

Labor and Employment Alert

NLRB Rules that Requiring Employees to Waive Class-Wide Arbitration Constitutes an Unfair Labor Practice

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Continuing with its string of controversial, pro-labor rulings, the National Labor Relations Board (NLRB) recently decided that an employer commits an unfair labor practice by requiring employees to sign an arbitration agreement that waives class or collective claims. *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3 2012). The NLRB's decision is a significant departure from *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), in which the Supreme Court upheld a class-action waiver in a consumer contract. The NLRB has now placed significant limits on the scope of the *AT&T Mobility* decision as it applies to employment contracts, particularly in non-unionized workplaces. As a result, the NLRB's decision is a huge victory for plaintiffs' lawyers and unions.

In *AT&T Mobility*, the Supreme Court held that a California rule, which classified most class-action waivers in consumer contracts as unconscionable, was preempted by the Federal Arbitration Act (FAA). The Court held that a class-action waiver in an arbitration provision is permissible. In its decision, the Supreme Court recognized that the "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." Federal district courts have extended the Court's ruling to uphold class-action waivers in arbitration agreements in employment contracts.

In the NLRB case, the employer required all new and current employees to sign a "Mutual Arbitration Agreement (MAA)." Under the MAA, all employment-related disputes were to be resolved through individual arbitration, but employees waived the right to bring class or collective claims, either in arbitration or in court. *Id.* When an employer refused to arbitrate a collective claim under the Fair Labor Standards Act (FLSA), the employee filed an unfair labor practice charge with the NLRB. *Id.*

In one of its last opinions before Member Becker's recess appointment ended, the NLRB found that an employee's right to institute legal action on behalf of other employees constitutes protected, concerted activity within the meaning of Section 7 of the National Labor Relations Act (NLRA). By imposing a mandatory arbitration agreement that precludes class claims in any forum, the company was found to have violated Section 8(a)(1). The Board relied on the Norris-LaGuardia Act's proscription against federal courts enforcing employer-employee agreements that restrict NLRA-protected rights.

In the most tenuous portion of the opinion, the NLRB addressed the employer's principal argument — that invalidating the MAA's restriction on class proceedings conflicts with the FAA and *AT&T Mobility*. The NLRB provided two alternative reasons for rejecting this argument: first, the FAA's public policy of enforcing arbitration agreements is not contravened where enforcement would violate the NLRA rights of employees, and second, even if there were a conflict between the two federal statutes, the NLRA would have to prevail. The Board noted that the Norris-LaGuardia Act was passed seven years after the FAA, and is therefore deemed to have repealed inconsistent provisions in an earlier-enacted law, under controlling Supreme Court case law.



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Under this new NLRB decision, *D.R. Horton*, any mandatory arbitration agreement that precludes employment class or collective actions violates the NLRA. This ultimately will be reviewed by the courts, and likely will be reviewed by the Supreme Court. Until then, the case presents a significant hurdle to class-action waivers.

There are compelling arguments that *D.R. Horton* was wrongly decided in light of the forceful opinion in *AT&T Mobility*. We await further developments.

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