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Arbitration Agreement Barring Class Litigation Violates the NLRA

The NLRB in D.R. Horton *holds that the home builder violated the NLRA by conditioning employment on agreements providing that all employment disputes and claims would be resolved in arbitration, and foreclosing any litigation of "class" or "collective" claims in court or arbitration.*

January 9, 2012

On January 6, the National Labor Relations Board (Board or NLRB) issued a long-awaited decision in *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, dealing with whether a nonunion employer's mandatory arbitration agreement—requiring arbitration of all claims on an "individual" basis and precluding any "class" and "collective action" proceeding—violated the National Labor Relations Act (NLRA). A plurality consisting of Board Chairman Mark Pearce and Member Craig Becker ruled that home builder D.R. Horton's mutual arbitration agreement (MAA) violated the NLRA because it required employees—as a condition of employment—to forgo class and collective action court and arbitration proceedings.

The *D.R. Horton* ruling was dated January 3, 2012, the last day of Member Becker's recess appointment and the day before President Obama announced three new recess appointments to the NLRB.[1] Board Member Brian Hayes was recused and did not participate in deciding the merits of the case.

The *D.R. Horton* ruling applies only to employees (as that term is defined in the NLRA) of employers subject to the NLRA. The decision has no application to supervisors, managerial employees, and independent contractors. The widespread use of arbitration agreements that preclude class and collective action proceedings also clearly means there will be additional litigation regarding these issues, and the *D.R. Horton* case itself will likely be reviewed by a U.S. Court of Appeals. However, the *D.R. Horton* ruling warrants careful review by all employers that are using or considering the use of agreements that restrict class and collective actions, including employment-related claims.

Background

Section 7 of the NLRA protects the rights of employees covered by the NLRA to "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid and protection" and "to

1. On January 4, 2012, President Obama announced three new recess appointments to the NLRB: Democrats Sharon Block and Richard Griffin and Republican Terrence Flynn. Sharon Block most recently was Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor. Richard Griffin was the General Counsel for the International Union of Operating Engineers. Terrance Flynn was Chief Counsel to former Republican NLRB Member Peter Schaumber and more recently has been counsel for Republican NLRB Member Brian Hayes.

refrain from any and all such activities." Section 7 rights apply to union *and* nonunion employees of NLRA-covered employers. Further, Section 8(a)(1) of the NLRA makes it unlawful for employers to "interfere with, restrain, or coerce employees" regarding their Section 7 rights.

In January 2006, D.R. Horton began to require new and current employees to execute an MAA as a condition of employment. The MAA required that "all disputes and claims relating to the employee's employment" be determined by arbitration. The MAA further stated that the arbitrator "may hear only Employee's individual claims," and "does not have 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." In other words, the MAA required all employment-related disputes to be resolved in individual arbitration, without the possibility of class or collective claims.

The NLRB case arose after an attorney representing one of D.R. Horton's superintendents sought to initiate arbitration of a claim, on behalf of all similarly situated superintendents nationwide, that D.R. Horton was misclassifying its superintendents as exempt from the Fair Labor Standards Act. D.R. Horton refused to arbitrate, citing the language in the MAA barring collective claims. An unfair labor practice charge was then filed with the NLRB, based on a claim that D.R. Horton violated Section 8(a)(1) of the NLRA by conditioning employment on the MAA, which was alleged to interfere with protected rights under Section 7.

The Decision in *D.R. Horton*

The Board plurality decision in *D.R. Horton* states that the Board and the courts have previously held that Section 7 protects the right of employees to join together to pursue workplace grievances, including through litigation. This prompted the Board in *D.R. Horton* to conclude that "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." The Board therefore found that the employer, by making the MAA a condition of employment, explicitly restricted activities protected by Section 7.

The Board plurality concluded that the MAA violated the NLRA because it was an individual agreement that restricted Section 7 rights. Significantly, the Board recognized that it is "well settled . . . that a properly certified or recognized union may waive certain Section 7 rights." The Board also acknowledged the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, where the Court stated: "Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."[2] Nonetheless, the Board plurality suggested that a "properly certified or recognized union"—engaging in bargaining based on the "*exercise* of Section 7 rights" (emphasis in original)—was necessary for an agreement like the MAA to be considered lawful.

The plurality in *D.R. Horton* also relied on the Norris-LaGuardia Act (NLA) in support of its decision. The NLA states in part that federal courts cannot enter an injunction against certain activities, including "aiding any person . . . prosecuting any action or suit in any court." This provision of the NLA, according the Board, means that "an arbitration agreement imposed upon individual employees as a

2. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 1465 (2009) (Supreme Court upholds enforceability of arbitration clause in collective bargaining agreement waiving employee rights to pursue court litigation regarding discrimination claims arising under Title VII and ADEA).

condition of employment cannot be held to prohibit employees from pursuing an employment-related class, collective, or joint action in a Federal or State court."

The Board plurality indicated that its decision did not create a conflict between the Federal Arbitration Act (FAA) and the NLRA because the Supreme Court—when upholding the resolution of statutory rights in FAA arbitration—has indicated that such arbitration did not require a party to "forgo the substantive rights afforded by [a] statute."[3] In *D.R. Horton*, the Board stated that the employer's agreement, by barring class and collective claims, "directly violates the substantive rights vested in employees by Section 7 of the NLRA."

The Board in *D.R. Horton* solicited amicus briefs concerning the case. Amicus briefs were filed by many parties, including a brief filed by Morgan Lewis on behalf of the Council on Labor Law Equality, a copy of which is available at http://mynlrb.nlrb.gov/link/document.aspx/09031d45805767bf.

Implications of the Board's Decision

Employers evaluating the potential impact of *D.R. Horton* should recognize that the ruling's impact on other cases remains unclear, and that the decision itself is subject to some important limitations.

First, the *D.R. Horton* decision applies only to "employees" as that term is defined in the NLRA. The ruling has no application to managerial employees, supervisors, or independent contractors, none of whom have rights protected under the NLRA. Therefore any class or collective action restrictions relating to those individuals are unaffected by the *D.R. Horton* decision. Also, the *D.R. Horton* ruling does not have any direct impact on employers not covered by the NLRA.

Second, *D.R. Horton* states that the decision does *not* require employers to "permit, participate in, or be bound by a class-wide or collective arbitration proceeding." The Board indicated that "[e]mployers remain free to insist that *arbitral* proceedings be conducted on an individual basis" (emphasis added).

Third, other variations and factual settings involving class/collective action restrictions are not addressed in *D.R. Horton*. The decision does not resolve whether an employer can require employees to waive class/collective claims in court while continuing to permit class claims in arbitration. Nor does the decision address the legality of agreements that are not a condition of employment (e.g., an agreement with individual employees to resolve a pending dispute or all potential employment disputes through non-class arbitration). Also unaddressed in *D.R. Horton* are employee agreements associated with particular compensation or benefit programs or that are otherwise supported by separate consideration.

Fourth, enforceability of class/collective action restrictions is adjudicated much more often in the courts than before the NLRB, and the courts (especially federal courts) have been more receptive to the use and enforceability of mandatory arbitration and class/collective action restrictions. In this regard, the impact of *D.R. Horton* is unclear, and *D.R. Horton* itself remains subject to appellate review.

Fifth, the *D.R. Horton* decision addresses what the Board itself recognizes as "an issue of first impression," and the Board's reasoning in several respects invites potential legal challenge. For example, possible issues include the following:

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3. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985).

- The NLRA provides little if any support for the Board's statement in *D.R. Horton* that complex class action court litigation (involving statutes over which the NLRB has no enforcement authority) was a "core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."
- The plurality in *D.R. Horton* states an employee's procedural right to engage in class action litigation is a form of "protected" collective activity under NLRA Section 7, while disregarding the equally protected right of employees to "to refrain from any and all such activities."
- The cases upholding arbitration agreements containing restrictions on class/collective claims appear contrary to the premise of *D.R. Horton*, which suggests union representation is necessary before employees and employers can lawfully agree to have legal claims resolved in arbitration on an individual basis. Existing case law supports the right of employees generally to forgo court litigation and class action claims in favor of the speed, informality, and cost savings associated with having claims resolved individually and/or in arbitration.
- There is no acknowledgment in *D.R. Horton* of an employee's right as an "individual" to resolve grievances "*without* the intervention of [a] bargaining representative."[4]
- Finally, questions may be raised about whether *D.R. Horton*—decided by only two Board members, with Member Hayes recused—complies with the Supreme Court decision in *New Process Steel*, which held that the Board must have a minimum of three members in order to act.[5]

Webinar—Social Media, Waivers, and the NLRA

Morgan Lewis is hosting a webinar—Social Media, Waivers, and the NLRA: What All Companies Need to Know—on Thursday, January 19, 2012 from noon to 1:00 p.m. Eastern Time. This webinar will include a detailed discussion of the *D.R. Horton* ruling, including (among other things) strategies and best practices regarding arbitration agreements and restrictions on class and collective actions. More information about this webinar, including registration, is available at http://www.morganlewis.com/index.cfm/bnodeID/d0bd5d5e-3daf-484b-8ca3-00809005ef82/eventID/89e90497-6ce6-4ea5-9d21-521d5bffc82b/fuseaction/event.detail.

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4. Section 9(a) of the NLRA states that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, *without* the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, [t]hat the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added).

5. *See New Process Steel, L.P. v. NLRB*, __ U.S. __, 130 S. Ct. 2635 (2010). The newly constituted five-member NLRB has a Democratic majority that may decide to apply the *D.R. Horton* ruling to other cases, but these members include President Obama's three most recent recess appointments. These appointments are likely to be challenged based on the President's departure from traditional standards regarding what constitutes a "recess."

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