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national employment PERSPECTIVE

December 6, 2013

A PUBLICATION OF SHOOK, HARDY & BACON L.L.P

FOCUS ON LABOR RELATIONS

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FIFTH CIRCUIT OVERRULES NLRB'S PROHIBITION ON CLASS-ARBITRATION WAIVERS

The Fifth Circuit Court of Appeals has overruled the National Labor Relations Board's (NLRB's) determination that class-arbitration waivers violated the National Labor Relations Act (NLRA). *D.R. Horton v. NLRB*, No. 12-60031 (5th Cir. Dec. 3, 2013). In upholding the class waiver in D.R. Horton's arbitration agreement, the Fifth Circuit joined its sister circuits.

The issue arose in the context of an employee's claim that the arbitration agreement's class-action waiver was an unfair labor practice under the NLRA. The employee and a nationwide class had sought to arbitrate claims that their employer, D.R. Horton, misclassified them as exempt from statutory overtime protections, and the company raised the agreement's bar on collective claims.

In its 2012 *In re D.R. Horton* decision, the NLRB held that employers violate the NLRA by requiring employees to sign arbitration agreements prohibiting employees from pursuing claims in a collective or class action. Section 7 of the NLRA mandates that employees have the right to engage in concerted activities for the purpose of mutual aid or protection. The NLRB determined that the class waivers contained within the arbitration agreements violated Section 7, concluding that filing a class action regarding wages, hours or working conditions is protected conduct.

Rejecting the NLRB's ruling, the Fifth Circuit found that the NLRB did not give proper weight to the Federal Arbitration Act (FAA) and ruled that the use of class-action procedures "is not a substantive right." Section 2 of the FAA requires courts to enforce arbitration agreements according to their terms, and courts require the party challenging an arbitration agreement to establish that Congress intended for another statute to override the FAA's mandate. Finding that the NLRA contains no congressional command to override the FAA, the Fifth Circuit ruled that the NLRB failed to abide by the FAA when it determined that the FAA must yield to the NLRA. Therefore, the arbitration agreements were to be enforced according to

their terms, including the class-waiver provisions. The Fifth Circuit noted that it was “loath to create a circuit split” and that every other circuit that had considered the issue had refused to defer to the NLRB’s reasoning.

The NLRB also held that the class waivers violated Section 8(a)(1) of the NLRA because (1) employees would reasonably interpret the class waiver to preclude or restrict their right to file charges with the NLRB, and (2) the class-waiver provisions required employees to waive their right to maintain joint, class or collective employment-related actions in any forum. The NLRB ordered D.R. Horton to rescind or revise its arbitration agreements to clarify that employees were not prohibited from filing charges with the NLRB or from resolving employment-related claims collectively or as a class. The Fifth Circuit agreed that the arbitration agreement could be misconstrued as waiving employees’ trial *and* administrative rights and thus upheld the NLRB’s order requiring D.R. Horton to clarify its agreement.

Judge James Graves concurred in part and dissented in part. He agreed with the NLRB’s finding that the class waiver interfered with the exercise of employees’ Section 7 rights and noted that the NLRB’s specific finding that the agreement violated the NLRA did not conflict with the FAA because the FAA does not require an agreement that violates the NLRA to be enforceable. Judge Graves would have affirmed the NLRB’s decision in toto.

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