

One Minute Memo[®]



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NLRB Plurality Thumbs Its Nose at Private Arbitration Agreements for Non-Union and Union Employers

A Brief Review of this Significant Decision and An Invitation to a Webinar on Thursday, January 12

In a case of great significance to both union and non-union employers, the National Labor Relations Board late Friday afternoon dealt a crushing blow to arbitration agreements. During the past two dozen years, private employers have implemented arbitration agreements as a means to resolve employment disputes more efficiently than is possible in the judicial system. At the end of 2011, almost 40% of all cases pending in the federal courts were claims by employees or former employees against employers. The U.S. Supreme Court in *AT&T Mobility v. Concepcion* just last year endorsed use of an arbitration system that is fair and regular, preserves access to remedies, and provides for a decision by a neutral third party arbitrator. A common feature of arbitration agreements approved by the Supreme Court in *Concepcion* is a waiver of any resort to class or collective actions.

On Friday, however, in a devastating blow to arbitration, two Members of a three Member NLRB struck down all class action waivers as a violation of Section 7 of the NLRA. Relying upon an old line of cases that generally preserved access to the legal system by employees as a form of protected concerted activity, the two Member plurality invalidated the class action waiver contained in the company-wide arbitration program of D.R. Horton, a nationwide homebuilder headquartered in Dallas. Although the two Members paid lip service to the national policy favoring private arbitration agreements and to the recent Supreme Court cases striking down limitations on arbitration, the two Members essentially elevated the National Labor Relations Act to the status of "Super Class Action Statute" -- a result certainly not contemplated by Congress in 1935 when the NLRA was enacted and when class or collective actions were a rarity.

The decision in *D.R. Horton* likely will be reviewed by the U.S. Court of Appeals, and perhaps by the Supreme Court as well. Meanwhile, many important questions loom for employers with arbitration policies. Should policies be revised or withdrawn? Can courts rely on *Section 7* to invalidate arbitration agreements, or can only the NLRB do that? Must class or collective waivers be removed, or can they be severed with the rest of the arbitration agreement enforced? Is there additional language that may or should be added to such policies that will preserve them? Unfortunately, the *D.R. Horton* decision, rather than settling the dust as many had hoped, has stirred up a storm that is likely to cause problems for businesses and employers for years to come.

Join us on a webinar to review the decision and discuss its implications on Thursday, January 12th. Marshall Babson, nationally recognized labor lawyer and former Member of the NLRB, and his colleagues will lead the discussion.

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