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Fifth Circuit Overrules NLRB – U.S. Employers Can Require Employees to Resolve Disputes on Individual Basis, Not by Class Action

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In 2012, the **National Labor Relations Board** (NLRB) ruled that an employer violated the National Labor Relations Act (NLRA) by requiring its employees to sign an arbitration agreement that prohibited pursuit of a class action. The NLRB reasoned that the prohibition interfered with employees' Section 7 rights to engage in "protected concerted activity." On December 3, 2013, the Fifth Circuit Court of Appeals rejected the NLRB's reasoning and held that employment arbitration agreements containing class action waivers are lawful and enforceable. The decision makes clear that employers can require employees to resolve all employment-related disputes individually through arbitration.

The case involved D. R. Horton, Inc., a home builder operating in more than 20 states. Three provisions in its mandatory arbitration agreement were at issue in the appeal. First, the agreement included a voluntary waiver of a court trial before a judge or jury. Second, all claims were to be determined exclusively by final and binding arbitration. Third, the arbitrator could not consolidate claims of other employees or fashion a class or collective action. The enforceability of the arbitration agreement was called into question when an employee who worked as a superintendent claimed that he and other superintendents had been misclassified as exempt from statutory overtime under the **Fair Labor Standards Act** (FLSA).

The employee filed an unfair labor practice charge with the NLRB alleging the class action waiver violated the NLRA. An administrative law judge held the agreement violated the NLRA because its language would cause employees reasonably to believe they could not file an unfair labor practice charge with the NLRB. On review, the NLRB upheld this finding, and that the agreement's class waiver violated the NLRA.

The Fifth Circuit considered past judicial precedent and undertook a close reading of both the NLRB and the **Federal Arbitration Act** (FAA), a federal statute that favors use of arbitration to resolve disputes (as opposed to use of the courts or agencies). Notably, there are numerous prior court decisions that hold there is no right to use class procedures under various employment statutes, including under the ADEA and the FLSA (the statute in question in D. R. Horton). Also, while the FAA's "savings clause" on its surface calls into question whether the NLRA's core principles of

favoring collective action supersedes the FAA, the Court rejected this argument. The Fifth Circuit found that the NLRA did not explicitly override arbitration as a remedy, that a class action is not a substantive right, and that the very purposes of arbitration upon which the FAA is premised (speed, efficiency, cost savings to the parties) would be lost if the NLRA trumped the FAA. Lastly, the Fifth Circuit noted that no other circuit had adopted the NLRB's position but, rather, each had held that arbitration agreements containing class waivers are enforceable.

On a more narrow point, the Fifth Circuit agreed with the NLRB. Namely, the Board had concluded that the particular language of D. R. Horton's arbitration agreement left the impression that the employee was prohibited from filing an unfair labor practice charge. (An arbitration agreement would violate the NLRA if it banned employees from filing charges with the NLRB.) The Fifth Circuit likewise concluded that the agreement's language could be reasonably misconstrued and agreed with the NLRB that the employer should correct the language in its agreement.

The NLRB may ask the entire Fifth Circuit to review the case or appeal to the U. S. Supreme Court. The case is another rebuke to the relatively activist position the NLRB has taken in recent cases – again a federal court has ruled the NLRB is without authority for its position. While some may question the politics underpinning the decision, the panel was comprised of federal judges appointed by Presidents Carter, G. W. Bush and Obama (the Obama appointee dissented).

The case is an important reinforcement of the trend by federal courts in validating the use of arbitration agreements in employment as an alternative to the busy and costly court system. The policy implications are significant. In recent years class and collective actions against employers involving discrimination and wage and hour claims have increased tremendously. These lawsuits involve hundreds or thousands of potential plaintiffs and multiple years of employer decision making which make the litigation complex and potential recoveries enormous. In facing such "bet-the-Company" class or collective lawsuits, some employers simply resolve them (regardless of merit) to avoid the certainty of costly and burdensome litigation. Plaintiff lawyers, who profit far more than any class member, solicit potential clients with emails and advertising. Employers may wish to consider again the merits of moving to an alternative dispute resolution program for any and all employment disputes including mandatory arbitration.

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