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LEGAL ALERT

Legal Alert: Class Action Preclusion and the NLRB

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Executive Summary: In a 2-0 decision (with Member Hayes recused), the National Labor Relations Board (NLRB) has held that an employer violates the National Labor Relations Act (NLRA) when it requires employees to sign an agreement that precludes them from filing joint, class, or collective claims regarding wages, hours or other working conditions against the employer in any forum, arbitral or judicial. Comparing the agreement to "yellow dog" contracts,[1] the Board held such an agreement unlawfully restricts employees' exercise of their Section 7 rights to engage in concerted activities for mutual aid or protection. *See D.R. Horton, Inc. and Michael Cuda,* Case 12–CA-25764 (Jan. 3, 2012).

Background

In this case, the Board interpreted the employer's "Mutual Arbitration Agreement" (MAA), which required employees to arbitrate any employment-related claims (with certain exceptions not relevant to this case) and prohibited class-wide arbitrations. The MAA also required employees to waive the right to file an employment-related lawsuit in court against the employer.

An employee sought to initiate arbitration of a collective action under the Fair Labor Standards Act (FLSA) against the employer; however, the employer argued that the MAA bars arbitration of collective claims. The employee then filed an unfair labor practice (ULP) charge against the employer, claiming the employer violated Section 8(a)(1) of the NLRA by maintaining the MAA prohibiting class-wide arbitration.

Agreement Violates NLRA

Section 7 of the NLRA protects the rights of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. The Board noted that it has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7. The Board also held that collective pursuit of a workplace grievance in arbitration is equally protected by the NLRA. "Thus, employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA." Accordingly, under the test set forth in *Lutheran Heritage Village,* the Board held that the MAA violates Section 8(a)(1) because it expressly

restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity.

In reaching this decision, the Board rejected the reasoning of a 2010 Memorandum issued by Board's General Counsel at the time (GC Memo 10-06), which stated that class-action waivers are not *per se* unlawful so long as the waiver makes clear to employees that they "may act concertedly to challenge the waiver itself and will not be subject to retaliation by their employer for doing so."

NLRB Decision Conflicts with Supreme Court and Other Federal Precedent

The Board attempted to reconcile this decision with the recent Supreme Court ruling in *AT&T Mobility v. Concepcion* 131 S. Ct. 1740 (2011), which held that Section 2 of the Federal Arbitration Act (FAA) preempts state court limitations that burden the parties' right to agree to arbitrate disputes. The Board had to acknowledge *Concepcion*'s identification of the "overarching purpose of the FAA," which is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" and the Supreme Court's further holding that class arbitration "sacrifices the principal advantage of arbitration." The Board opined, however, that because *Concepcion* involved reversing the then-California policy that any class action waiver in a consumer agreement (a/k/a "contract of adhesion") was unconscionable, its ruling was distinguishable because, in the Board's ruling "only agreements between employers and their own employees are at stake." While such contracts of adhesion might cover "tens of thousands of potential claimants," a class action against an employer might have fewer potential claimants and, thus, would be a "far less cumbersome" proceeding "more akin to an individual arbitration proceeding."

The Board also argued that another basic difference in its case is that it involves the issue of arbitration of federal statutory rights enacted by Congress rather than consumer rights, which were involved in the *Concepcion* decision. In *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991), the Supreme Court permitted the arbitration of statutory rights cases "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," because the statute (the ADEA in that case) "will continue to serve both its remedial and deterrent function." The Board, however, argued that the holding in *Gilmer* required in this instance that the preclusion clause be found unlawful because it purports to waive the rights set forth in Section 7 of the NLRA.

[W]e conclude that finding the MAA unlawful, consistent with the well established interpretation of the NLRA and with core principles of Federal labor policy, does not conflict with the FAA and, even if it did, the finding represents an appropriate accommodation of the polices underlying the two statutes.

The Board stated that employment arbitration of statutory rights is enforceable so long as the party does not forgo the substantive rights afforded by the statute. The Board then held that the preclusion provision violated the NLRA and that this conclusion does not conflict with the FAA requirements. Noting that *Gilmer* did not address Section 7 or the validity of a class action waiver, the Board said in this instance the right to be

vindicated was "the right to engage in collective action—including collective legal action" and that the issue in this case is whether an employer can preclude employees from taking the collective action inherent in seeking class certification whether or not they are ultimately successful under Rule 23 of the Federal Rules of Civil Procedure. The Board said that such protection is substantive, not procedural.

Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216 (b) or other legal procedures is not.

Note that the Board's conclusion directly conflicts with at least two federal court decisions – one from the Northern District of Georgia and one from the Southern District of California – which recently rejected the plaintiffs' arguments that a class action waiver in an arbitration agreement violated the NLRA. *See Slawienski v. Nephron Pharmaceutical Corporation,* 2010 U.S. Dist. Lexis 130365 9 C.V. No 1:10-CB-0460-JEC (N.D. Ga. December 9, 2010) ("There is no legal authority to support plaintiff's position [that waiver of a collective action under the FLSA violates the NLRA]. The relevant provisions of the NLRA . . . deal solely with an employee's right to participate in union organizing activities . . . It is apparent from the face of the complaint that plaintiff and the other opt-ins are not 'advocat[ing] regarding the terms and conditions of [their] employment'… Rather plaintiffs are pursuing FLSA claims in an attempt to collect alleged unpaid overtime wages."); *Grabowski v. C.H. Robinson Co.*, 2011 U.S. Dist. LEXIS 105680 (S.D. Cal. September 19, 2011) (agreeing with *Slawienski* reasoning and holding that the plaintiff had failed to show his claim for unpaid wages "implicated the 'mutual aid or protection' clause" of the NLRA).

The Board also opined that, if there are conflicts between the FAA and the NLRA, the FAA would have to give way. The Board then resolved the conflict between the two statutes in favor of its interpretation.

The Board attempted to "narrow" is holding when it concluded that it was only compelling employers to not require employees to waive their NLRA rights to collectively pursue litigation or employment claims in all forms, 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 classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis.

The Board stated its holding was not expected to be far reaching and observed that only those agreements "that would be reasonably read to bar protected, concerted activity are vulnerable."

For example, an agreement requiring arbitration of any individual employment related claims, but not precluding a judicial forum for class or collective claims, would not violate the NLRA, because it would not bar concerted activity.

Further, the Board said it was not determining whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration.

Despite the confusion of these statements the Board stated:

[O]ur holding rests not on any conflict between an agreement to arbitrate and the NLRA, but rather solely on the conflict between the compelled waiver of a right to act collectively in any forum, judicial or arbitral, in an effort to vindicate workplace rights and the NLRA.

Employers' Bottom Line:

The Board's decision is highly likely to be appealed since it conflicts with relevant Supreme Court decisions interpreting the FAA and the Board appears to have exceeded its authority by interpreting this Act. If the decision stands, however, it will significantly restrict employers' ability to enforce class-action waiver agreements. We will keep you informed as to the status of this case and any appeal of the Board's decision.

If you have any questions regarding this decision or other labor or employment issues, please contact the authors of this Alert, John Allgood, jallgood@fordharrison.com, or Jeff Mokotoff, jmokotoff@fordharrison.com, or the Ford & Harrison attorney with whom you usually work.

[1] These contracts, in which individual employees are required, as a condition of employment, to cede their right to engage in collective action, were first prohibited by the Norris-La Guardia Act (a predecessor of the NLRA).