CLIENT ALERTS & INSIGHTS

Supreme Court Lays D.R. Horton Debate to Rest; Rejects NLRB Position That Class Waivers Violate Employee Rights

MAY 21, 2018

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On Monday, May 21, 2018, the United State Supreme Court, in a 5-4 opinion written by Neil Gorsuch, ended a six-year dispute started by the National Labor Relations Board's ("NLRB") 2012 decision in *D.R. Horton*, 357 NLRB 2277 (2012), which held that mandatory arbitration agreements that contain class and collective action waivers violate Section 7 of the National Labor Relations Act ("NLRA").

In Monday's opinion, Justice Gorsuch wrote that the Federal Arbitration Act ("FAA") instructs that "arbitration agreements providing for individualized proceedings must be enforced" and neither the FAA nor the NLRA suggest otherwise. Therefore, employers do not violate the NLRA if they require workers to forgo the ability to pursue class actions by including the class waiver provisions in arbitration agreements that must be signed as a condition of employment. In January 2017, the Supreme Court consolidated decisions from the Fifth Circuit (*Murphy Oil USA, Inc. v. NLRB,* 808 F.3d 1013, 1015 (5th Cir. 2015)), which rejected the NLRB's position and upheld class action waivers, and the Seventh and Ninth Circuits (*Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016)), both of which followed the Board's original *D.R. Horton* decision.

The dispute began in 2012 in *D.R. Horton*, in which the Board ruled that D.R. Horton violated Section 7 of the NLRB by requiring employees to agree to mandatory arbitration of employment disputes and forego class and collective action as a condition of employment. The Fifth Circuit refused to enforce the Board's order, concluding that the decision violated the FAA. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir. 2013). In *Murphy Oil*, the Fifth Circuit again rejected the Board's *D.R. Horton* position. The Second and Eighth Circuits followed suit. *Sutherland v. Ernst & Young*, 726 F.3d 290, 297 n.87 (2d Cir. 2013); *Patterson v. Raymours Furniture Co.*, No. 15-2820 (Sep. 2, 2016 2d Cir.).

However, the Seventh and Ninth Circuits soon created a split among the appellate courts requiring Supreme Court clarification. In *Epic Systems*, the Seventh Circuit departed from other federal circuits and sided with the Board, ruling that an employer's arbitration agreement requiring employees to bring wage-and-hour claims in individual arbitrations and prohibiting class and collective actions violates Section 7 of the NLRA. The Seventh Circuit found there was nothing so "concerted" as class action litigation. The Ninth Circuit soon followed in *Morris v. Ernst & Young.* The Sixth Circuit in *NLRB v. Alternative Entertainment, Inc.,* 858 F.3d 393 (6th Cir. 2017), continued the split by siding with the Seventh and Ninth Circuits.

Thus, in resolving the split and rejecting the NLRB's stance (adopted by the Seventh, Ninth, and Sixth Circuits), the Supreme Court endorsed the legality of employers' use of mandatory arbitration agreements that include class action waivers.

Companies should consult with counsel to determine whether such waivers should be included in employment or arbitration agreements.

For more information on this topic, contact a member of Benesch's Labor & Employment Practice Group.

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