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NLRB Declines to Appeal Class Action Waivers to Supreme Court: What Does it Mean for Employers?

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On July 15, the **National Labor Relations Board** (NLRB or Board) let its deadline to seek Supreme Court review of the Fifth's Circuit decision (**D.R. Horton v. NLRB**) upholding **class action waivers** in **mandatory arbitration agreements** lapse without taking any action. The key question: What does this mean for employers? The answer: Unfortunately, not much.

While some so-called "experts" and prognosticators have speculated that perhaps this turn of events signals that the NLRB is starting to come around on class action waivers, count me in as a skeptic. For my money, a much more likely explanation for the NLRB's inaction is that the Board stuck its finger in the air, determined which way the legal winds were blowing, and took a pass for fear that the Supreme Court would shoot down their anti-class action waiver initiative for good.

After all, by taking a pass, the NLRB can keep right on conducting business as usual (i.e. ignoring the four circuit courts that have ruled against them on this issue and continue bringing unfair labor practice charges against companies attempting to implement class action waivers). Such a strategy is possible because the NLRB only has to reverse course if the Supreme Court or a later decision by the Board itself compels it to do so.

Perhaps the NLRB is waiting for a different case with more favorable facts, or perhaps it is waiting for a different Supreme Court with more favorable members. Regardless, for those companies wanting to implement class action waivers in arbitration agreements, courts across the country are quite amenable, but don't expect a free pass from the NLRB.

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