PDF

The NLRB Finds That Class and Collective Action Waivers in Mandatory Arbitration Agreements Violate the NLRA

January 19, 2012

In a decision that could subject class- and collective-action waivers to increased challenges, the National Labor Relations Board ("NLRB") has ruled in *D.R. Horton, Inc. and Michael Cuda*, Case 12–CA–25764, that arbitration agreements requiring employees to waive their rights to maintain collective or class actions in any forum over issues of wages, hours, and other working conditions violate the National Labor Relations Act ("NLRA") by unlawfully inhibiting "concerted activity."

The NLRB's January 3, 2012 decision sets up a potential conflict with the US Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which held that the Federal Arbitration Act ("FAA") preempts state laws that invalidate as unconscionable class-action waivers in arbitration agreements. The *AT&T* Court held that the use of class-action waivers in arbitration agreements is authorized by the FAA.

Unlike in *AT&T Mobility*, however, the NLRB's decision is based on a federal law—not a state law. Accordingly, there is no issue of "preemption." Rather, the NLRB's decision creates a conflict between the two federal laws—the FAA and the NLRA—at least as the NLRA has been interpreted by the NLRB. Because the NLRB has no jurisdiction to interpret the FAA, a federal court will ultimately need to decide which law should be given effect.

In *D.R. Horton*, the NLRB considered the mandatory arbitration agreements used by a homebuilder with nationwide operations. Under these agreements, employees agreed to arbitrate all claims on an individual basis, waiving the right to collective action in any forum. D.R. Horton superintendent Michael Cuda signed such an agreement. He subsequently filed a class-action arbitration demand alleging D.R. Horton had misclassified the class of employees as exempt. D.R. Horton took the position that the arbitration demand was ineffective, citing language in the arbitration agreement barring collective arbitration. In response, Cuda filed an unfair labor practice charge with the NLRB.

The NLRB's ruling is twofold. First, the NLRB found that class litigation constituted "concerted activity" protected by Section 7 of the NLRA and that D.R. Horton's arbitration agreement interfered with that concerted activity. "Concerted activity" is defined by 29 U.S.C. § 157 as efforts "for the purpose of collective bargaining or other mutual aid or protection." The NLRB explained that concerted activity must be undertaken for the benefit of a group of employees, not purely for individual gain. Citing its own and other federal precedents, the NLRB found that "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator . . . is engaged in conduct protected by Section 7." The NLRB then determined that D.R. Horton's arbitration agreement violated Section 8(a)(1) of the NLRA, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. The NLRB rejected the view that D.R. Horton did not violate Section 8(a)(1) because no employees were expressly threatened, disciplined, or discharged. The NLRB reasoned that Section 8(a)(1)'s prohibition of retaliation is not limited to situations in which an employee is demoted or fired for engaging in protected activity. "When, as here, employers require employees to execute a waiver as a condition of employment, there is an implicit threat that if they refuse to do so, they will be fired or not hired." Thus, the NLRB ruled that D.R. Horton's arbitration agreement amounted to "interference" and that such an inhibition, under the NLRA, is unlawful.

Second, the NLRB determined that its ruling did not conflict with either the FAA or the *AT&T Mobility* decision. Although the NLRB acknowledged that the FAA was "arguably in tension" with its interpretation of the NLRA, it asserted that "the weight of this countervailing consideration was considerably greater in the context of *AT&T Mobility*." According to the NLRB, employment class actions typically involve substantially fewer claimants than consumer class actions like the one at issue in *AT&T Mobility*. As a result, the NLRB reasoned that class arbitration in the employment context would not be as burdensome. The NLRB also distinguished *AT&T Mobility* on the ground that the case dealt with a conflict between the FAA and state law. Here, in contrast, the NLRB considered a potential conflict between the FAA and another federal law—the NLRA. The NLRB determined that, even if incompatible, the FAA must give way to the

NLRA because the NLRA was enacted later and repealed all prior acts and parts of acts that were in conflict.

D.R. Horton is subject to appeal, and a court may ultimately conclude that the NLRB's attempts to void *AT&T Mobility* and the FAA are unavailing.

Notably, the NLRB's decision applies only to "employers" and "employees" covered by the NLRA; it does not affect *collectively bargained* waivers of employees' rights to bring class or collective actions. Moreover, employers may continue to use arbitration agreements that preclude class arbitration as long as those agreements allow employees to bring class or collective claims in other forums (i.e., judicial or administrative courts).

The NLRB's decision is **available here**.