Insight

IN-DEPTH DISCUSSION

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NLRB Continues Attack on Class and Collective Action Waivers

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There seems to be no end in sight to the standoff between the National Labor Relations Board and at least a majority of the federal courts over the legality of arbitration agreements that require employees to waive the right to lead or participate in class or collective actions. The NLRB has issued a barrage of cases in recent months reaffirming and expanding its controversial theory that this requirement violates the National Labor Relations Act, notwithstanding Supreme Court precedent upholding such waivers under the Federal Arbitration Act in cases involving other statutes. In addition, despite losing twice on this issue at the Fifth Circuit Court of Appeals, the NLRB has continued to advocate its theory in that and other circuits. Meanwhile, the appellate courts remain deluged with petitions to review NLRB decisions invalidating class waivers and the agreements in which they are contained. These and related developments are discussed below.

NLRB Decisions

In *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), a 3-2 majority of the NLRB decided that requiring employees to agree to a class and collective action waiver in an arbitration agreement violates the NLRA because it deprives employees of the right to engage in protected concerted activity. The Fifth Circuit reversed this decision, however, in view of the Supreme Court precedent upholding class and collective action waivers. *D.R. Horton, Inc. v. NLRB, 737* F.3d 344 (5th Cir. 2013) (enforcement of NLRB order denied in relevant part).

The NLRB reaffirmed its *D.R. Horton* theory in a later case, *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). Once again, the Fifth Circuit rejected the NLRB's decision. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (enforcement of NLRB order denied in relevant part). However, the NLRB has announced that it intends to petition the court for an en banc rehearing of this case.

Relying on a policy of "nonacquiescence," the NLRB has refused to defer to the rulings of the Fifth Circuit in *D.R. Horton* and *Murphy Oil*, and it has continued to issue numerous decisions reaffirming the principle established in those cases. In doing so, the NLRB has rejected numerous defenses raised by employers. For example, the NLRB has held that:

- The six-month statute of limitations in Section 10(b) of the NLRA is ineffective in such cases, even if employees signed the arbitration agreement more than six months before an unfair labor practice charge was filed with the Board. See *PJ Cheese, Inc.*, 362 NLRB No. 177 (2015).
- An opt-out provision in an arbitration agreement is also ineffective and itself an additional burden on employees' protected rights to pursue collective action. See *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (2015). Note, however, that the Ninth Circuit arguably has reached a contrary conclusion in the *Johnmohammadi* decision discussed below.
- Even if an arbitration agreement does not include an express waiver of class and collective actions, it is unlawful if the employer interprets the agreement to bar such actions by moving in court to compel arbitration on an individual basis. See *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016).
- The fact that an arbitration agreement permits employees to file claims with administrative agencies, which could then pursue a judicial remedy on behalf of employees as a group, is not an effective defense because access to administrative agencies is not the equivalent of access to a judicial forum where employees themselves may seek to litigate their claims on a collective basis. See *SolarCity Corporation*, 363 NLRB No. 83 (2015). Note, however, that the Eighth Circuit has reached a contrary conclusion in the *Owen v. Bristol Care* decision discussed below.
- An arbitration agreement that precludes collective action in all forums is unlawful even if entered into voluntarily. See *Ross Stores, Inc.*, 363 NLRB No. 79 (2015).

The foregoing are only examples of the employer defenses rejected by the NLRB in the numerous cases issued by that agency involving the *D.R. Horton* theory.

Supreme Court Precedent

The NLRB's approach to this issue appears to be on a collision course with a series of decisions of the U.S. Supreme Court on the enforceability of class and collective action waivers under the Federal Arbitration Act. In *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), the Court ruled that FAA enforcement of a class action waiver in a standard form contract containing an arbitration agreement overrides a state law prohibiting mandatory arbitration and class action waivers as unconscionable. Subsequently, the Court ruled in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), that arbitration agreements should be enforced according to their terms, even for claims under federal statutes, unless the FAA's mandate has been overruled by a "contrary congressional command."

In addition, the Supreme Court ruled in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), that class action waivers in arbitration agreements are enforceable under the FAA, even if the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery and arbitration is economically unfeasible. And in the most recent decision, *DirecTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015), the Court upheld a class action waiver in the arbitration provision of a service agreement under the FAA, rejecting a claim that the waiver could be invalidated by state law.

It appears likely that the Supreme Court will ultimately resolve this apparent conflict between its precedent under the FAA and the NLRB's theory under the NLRA. At least until the recent passing of Justice Scalia, it seemed unlikely that the Court would defer to the NLRB in light of that precedent, although this assessment could change if there is a shift in the control of the Supreme Court. But in several other contexts and

over the course of many years, the Supreme Court has reined in the NLRB when that agency's remedial preferences trenched on other federal statutes. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) and cases cited therein.

It should be noted, however, that a confrontation over this issue might be avoided if a change occurs in the control of the NLRB. In this regard, strong dissents by two Board members in numerous cases upholding the *D.R. Horton* theory suggest that it could be rejected if such a change in control occurs next year as a result of the upcoming presidential election.

Pending *D.R. Horton* Appeals

At last count, at least 28 cases involving the *D.R. Horton* issue were pending in the federal appellate courts on review from decisions of the NLRB. Under federal law, employers have three appellate court options when seeking review of a decision of that agency—(1) the circuit where the unfair labor practice allegedly took place; (2) any circuit in which the employer transacts business; or (3) the D.C. Circuit. 29 U.S.C. §160(f). Not surprisingly, national companies have favored the Fifth Circuit in view of that court's decisions in the *D.R. Horton* and *Murphy Oil* cases. As a result, at least 20 cases are pending in that circuit. The remaining cases are divided among four other circuits—the Ninth (four cases), the Eighth (two cases), the Third (one case); and the D.C. Circuit (one case). All of these cases are pending on petitions for review filed by employers from adverse decisions of the NLRB involving essentially the same issue.

This appellate scene is highly unusual and might be unprecedented. As a result of the sheer volume of appeals, the NLRB has recently taken the unusual step of requesting the Fifth Circuit to hold in abeyance many of the cases pending in that circuit until the Board's petition for an en banc rehearing of the *Murphy Oil* decision has been resolved. So far, it appears the court is complying with that request.

In a favorable development for employers, when oral argument was recently held in one of the pending Eighth Circuit cases, that court reportedly declined to hear argument on the *D.R. Horton* issue in view of contrary circuit law. *Cellular Sales of Missouri v. NLRB*, Case Nos. 15-1860, 15-1620 (8th Cir.). It appears that the contrary circuit law was established in a private party case, *Owen v. Bristol Care*, discussed below.

Private Party Cases

The NLRB's *D.R. Horton* theory has also been rejected by federal appellate courts in several cases involving employment-related class or collective actions filed by private parties, typically in the context of motions to compel arbitration. For example:

- The Second Circuit upheld a class action waiver in an arbitration agreement and refused to defer to the NLRB's decision in *D.R. Horton. Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013).
- The Eighth Circuit upheld a class action waiver in such an agreement, stating it did not owe any deference to the NLRB's reasoning in *D.R. Horton. Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).
- The Eleventh Circuit relied on the Fifth Circuit's decision rejecting the *D.R. Horton* theory in finding that the FLSA does not prohibit an employer from including a collective action waiver in an arbitration agreement. *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014).
- The Ninth Circuit found that it was not necessary to rule on the Board's *D.R. Horton* theory in granting an employer's motion to compel arbitration of wage and hour claims, because the plaintiff had failed to raise that argument before the district court. However, the court noted in detail that the Eighth Circuit and several federal district courts had refused to follow the Board's theory. *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013).

Subsequently, a different Ninth Circuit panel issued two decisions that raised the *D.R. Horton* theory but avoided deciding whether it was valid or must otherwise be limited. In *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014), the court granted an employer's petition to compel arbitration of an overtime claim because the employee could have chosen to opt out of an arbitration agreement during a 30-day window period, but chose not to do so. The court stated that having freely elected to arbitrate employment-related disputes on an individual basis, the employee could not claim that enforcement of the agreement violated the Norris-LaGuardia Act or the NLRA. Thus, the court distinguished *D.R. Horton*, which by its terms addressed only mandatory pre-dispute agreements. In the companion *Davis* decision, 755 F.3d 1089 (9th Cir. 2014), the court reversed a federal district court's denial of an employer's motion to compel arbitration and remanded the case, but declined to state an opinion on whether a mandatory arbitration program would violate the NLRA.

Until recently, the NLRB did not participate in private party cases because they did not involve review of a decision of that agency. However, the NLRB has recently changed course by filing amicus curiae briefs in such cases in support of its theory. So far, the Board has filed briefs in three of these cases, all of which are still pending. *Morris v. Ernst & Young*, Case No. 13-16599 (NLRB Amicus Brief filed 11/6/2015, 9th Cir.); *Lewis v. Epic Systems Corp.*, Case No. 15-2997 (NLRB Amicus Brief filed 12/16/15, Motion granted for NLRB to participate in oral argument 1/12/16, 7th Cir.); and *Patterson v. Raymours Furniture Co.*, Case No. 15-2820 (NLRB Amicus Brief filed on 12/23/15, 2d Cir.).

The *Epic Systems* case referred to above is unusual because the federal district court had relied on the NLRB's *D.R. Horton* theory to rule against the employer notwithstanding the Supreme Court precedent described above. In addition, a federal district court in California recently reached a similar decision. *Totten v. Kellogg Brown & Root, LLC*, Case No. ED CV 14-1766, 2016 WL 316019 (1/22/16 C.D. Cal.).

NLRB's Appellate Strategy

It is clear that the NLRB will not defer to the Fifth Circuit's view of the law as set forth in the court's *D.R. Horton* and *Murphy Oil* decisions. Instead, the Board could seek to obtain a ruling from the U.S. Supreme Court that the NLRA or Norris-LaGuardia Act overrides the FAA on the issue of class and collective action waivers.

In pursuing its strategy, the NLRB will follow its policy of "nonacquiescence," which involves a refusal to defer to adverse decisions of the federal appellate courts except as to "the law of the case," while eventually attempting to advance the issue to the Supreme Court's docket by filing a petition for certiorari with that court. In some other cases in the past, this process has lasted for several years. And, of course, an employer on the losing end of a future circuit court of appeal ruling likewise could then claim that the circuits were split on this issue warranting Supreme Court review and settlement of the issue.

Under normal circumstances, the NLRB would be required to show a "split in the circuits" before the Solicitor General will approve filing a petition for certiorari with the Supreme Court. That split may emerge after decisions are announced in any of the pending cases discussed above, and, as noted, a split would mean that an employer that lost on the *D.R. Horton* issue could itself seek review. The NLRB's amicus appearances in private party cases appear to be aimed at advancing the ball toward a split that it hopes will develop.

Fifth Circuit's View of "Nonacquiescence"

One further complication for the NLRB involves a position asserted by the Fifth Circuit in the *Murphy Oil* decision regarding the policy of nonacquiecence described above. In that case, the employer argued that the court should hold the NLRB in contempt for its "defiance" of the court's decision in *D.R. Horton*. The court declined to condemn the Board's nonacquiescence, but it stated that an "administrative agency's need to

acquiesce to an earlier circuit court decision when deciding similar issues in later cases will be affected by whether the new decision will be reviewed in that same circuit." In addition, the court added the observation that the "Board may well not know which circuit's law will be applied on a petition for review."

These statements by the Fifth Circuit suggest that an employer involved in a *D.R. Horton* case might consider notifying the Board during the administrative proceedings that it would seek appellate review of an adverse decision in that circuit—assuming it would have that option. As discussed above, this would include any employer that transacts business in the Fifth Circuit, or an employer involved in a case where the unfair labor practice allegedly took place in that circuit.

NLRB Rulings on Related Issues

In addition to deciding that employees cannot be required to agree to class and collective action waivers in an arbitration agreement, the NLRB has issued several decisions involving two related issues.

First, the Board has ruled in numerous cases that an arbitration agreement was unlawful because complicated language might cause employees to construe the agreement as prohibiting them from filing unfair labor practice charges with the NLRB. For example, see *Everglades College, Inc.*, 363 NLRB No. 73 (2015). This is essentially a drafting problem that employers should avoid because it could complicate an appeal to the federal courts from an NLRB decision on the issue of class and collective action waivers. For example, although the employer prevailed on the main issue in the appeal of the *D.R. Horton* case as discussed above, the court also found that the employer had violated the NLRA in that case because employees would interpret the arbitration agreement as prohibiting the filing of charges with the NLRB.

Second, the NLRB has decided that an employer could not require employees to agree to a class and collective action waiver in a personnel document that did not also include an agreement to arbitrate employment-related claims. For example, see *Logisticare Solutions, Inc.*, 363 NLRB No. 85 (2015). Such language should be avoided because the absence of an agreement to arbitrate claims precludes reliance on the FAA, which is critical in the defense of such cases.