NLRB Finds Arbitration Provision Banning Class and Collective Actions to be Unlawful

January 11, 2012

EMPLOYMENT BULLETIN - JANUARY 11, 2012

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On January 3, 2012, the National Labor Relations Board (NLRB) held in *D.R. Horton* that a mandatory arbitration agreement between an employer and its employees violated the National Labor Relations Act (NLRA), because it required employees to waive their rights to participate in class or collective actions. Specifically, the agreement stated that an arbitrator "may hear only Employee's individual claims and does not have the 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."

An employee filed an unfair labor practice with the NLRB, alleging that the agreement prevented him and other employees from pursuing wage claims under the Fair Labor Standard Act as a class or collective action in court. The NLRB found that the agreement violated Section 8(a)(1) of the NLRA because it interfered with employees' right to engage in protected, concerted activity. The NLRB reasoned that class and collective actions are a form of protected, concerted activity. As a remedy, the NLRB required the employer to revise or rescind its mandatory arbitration agreement to comply with the NLRA and also to provide notice to employees of the revised or rescinded agreement and of employees' rights under the NLRA.

The NLRB rejected the employer's argument that finding an unfair labor practice in this situation would directly conflict with the Federal Arbitration Act. Last year, in *AT&T Mobility v. Concepcion*, the Supreme Court held that it was permissible under the Federal Arbitration Act for arbitration agreements to ban class or collective proceedings. The NLRB distinguished its holding from *Concepcion*, explaining that employers could ban class or collective arbitration so long as employees could pursue collective or class actions in court.

The decision in *D.R. Horton* means that mandatory arbitration agreements between an employer and its employees which prohibit class or collective actions may be considered an unfair labor practice under federal labor law. This applies to both unionized and non-unionized workforces. The NLRB suggested that such an agreement would not be unlawful if it was not a condition of employment and employees were free to decline entering into the agreement. We expect the decision to be appealed in court, but, for now, employers should review their mandatory arbitration agreements in light of the decision.