

NLRB Decision Bars Employment Arbitration Agreements That Prohibit Class or Collective Claims

Introduction

This case began when counsel for Michael Cuda, an employee of D.R. Horton Inc. a homebuilding company with employees in 20 states, notified D.R. Horton of his intent to initiate arbitration on behalf of himself and a group of similarly situated employees nationwide who were misclassified as exempt from the provisions of the Fair Labor Standards Act. D.R. Horton responded that the notice was ineffective because under the terms of Mr. Cuda's arbitration agreement, he had waived his ability to pursue claims collectively and was limited to pursuing his claim on an individual basis in arbitration.

Mr. Cuda subsequently filed an unfair labor practice charge with the NLRB. He complained that D.R. Horton's arbitration agreement improperly restricted his right to engage in concerted activity to improve or address workplace terms or conditions under Section 7 of the NLRA because it prohibited class or collective arbitration of employment disputes. The General Counsel of the NLRB also issued a complaint in the case that D.R. Horton's arbitration agreement, which all employees had to sign as a condition of employment, was an unfair labor practice under Section 8(a)(1) of the NLRA because it interfered with, restrained or coerced employees in the exercise of their Section 7 rights. The General Counsel also complained that the agreement was an unfair labor practice under Section (8)(a)(4) because the language of the agreement stating that "all disputes and claims relating to the employee's employment with [D.R. Horton] will be determined exclusively by final and binding arbitration" would lead employees to believe that they were barred from or restricted in their ability to file charges with the NLRB.

The NLRB sided with Cuda and the General Counsel and found that D.R. Horton's mandatory, mutual arbitration agreement violated Cuda's Section 7 rights and also violated Sections 8(a)(1) and 8(a)(4) of the NLRA. The NLRB reasoned that Section 7 of the NLRA protects the employees' substantive right to engage in concerted activity to improve wages through litigation or arbitration and that any individual agreement that would restrict or waive the employees' right to engage in that concerted activity would violate Section 8. It further compared the D.R. Horton agreement to a "yellow dog contract" that is "invalid as a matter of law." (Decision at 6) The NLRB also rejected D.R. Horton's argument (and that of the supporting *amici* including the US Chamber of Commerce) that a finding that the waiver violates the NLRA would conflict with the Federal Arbitration Act (FAA). This argument is based on the US Supreme Court decision in *AT&T Mobility v. Concepcion*, which held, in a consumer fraud case, that the FAA, which favors arbitration of disputes, trumped a California Supreme Court decision invalidating mandatory arbitration provisions with class action waivers as unconscionable. 131 S.Ct. 1740 (2011). The NLRB, however, reasoned that no such conflict arose in the *D.R. Horton* case because the NLRA would apply similarly to arbitration agreements and all other private contracts that conflict with federal labor law using the example that the outcome would be the same if D.R. Horton required employees to agree to litigate (instead of arbitrate) their claims in court exclusively on an individual basis. From the NLRB's perspective, it is the limitation on pursuing employment claims of more than one employee jointly in all forums that violates Section 7. The NLRB left open the possibility that if an arbitration agreement permitted employees to pursue class and collective claims in court, the

employee's NLRA rights are preserved even if there is no option for classwide arbitration. Unsettling to many employers, however, is the fact that the ruling expressly does not take a position on whether an arbitration agreement, entered as a condition of employment, that permits collective or class claims but limits them to arbitration (i.e. excludes judicial forums for collective or class claims) would be enforceable.

The ruling orders D.R. Horton to stop using its arbitration agreement, or rescind or revise its arbitration agreement with its employees to make clear that (1) the agreement does not constitute a waiver of the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial; and (2) the agreement does not restrict employees' right to file charges with the NLRB. D.R. Horton must also post a notice regarding the ruling within 14 days and certify its compliance with the ruling within 21 days.

Due to the fact that numerous employers across the country have entered into arbitration agreements with their employees, this ruling is likely to be the subject of an appeal and further litigation in the coming months. Employers with employee arbitration agreements should review them to determine whether they improperly restrict class or collective action in light of the *Cuda* decision. Squire Sanders' employment

lawyers regularly advise on arbitration agreements and are able to assist employers to address the implications of this ruling. For more information on how this ruling may affect your business practices, please contact your principal Squire Sanders lawyer or one of the lawyers noted on this alert.

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