NLRB during such times, and that accordingly, the NLRB's finding of a violation against Noel Canning was without authority. In *D.R. Horton*, the Fifth Circuit effectively skirted the issue in *Noel Canning* by finding that *D.R. Horton* failed to raise the issue in a timely fashion, and that moreover, the argument did not deprive the Fifth Circuit of jurisdiction over the NLRB's petition for review. The court addressed the argument also pending in other courts that Member Becker's recess appointment to the NLRB had expired prior to the NLRB's issuance of the decision in *D.R. Horton* on January 3, 2012. Member Becker was one of two Members who authored the decision in *D.R. Horton*. The court dismissed this challenge to the authority of the Board as either unconvincing or unsupported by evidence in the record. Finally, the court dismissed a challenge that the Board in *D.R. Horton* had not made a proper delegation of authority to a three Member panel as required by Section 3(b) of the NLRA, a requirement of some significance in light of the U.S. Supreme Court's decision in *New Process Steel v. NLRB*, 130 S.Ct. 2635, 2639 (2010).

Seyfarth Shaw LLP authored the brief for the U.S. Chamber of Commerce in this matter as an amicus in support of *D.R. Horton*. For more information, please contact the authors or any member of the Workplace Arbitration Team.

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