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## **Fifth Circuit Overturns NLRB Decision on Class and Collective Action Waivers**

On December 3, the Fifth Circuit set aside the National Labor Relations Board's ("NLRB" or "Board") ruling that the National Labor Relations Act ("NLRA") prohibits employers from including class or collective action waivers in mandatory arbitration agreements. The NLRB had previously held that a waiver used in homebuilder D.R. Horton, Inc.'s arbitration agreements ran afoul of the NLRA because a reasonable employee could view such a waiver as a limitation on engaging in protected concerted activity. The Board's decision originated from a claim brought against D.R. Horton by an employee who had attempted to initiate a class action under the Fair Labor Standards Act ("FLSA"). The employee then turned to the NLRB, arguing that D.R. Horton's agreement violated Section 7 of the NLRA by conditioning employment upon a waiver of the right to pursue claims in a collective manner. In January 2012, the NLRB agreed.

In overturning the NLRB's decision, the Fifth Circuit held that the Board failed to apply appropriate weight to the Federal Arbitration Act ("FAA"), which allows lawful arbitration agreements to be enforced as written. Specifically, the Fifth Circuit held that class action procedures are not a substantive right, and, further, the "NLRA should not be understood to contain a congressional command overriding application of the FAA." The court did agree with the NLRB, however, that arbitration agreements must permit filing of administrative claims with the Board.

While the Fifth Circuit's ruling is a victory for employers, the effect of the ruling may be diluted by two factors. First, the decision is only binding upon courts located in Louisiana, Mississippi, and Texas (the area the Fifth Circuit covers). Second, the NLRB takes the position that only Supreme Court decisions are binding upon it. Thus, the Board will continue to pursue complaints on this issue, both outside and inside the Fifth Circuit.

The Eighth Circuit has also refused to apply the NLRB's D.R. Horton rationale in a case that did not involve the Board. The Fifth Circuit's rationale increases the odds that the Eighth Circuit will continue to disagree with the Board's position, even in direct appeals of NLRB decisions. When deciding whether to include class waivers in arbitration agreements, employers will have to weigh the possibility of potential vindication before an appellate court against the loss of both money and time spent defending NLRB complaints (thanks to the Board's lengthy process).

Employers who have included or are considering including class or collective action waivers in their mandatory arbitration agreements should make clear that the agreements permit filing administrative charges with the NLRB and other federal agencies. We encourage employers to contact their Thompson Coburn attorney to discuss the advantages and disadvantages of these waivers in light of the Fifth Circuit's ruling.

If you have questions regarding the above-referenced decision, or other labor or employment issues, please contact a member of Thompson Coburn's Labor and Employment Group.

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