

In a highly anticipated decision, the Fifth Circuit Court of Appeals declined to enforce the key portion of the National Labor Relations Board's (NLRB) decision in *D.R. Horton, Inc.* In January 2012, the NLRB ruled that an arbitration agreement between an employer and an employee that required the employee to bring any claims against the employer in an arbitration proceeding (as opposed to a court-filed lawsuit), and which precluded the employee from asserting claims on a class or collective action basis, violated the employee's right under Section 7 of the National Labor Relations Act (NLRA) to engage in protected concerted activity. However, in its December 3, 2013 **decision** the Fifth Circuit ruled against the NLRB, holding that the NLRA does not confer on employees a substantive right to pursue claims on a class basis. Citing a number of recent pro-arbitration decisions from the U.S. Supreme Court (as well as similar decisions by other courts of appeals), the Fifth Circuit concluded that NLRB failed to give "proper weight" to the Federal Arbitration Act, a law that embodies a strong federal public policy favoring the resolution of disputes through arbitration. Accordingly, the Fifth Circuit denied enforcement of the NLRB's decision to the extent it found that the arbitration agreement was unlawful and unenforceable because it precluded the employee from raising claims on a class basis. The court did, however, enforce the NLRB's ruling that the agreement at issue in *D.R. Horton, Inc.* violated the NLRA to the extent it could be interpreted to preclude employees from filing an unfair labor practice charge with the NLRB, a right which cannot be waived.

The Fifth Circuit's decision has significant implications for employers, particularly in the area of wage and hour litigation. Wage and hour claims by employees, such as those alleging unpaid overtime and other pay-related issues, continue to rise, and continue to be costly for companies, particularly since these claims are typically brought by a single employee or small group of employees on behalf of a class of similarly-situated employees – sometimes hundreds or thousands in number – in what is called a class action or, in some cases, a collective action. Employers have attempted to limit the impact of class and collective actions by requiring that employees agree to resolve any disputes they may have with the employer through arbitration, and that they do so only with regard to their own individual claims and not on behalf of a class of employees.

Although the Supreme Court has been generally supportive of arbitration agreements and has not signaled concern with respect to waivers of class or collective action rights in those agreements, the NLRB stepped into the fray in January 2012 when it issued the *D.R. Horton, Inc.* decision. But since the NLRB issued its decision in *D.R. Horton, Inc.* nearly two years ago, almost every single court, state and federal, that has been presented with the "D.R. Horton" issue has refused to follow – or has outright rejected – the NLRB's theory. For its part, the NLRB has continued to prosecute employers who have implemented and enforced arbitration agreements including those that have successfully compelled employees to arbitrate their individual, non-class claims in the courts. With the Fifth Circuit's rejection of the NLRB's position on class and collective action waivers in arbitration agreements, employers have been granted a reprieve, although the NLRB still may seek Supreme Court review. In the meantime, employers who have been reluctant to embrace arbitration agreements that preclude class or collective claims because of the NLRB's position may wish to reconsider their adoption and thereby reap the substantial benefits that they offer.

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