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NLRB Reaffirms *D.R. Horton* Decision Invalidating Arbitral Class Action Waivers

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In a controversial decision that rejects the precedent of numerous federal and state courts, the National Labor Relations Board (NLRB) has reaffirmed its earlier decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). In *D.R. Horton*, the NLRB ruled that an arbitration agreement under which employees were required to waive the right to bring class or collective actions violated the National Labor Relations Act (NLRA). In the recent decision, a 3-2 NLRB majority invalidated a similar agreement, concluding that the “reasoning and result” of the *Horton* decision were correct. *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). Two dissenting NLRB members disagreed with the decision, one observing that the majority had chosen to “double down on a mistake that, by now, is blatantly obvious.”

Procedural Background

The *Murphy Oil* case involved a company that operates retail fueling stations in 21 states. The company required employees to sign an agreement requiring arbitration of employment disputes and waiving the right to file or participate in a group, class or collective action in court, arbitration or other forum. Notwithstanding this agreement, four employees filed a collective action against the company in federal district court alleging violations of the Fair Labor Standards Act (FLSA). The company responded by filing a motion in that court to compel individual arbitration of the claims as provided in the agreement. The lead plaintiff then filed an unfair labor practice charge with the NLRB, and the General Counsel of that agency issued a formal complaint against the company.

At that point, the company revised the arbitration agreement to provide that employees did not waive their right under the NLRA to file a group, class or collective action, but that the company could seek dismissal of such claims under the Federal Arbitration Act (FAA). Thereafter, the federal district court granted the company’s pending motion to compel arbitration on an individual basis. The NLRB’s General Counsel issued an amended complaint against the company. After a two-year delay, the NLRB issued the *Murphy Oil* decision, in which it found that the company had committed two violations of the NLRA—requiring employees to sign the arbitration agreements and enforcing the agreements in court.

D.R. Horton Rationale Reaffirmed by NLRB

The three-member NLRB majority in *Murphy Oil* justified the decision by restating the rationale of the earlier decision in *D.R. Horton*, consisting of three main arguments. First, mandatory arbitration agreements that bar employees from bringing joint, class or collective workplace claims in any forum restrict the exercise of a substantive right to act concertedly for mutual aid and protection under Section 7 of the NLRA. Second, employer-imposed individual agreements that restrict the Section 7 rights of employees, including agreements requiring employees to pursue claims against an employer individually, have been held to violate the NLRA. Third, a decision finding an arbitration agreement unlawful under the NLRA, because it precludes employees from bringing joint, class or collective claims in any forum, does not conflict with the FAA.

D.R. Horton Decision Reversed by Fifth Circuit

The NLRB majority in *Murphy Oil* was not persuaded by the fact that the decision in *D.R. Horton* was later reversed by the U.S. Court of Appeals for the Fifth Circuit. Relying on longstanding Supreme Court precedent, the Fifth Circuit had ruled that the FAA has equal importance to the NLRA; that the NLRB cannot effectuate the policies of the NLRA by ignoring other equally important congressional objectives; and that the courts do not defer to NLRB decisions that conflict with other federal statutes, such as the FAA. In addition, the Fifth Circuit rejected the central premise of the *Horton* decision that the right to file a class or collective action is a “substantive” right under the NLRA, noting that the Supreme Court has repeatedly held that the use of class action procedures is only a procedural right, not a substantive right. Furthermore, relying on more recent Supreme Court precedent, the Fifth Circuit held that the FAA requires arbitration agreements to be enforced according to their terms; that the FAA’s savings clause did not apply; and that the application of the FAA was not precluded by a contrary congressional command in the NLRA. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

D.R. Horton Precedent Rejected by Numerous Courts

The NLRB majority in *Murphy Oil* was also not persuaded by numerous other federal and state decisions that have rejected the *D.R. Horton* precedent. Although the Fifth Circuit is the only court to rule on this issue in a case decided by the NLRB, many other federal and state courts—almost 40 according to one of the dissenting opinions in *Murphy Oil*—have refused to follow the NLRB’s precedent when cited by plaintiffs in litigation over the enforceability of class or collective waivers in employment arbitration agreements. As stated in one of the dissenting opinions, the result has been “near universal condemnation from the federal and state courts.”

For example, the Second Circuit and the Eighth Circuit have both rejected the NLRB’s *D.R. Horton* precedent. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owens v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). The Ninth Circuit, without deciding the issue, has “note[d] that the two courts of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB’s decision in *D.R. Horton* on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act.” *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n. 3 (9th Cir. 2013). Indeed, even the California Supreme Court concluded that its earlier precedent, sharply limiting the efficacy of arbitral class action waivers, yielded to the Supreme Court’s seminal decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), and, in also refusing to follow *D.R. Horton*, that the NLRA did not override the FAA’s mandate. *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014).

Dissenting Opinions Lay Groundwork for Future Litigation

The dissenting NLRB members issued strong and detailed opinions that criticize the majority opinion in unusually emphatic language and provide persuasive arguments for use in future litigation over this issue. NLRB Member Johnson stated that the decision was an “unfortunate example of a federal agency refusing to follow the clear instructions of our nation’s Supreme Court on the interpretation of the statute entrusted to our charge.” Member Johnson also added that the majority was “compounding that error by rejecting the Supreme Court’s clear instructions on how to interpret the Federal Arbitration Act, a statute where the Board possesses no special authority or expertise.” Likewise, Member Miscimarra criticized the NLRB majority for treating the NLRA as the “protector of class action procedures under all laws, everywhere,” and for concluding that the NLRA “trumps all other federal statutes.”

Prospects for Future Litigation over Class and Collective Action Waivers

In view of the NLRB majority's decision in *Murphy Oil* to "double down" on its earlier decision in *D.R. Horton*—as well as the serious conflict that exists between two important federal statutes as a result of that decision—it seems likely that the U.S. Supreme Court will ultimately decide this issue. The NLRB did not file a petition with the Supreme Court to review the Fifth Circuit's *D.R. Horton* decision, and it is unclear whether the decision in *Murphy Oil* will be appealed to one of the circuit courts, setting the stage for another opportunity to petition the Supreme Court for review. But it appears the pressure will continue to build for a definitive resolution of this issue.

As one of the dissenting opinions pointed out, at least 37 cases involving this issue are now pending at the NLRB, and many more are pending at the regional level. Administrative law judges regularly issue decisions on this issue, and the cases continue to pile up at NLRB headquarters in Washington.

The sad irony is that Congress's intent in passing the FAA was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" so as not to "frustrate[] the statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 22-23 (1983). Meanwhile, employers expend huge sums on defense costs with no end in sight, and the conflict between the NLRA and FAA, caused by the NLRB's approach to this issue, remains unresolved.

Opt-Out Agreements

Some employers offer employees an opportunity to opt out of an arbitration agreement with a class or collective waiver within a specified period, such as the first 30 days of employment. The Ninth Circuit has enforced an arbitral class action waiver contained in such an agreement, finding *D.R. Horton* inapplicable in that circumstance. *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1075-1077 (9th Cir. 2014). The *D.R. Horton* decision repeatedly noted that the agreement in that case was a mandatory condition of employment and stated that the decision did not reach the question whether an employer and employee can enter into an agreement that is not a condition of employment to resolve potential employment disputes through non-class arbitration. However, from a review of the *Murphy Oil* decision, it appears that this issue remains unresolved as no mention of it appears in the majority's decision.

Administrative law judges, however, continue to find that employers violated the NLRA by using and enforcing arbitration agreements containing class action waivers, even with an opt-out provision of the type described above. See *Rpm Pizza*, 2014 WL 3401751 (July 11, 2014); *Domino's Pizza, LLC*, 199 L.R.R.M. 1170 (2014); *Kmart Corp.*, 197 L.R.R.M. 1689 (2013); *The Gamestop Corp.*, 2013 WL 4648418 (Aug. 29, 2013); *24 Hour Fitness USA, Inc.*, 2012 WL 5495007 (Nov. 6, 2012). However, at least one ALJ concluded that such an opt-out provision makes the arbitration agreement truly voluntary. See *Bloomingdales, Inc.*, 2013 WL 3225945 (June 25, 2013).

As these cases make their way through further NLRB and judicial review, the effectiveness of opt out clauses will be front and center.

Risks for Employers

Employers with mandatory arbitration agreements that include class or collective action waivers, and those considering the adoption of such an agreement, should evaluate the effect of this legal development. While the benefits of such an agreement can be substantial, expensive litigation before the NLRB or before courts reviewing the NLRB's position may follow if such an agreement is challenged. Employers should evaluate the comparative choices and risks with the help of knowledgeable counsel.

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