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Arbitration Agreements Prohibiting Class Actions in All Forums Ruled Unenforceable

The National Labor Relations Board (NLRB or the Board) recently ruled in D.R. Horton, Inc. and Michael Cuda that arbitration agreements that prohibit employees from asserting class actions in court and in arbitration violate the National Labor Relations Act (NLRA).

In 2006, the home-building company D.R. Horton, Inc. (the "Company") required new and current employees to execute a Mutual Arbitration Agreement (the Agreement) as a condition of their employment. The Agreement completely waived an employee's ability to resolve an employment-related dispute in court and required resolution of disputes through arbitration. Further, the Agreement gave the arbitrator the ability to hear only individual claims and expressly divested the arbitrator of authority to consolidate claims or fashion a class or collective action. In essence, the Agreement permitted resolution of employment-related disputes only through individual arbitration.

Michael Cuda worked for the Company as a superintendent from July 2005 through April 2006 and signed the Agreement. In 2008, Cuda's attorney notified the Company that he intended to arbitrate a nationwide class action, alleging that the Company misclassified superintendents as exempt from the Fair Labor Standards Act. The Company maintained the Agreement barred arbitration of a class action. Cuda's attorney filed an unfair labor practice charge with the NLRB.

The NLRB considered whether the Agreement violated Section 7 of the NLRA, which permits employees to "engage in concerted action for mutual aid or protection." Section 8(a)(1) prohibits employers from interfering with employee rights under the NLRA, deeming such interfering acts to be an unfair labor practice. The Board held that the Agreement restricted the employees' Section 7 rights, thereby violating Section 8(a)(1) and constituting an unfair labor practice.

The Board also explored whether its decision was in conflict with the statutory provisions or policies underlying the Federal Arbitration Act (FAA). It determined that its holding accommodated the policies underlying both the NLRA and the FAA.

Finally, the Board explained that its decision did not implicate the recent decision in *AT&T Mobility v. Concepcion (Concepcion)*, in which the U.S. Supreme Court invalidated a California law that made consumer arbitration agreements with class-action waivers unenforceable. The NLRB explained that *Concepcion* presented a conflict between the FAA

Related practice areas:

Labor Regulation and Union Relations

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and state law, which triggered the principles of the Supremacy Clause. The case before the Board, however, involved two federal laws and thus did not invoke the Supremacy Clause.

At the end of its decision, the Board took care to clearly set forth what class-action rights may be restricted by an employment arbitration agreement. The Board explained, "we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial." The Board clarified that it was not mandating that employers give employees the ability to arbitrate class claims; to the contrary, employers may require that employees arbitrate claims on an individual basis. Rather, so long as an arbitration agreement allows employees to pursue class-action claims in at least one forum, arbitral or judicial, employee rights under the NLRA will not be violated.

In light of the NLRB's ruling, employers should review their employee arbitration agreements to discern whether the agreements permit employees to bring class-action claims in court or through arbitration. If so, the agreements are likely still enforceable. However, if the agreements completely invalidate an employee's ability to bring a class or collective action, the enforceability of the agreement should be reassessed with counsel.

The Board's ruling will likely be appealed to the U.S. Court of Appeals and possibly even to the U.S. Supreme Court.

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