A Timely Analysis of Legal Developments

ASAP®

January 2012

NLRB Strikes Down Arbitral Class Action Waiver

By Henry Lederman, Gavin Appleby and William Emanuel

In *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), the National Labor Relations Board, by a 2-0 vote, found that an arbitration agreement requiring "as a condition of employment" all employees to agree to waive the right to bring class or collective actions in any forum violated Section 8(a)(1) of the National Labor Relations Act (NLRA), which guarantees the rights of employees to engage in concerted, protected activity. The decision was issued by Board Chairman Mark Pearce and Member Craig Becker on January 3, 2012, the final day of Member Becker's controversial recess appointment. Republican Board Member Brian Hayes was recused and did not participate in deciding the merits of the case. The decision has potentially wide-ranging implications for employers who have required employees to agree to arbitrate their disputes and at the same time waive the right to pursue their claims on a class or collective basis. The decision, however, also leaves open the possibility that agreements that are not "imposed" on employees may yet be enforceable, even if those agreements ban class or collective actions in any forum.

The *D.R. Horton* case involved a home builder with operations in more than 20 states that compelled each new and current employee to enter into an agreement requiring that an arbitrator hear only an employee's individual claims without any authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

The decision held that "an individual who files a class or collective action regarding wages, hours, or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by [the NLRA]." Thus, according to the decision, by requiring employees as a condition of employment to forego their rights to such concerted activity, D.R. Horton violated the NLRA, for as the Board stated, "When, as here, employers require employees to execute a waiver as a condition of employment, there is an implicit threat that if they refuse to do so, they will be fired or not hired."

Deciding that the D.R. Horton agreement violated the NLRA, the Board then addressed whether its decision was consistent with the language and goals of the Federal Arbitration Act, which, as the decision noted, "manifests 'a liberal federal policy favoring arbitration agreements.'" Ordinarily, arbitration agreements must be enforced in accordance with their terms. Nonetheless, the Board held that its decision did not conflict with the goals of the Federal Arbitration Act because, principally, the right to bring a class or collective action was not merely a procedural

right, but rather was a substantive right guaranteed by the National Labor Relations Act as a form of concerted protected activity. Thus, the Board purported to distinguish the United States Supreme Court's recent decisions in *Stolt Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010) and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which held, respectively, that arbitrators do not inherently have the right to preside over class proceedings and that it was permissible for arbitration agreements to ban such proceedings because arbitration is designed to provide an informal, simple mechanism for the resolution of bilateral disputes and is ill-suited to "bet the company" class proceedings.

The Board's decision suggested that employment class actions, as distinguished from those involving consumers (as in the *AT&T Mobility* case), are limited in scope, and thus, "class-wide arbitration . . . is far less cumbersome and more akin to an individual arbitration proceeding." As to the Federal Arbitration Act's goal to provide a speedy, inexpensive alternative dispute resolution mechanism, enforcement of the Board's rule, the decision states, would have limited effect in employment cases because in employment cases, "the class is so limited in size." The Board decision, however, did not address the many national and even state-wide class proceedings that involved hundreds, thousands, or even millions of employees. For example, the recent highly publicized United States Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), involved a certified class of approximately 1.5 million employees, a matter overlooked in the *D.R. Horton* decision.

In closing, the Board purported to "emphasize the limits of our holding and its basis," suggesting that very few arbitration agreements would actually be affected by its decision and that its ruling only applies to "employees" as defined by the National Labor Relations Act, a definition that in many instances applies to a more narrow range of workers than the entire employee population of any company. Thus, for example, individuals who may be entitled to overtime because they do not hold an "exempt" position still may be considered non-employee supervisors under the NLRA.

Also, expressly not addressed is the effect of clauses in arbitration agreements that allow employees to opt out of the program without fear of retaliation. Repeatedly in the decision, the Board made clear that it was addressing arbitration agreements that **required** a waiver of the right to engage in concerted activity **as a mandatory condition of employment**. Many arbitration agreements, however, contain clauses allowing employees to "opt out" of the program. Under such agreements, employees may choose to refrain from participation in the arbitration process, leaving them with the right to go to court, file or participate in a class action and avoid arbitration entirely. Thus, the decision states:

> Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer **leaves open a judicial forum for class and collective claims**, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration. **Employers remain free to insist that arbitral proceedings be conducted on an individual basis**. (Emphasis added.)

Accordingly, so long as employees have the right to opt out of the arbitration agreement, it may be argued that their decision not to do so was not imposed upon them as a condition of employment, much less would opting out be a ground for termination of their employment.

The Board expressly stated that it was not reaching the "more difficult question[] of . . . whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation and court." As a result, employers that have permitted employees to opt out of arbitration may be advantaged by the purported narrowness of the Board's holding.

It seems unlikely that the Board's 2-0 decision on this important arbitration question will be the last word on the issue. The employer in this case has a right to seek review by the U.S. Court of Appeals. Likewise, any other employers who are found guilty of an unfair labor practice by the Board on the same grounds would have a similar right to seek review by the Court of Appeals. Meanwhile, however, it appears likely that the precedent established in this case will be followed by the Board's acting general counsel and administrative law judges in similar cases.

In addition to the unusual last-minute timing of the Board's decision, which issued just prior to Member Becker's exit, the case is attracting considerable criticism as a result of the 2-0 vote by an agency that by law is comprised of five members. This might raise an issue under the Supreme Court's recent decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010), where the Court held that the NLRB needs a quorum of three members to rule on a case. In addition, the decision appears contrary to a firmly-established tradition of the NLRB against establishing Board precedent without the votes of at least three members of the Board. This principle was reaffirmed by two Democratic members of the Board as recently as 2010 in *Hacienda Resort Hotel and Casino*, 355 NLRB No. 154 (Aug. 27, 2010).

Employers with current class arbitration waiver agreements or those considering such agreements should evaluate the effect of this new legal development. While more litigation on the issue is sure to follow, employers will immediately need to consider the risk of creating, maintaining and applying current arbitration agreements under the NLRA. In some instances, an employer may decide to hold its position and await further judicial proceedings on the arbitration waiver issues, but such an employer should take that step only after evaluating the comparative risks with the help of knowledgeable counsel.

Henry Lederman is Co-Chair of Littler Mendelson's Alternative Dispute Resolution Practice Group and a Shareholder in the Walnut Creek office, Gavin Appleby is a Shareholder in the Atlanta office, and William Emanuel is a Shareholder in the Los Angeles office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Lederman at hlederman@littler.com, Mr. Appleby at gappleby@littler.com, or Mr. Emanuel at wemanuel@littler.com.