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Class Action Arbitration Bans – the Obama NLRB Attempts to Trump the Federal Arbitration Act and the Supreme Court

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Two recent decisions on arbitration, one from the National Labor Relations Board ("NLRB" or "Board") and one from the Supreme Court of the United States, present an interesting question: Can employers limit employees from launching potentially costly class actions? Some employers have applicants or new employees sign a separate agreement, or include a clause in application forms or in the employee handbook (which employees acknowledge), requiring employees to bring future disputes to arbitration *and* to agree that the arbitration will be individual only – not a class or collective action. These companies apparently hope that arbitration, and the avoidance of a jury trial, will be less costly than defending a court action if a dispute arises. They also hope to eliminate the attraction and risk of class and collective actions, which often are seen as providing undue leverage and a larger total payday to claimants and their attorneys.

In a decision issued on January 3, 2012, in *D.R. Horton, Inc. and Michael Cuda* (Case 12-CA-25764), a two-member panel of the NLRB took the novel position that an employer violates the National Labor Relations Act ("NLRA") when it requires employees covered by the NLRA (*i.e.,* most non-supervisory and non-managerial employees of most private sector employers, *whether unionized or not*) to agree, as a condition of employment, to binding arbitration of any disputes or claims arising out of their employment if the arbitrator is restricted to hearing only an individual claim, not a class or collective action.

Then, in a decision dated January 10, 2012, in *CompuCredit Corp. v. Greenwood* (No. 10-948), 565 U.S. ___, 132 S. Ct. 665 (2012), the Supreme Court extended a line of cases favoring the referral of disputes to arbitration and confirmed an organization's ability to require arbitration, even where a governing statute specifically describes "actions" in "court." The Court held that where a federal statute (in this case the Credit Repair Organizations Act ("CROA")) does not show a specific "contrary congressional command" as to whether a claim can proceed in arbitration, the Federal Arbitration Act ("FAA") "requires the arbitration agreement to be enforced according to its terms." Thus, a clause in a credit card application to resolve any dispute arising from the applicant's account by binding arbitration was held to be enforceable.

For employers, the key question is whether the Supreme Court's decision affects the viability of *D.R. Horton*. The answer is a resounding "maybe," leading to a next level of inquiry as to whether *D.R. Horton* can withstand likely challenges.

The central holding of *D.R. Horton* is that the employer's arbitration clause, by barring any court action and restricting arbitration to individual proceedings, supposedly violated the employees' right to engage in "concerted" action for "mutual aid or protection," as guaranteed by Section 7 of the NLRA. The *D.R. Horton* panel, however, did not point to any specific provision in the NLRA regarding whether the enforcement of arbitration agreements is limited. Therefore, there is a substantial argument that there is no clear "contrary congressional command" and the FAA thus "requires the arbitration agreement to be enforced according to its terms," including a restriction on class and collective action proceedings. There are, however, a number of factors, some outlined by the NLRB and some inherent in the Supreme Court holding, that come into play and might lead to a different conclusion. For example:

- The Supreme Court only addressed whether an arbitration clause could be enforced to bar access to the courts, not whether class and collective actions could be barred as well. Thus, the Court did not address the NLRA issue directly.

- As noted in *D.R. Horton*, prior Supreme Court precedents upholding class and collective action bans have not dealt with employment matters, and the most recent (*AT&T Mobility v. Concepcion*, 563 U. S. ___, 131 S. Ct. 1740 (2011)) dealt with a conflicting state law, not a federal law. While *CompuCredit* does conclude that arbitration agreements are favored even when federal statutory claims are at issue, it still does not deal with employment matters or the NLRA.

- In a concurring opinion in *CompuCredit,* Justice Sotomayor argues that intent to bar enforcement of an arbitration agreement is determined not just from the text, but also from the history or purpose of the statute. *D.R. Horton* (which predates Justice Sotomayor's opinion) makes a similar argument that the central tenet of NLRA Section 7 is violated if the arbitration clause is "enforced according to its terms" to bar collective action, which, based on the text, history, and purpose of the statute, supposedly shows an intent by Congress to override the FAA in this instance. The history of the NLRA, however, shows no evidence that, when Congress chose to codify a right of some employees to engage in protected concerted activities, it was meant to bar limitations on class and collective arbitrations or lawsuits.

- *D.R. Horton* also argues that an FAA exception to enforcement of arbitration clauses on any grounds that would allow for the revocation of any other contract applies to the NLRA. Therefore, *D.R. Horton* asserts that "the [class action] waiver interferes with the substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed." Further, although clearly not compelled by the explicit language of the NLRA, *D.R. Horton* urges that it is not in conflict with the FAA, but "accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible."

- In *CompuCredit,* the Supreme Court was directly interpreting the CROA. In a substantially different context, a Circuit Court of Appeals would be faced with reviewing an NLRB decision interpreting the NLRA. Thus, the question arises as to what deference the appellate court would give to the NLRB's position in

deciding whether to enforce an arbitration clause, like the one in *D.R. Horton, Inc.* The NLRB, however, in interpreting the FAA, which is not a labor statute, should not be entitled to the level of deference given to government agencies that interpret statutes they administer (known as "Chevron deference" after the seminal case on point, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)).

Even absent the *CompuCredit* case, it is not clear that the NLRB decision in *D.R. Horton* will become settled law. In its decision, the *D.R. Horton* panel acknowledges some alternative interpretations of the NLRA but then seeks to counter these interpretations largely using principles, not actual precedents. For instance, it notes that several parties filed *amicus curiae* briefs in support of D.R. Horton, Inc., that contended that, despite the arbitration clause, employees could still act in concert, such as by filing similar or coordinated individual claims. The panel simply rejects this by saying that "if the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in other concerted activities." In another example, the *D.R. Horton* panel notes that a 2010 General Counsel memorandum found that an arbitration waiver was an individual matter outside the scope of Section 7 of the NLRA. The panel essentially argues that the former General Counsel's arguments were erroneous or at odds with the General Counsel's own conclusion. Also, because the possible conflict between the NLRA and the FAA is "an issue of first impression for the Board," any of these alternative views could be adopted on appeal or in a later proceeding.

It should be noted that the approach in *D.R. Horton* also might be jettisoned by a new Board majority if President Obama is not re-elected, but it could be reinforced if a new generation of Board members were to tilt more decidedly against waivers requiring arbitration. Even if electoral change does not undo *D.R. Horton*, it is quite possible that *CompuCredit* may foreshadow court decisions, finding that the NLRA lacks the necessary clear "congressional command" to override the FAA's requirement that arbitration agreements be enforced according to their terms.

How *D.R. Horton* Could Affect Employers

If upheld, *D.R. Horton* is certain to affect employers that have not considered themselves vulnerable to the NLRB's reach in at least three significant respects:

- **First**, the decision is not restricted to assessing "protected concerted activity" in terms purely within the NLRA. Rather, it transcends the NLRA to examine whether there has been interference with the exercise of employee rights under the Fair Labor Standards Act, a statute interpreted and vigorously enforced by the Department of Labor but not the NLRB.

- **Second**, it may presage even greater interest by the NLRB in matters that have been regarded as the exclusive province of other administrative agencies charged by Congress to interpret and/or enforce legislation, including the assertion of substantive rights and protections against retaliation.

- **Third**, as with recent decisions concerning employee use of social media, *D.R. Horton* stands to affect *all employers covered by the NLRA* – even if none of the employer's employees are represented by a union.

What Employers Should Consider Now

- Employers should note that the NLRB decision only affects employees covered by the NLRA (whether they are union-represented or not). While "covered employees" can include individuals in addition to members of a collective bargaining unit, the term, as we previously noted, does not cover supervisors or certain other employees in an organization. Thus, even if the *D.R. Horton* panel decision stands, employees who are who are not covered by the NLRA could still be required as a condition of employment to agree, in writing, to use only individual arbitration proceedings to pursue employment claims.

- While the above bullet discusses treating employees covered by the NLRA and those who are not differently, the following are some considerations for employers' covered employees:

    - As a precaution in the event of challenge to a mandatory individual arbitration policy, some employers may decide to include specific language in their arbitration agreements to allow individual binding arbitration to go forward under the terms of the agreements should a ban on class and collective arbitration be found unenforceable. Nevertheless, this position could be rejected by the NLRB unless there is a shift in its prevailing view.

    - Employers may wish to act in consonance with *D.R. Horton* but attempt to rewrite their arbitration agreements for covered employees to be as procedurally restrictive as possible, such as in defining the standards for a class. However, great caution and circumspection would be required, as such measures as shifting expenses for class and collective actions to the parties seeking class status, or adding damage restrictions that could minimize exposure to large awards, might contravene the procedural safeguards required by courts for enforcement of arbitration clauses covering statutory employment rights and remedies.

    - Employers may wish to bide their time, hoping for a reversal of *D.R. Horto*n by a federal appellate court on a straightforward *CompuCredit* theory. Another theory for reversal is that the NLRB acted without authority in issuing *D.R. Horton* on January 3, 2012, when one of only three seated members (Hayes, the only Republican) recused himself and when the ability of another member (Becker) to validly participate in a decision at a time when the recess appointment by which he served may have expired. See *New Process Steel LP v NLRB,* 560 U.S.____, 130 S.Ct. 2635 (2010), where the Supreme Court held that the Board was without authority to decide cases when only two members were seated.

Epstein Becker Green will keep you updated on future developments in this area.

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