Employment Law

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National Labor Relations Board Limits Class Action Waivers in the Employment Context

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Last year, in the landmark decision *AT&T Mobility v. Concepcion*, the U.S. Supreme Court upheld the use of class action waivers in consumer arbitration agreements under the Federal Arbitration Act ("FAA"). The breadth of the Supreme Court's opinion in *AT&T Mobility* was an open question, however, particularly the extent to which it permitted class action waivers in employment arbitration agreements. In a much-anticipated decision that attempts to answer this question, a plurality of the National Labor Relations Board ("Board") issued an opinion last week invalidating class action waivers in the employment context, holding that such waivers violate the National Labor Relations Act ("NLRA").

In *D.R. Horton and Michael Cuda*, the employer required all employees to sign a Mutual Arbitration Agreement ("MAA") as a condition of employment, which provided that all employment-related disputes would be handled exclusively through final and binding arbitration, that the arbitrator had no authority to consolidate claims or award relief to a group or class of employees, and that employees waived the right to file a lawsuit or other civil proceeding to adjudicate employment disputes. When an employee gave notice of his intent to initiate a class arbitration for alleged wage and hour violations, the employer responded that a class claim would violate the MAA. Soon thereafter, the employee filed an unfair labor charge with the Board, asserting that the class waiver in the MAA violated the NLRA.

The NLRA vests employees with the right to engage in "concerted activities for the purposes of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. According to the Board, because the term "mutual aid or protection" includes efforts to improve the terms and conditions of employment, the act of bringing a class or collective action regarding wages, hours or working conditions is protected by the NLRA, regardless of whether a union is involved. Therefore, the Board concluded that requiring employees to waive their right to bring class or collective actions constitutes a violation of the NLRA.

As the Supreme Court noted in *AT&T Mobility*, however, the FAA contains a strong policy favoring the simplicity of arbitration, which was one of the key reasons the Supreme Court held that the complexity of class actions and the streamlined nature of arbitration are incompatible. Recognizing a potential conflict between the NLRA and the FAA, the Board explained why it believed its conclusion did not intrude upon the FAA, distinguishing the Supreme Court's decision in *AT&T Mobility*. According to the Board, whereas *AT&T Mobility* involved "tens of thousands of potential claimants," the average number of

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employees employed by a single employer is only 20 and most employment litigation involves only a specific subset of employees. The Board reasoned that the Supreme Court's concerns in *AT&T Mobility* about speed, cost, informality, and risk of class wide arbitration were mitigated in the employment context, opining that a class wide arbitration of employment disputes would be "more akin to an individual arbitration proceeding." Accordingly, for this and several other reasons articulated in the decision, the Board concluded that the Supreme Court's concerns in *AT&T Mobility* were not applicable here. Many employers, particularly those who have been the subject of employment class actions, would likely differ with the Board's view that employment class actions are simpler and more manageable than consumer class actions.

Ultimately, the Board did not hold that employers are required to permit class actions in arbitration. Rather, it held that employers cannot mandate a wholesale waiver and foreclose the class action remedy in both arbitral and judicial forums. The Board's decision likely will not be the last word on this issue. It is subject to review by the Eleventh Circuit Court of Appeal or the D.C. Circuit Court of Appeal, and may eventually be reviewed by the Supreme Court.

In the meantime, employers should consult with counsel to ensure that their employment arbitration agreements are valid and enforceable under California and federal law.

For a detailed discussion of the Supreme Court's *AT&T Mobility* decision, click here for Manatt's April 28, 2011, newsletter on the topic.

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