Arbitration Class Waivers: Another Victim of the NLRB

Remember those pesky overtime claims where one bad policy can trigger a class action-like lawsuit? We've suggested heading off the class warfare with mandatory arbitration policies that prohibit class-wide arbitration. Well, the NLRB just stuck its nose into that too. And you can imagine how that one went...

Class waivers, says the NLRB in *D.R. Horton*, violate employees' NLRA-guaranteed right to engage in "concerted activity." Not that long ago, the NLRB used this same right to move aggressively into regulating social media. If you force employees to sign an arbitration policy that has a class waiver, the NLRB will haul you in for an unfair labor practice.

The NLRB's ruling applies to you so long as you're covered by the NLRA—even if you're union free.

But there's good news. Managers, supervisors and independent contractors have no right to engage in "concerted activity" under the NLRA. The NLRB's ruling does not cover them. Satisfy the NLRB that your worker falls into one of those groups and you might require a class action waiver.

What about class waivers that are selectively imposed? Instead of including the waiver in a blanket arbitration policy for all employees, you might have all (or many of) your exempt employees sign an arbitration agreement with a class waiver. That might keep classes of your employees from ganging together to claim they were misclassified as salaried exempt. Better be sure, though, that the workers truly meet the NLRA's definition of managers, supervisors or independent contractors. Or you the NLRB could put you in a world of hurt.

I doubt we've heard the last of *D.R. Horton*. The NLRB's ruling will probably be appealed to the courts. Stay tuned.

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Arbitration

Federal Overtime Law

Fair Labor Standards Act (FLSA)

- Misclassification as exempt
- Overtime pay

National Labor Relations Act (NLRA)

- Concerted Activity
- National Labor Relations Board (NLRB)

Unions