BUTLER|SNOW

WORKPLACE

Volume 2012 No. 1

NLRB Invalidates Non-Union Class Action Waivers in Arbitration Agreements

By J. Wilson Eaton III

The National Labor Relations Board's January 3, 2012 ruling in D.R. Horton, Inc., 357 NLRB No. 184 (2012) invalidates all non-union employees' class action waivers contained in arbitration agreements. NLRB Chairman Mark Gaston Pierce and now-former Member (and former union attorney) Craig Becker held that class action waivers in a non-union employer's mandatory arbitration procedure violate Section 8(a)(1) of the National Labor Relations Act because they unlawfully restrict employees' right to engage in concerted action for mutual aid and protection, as provided by Section 7 of the Act ("Section 7 rights").
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Today's Work Environment Suggests Employers Should Examine Their Non-Competition Agreements to Ensure Clarity

By Timothy M. Threadgill

Technology has made today's business world smaller than ever. With the advancements of the internet, computers and mobile telephones, many employees are not confined to working in a particular office building. Instead, it is not uncommon for employees to work in a town where their employer does not even have a formal office. With that in mind, employers who employ non-competition agreements (or any restrictive covenant agreements) should analyze their agreements to contemplate the impact of technology on their wording and ensure the agreements clearly state what the employer intends.
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FMLA May Protect Pre-Eligibility Requests For Post-Eligibility Leave

By David P. Jaqua

In order to receive FMLA protection, an employee must be both eligible, meaning she or she has the requisite length of service and hours (at least 12 months total prior employment and at least 1,250 hours worked during the previous 12-month period), and entitled to leave, meaning an employee has experienced a triggering event (such as the birth of a child). "The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start." 29 C.F.R. §825.110(d). Many employers have assumed that an employee who has merely announced that she will need FMLA leave at a date in the future, but who is not eligible at the time of the announcement, is not yet protected by the FMLA and could have no claim for either interference or retaliation. An interference arises when an employee is denied or otherwise interfered with in exercising her substantive rights under the Act. A retaliation claim means an employee asserts that his employer discriminated against him because he engaged in an activity protected by the Act.

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Fifth Circuit Invalidates Arbitration Clause in At-Will Handbook

By J. Wilson Eaton III

Employers with arbitration agreements in their employee handbooks should immediately review the terms of the agreement and the handbook's expression of the employment at will rule. Recently, in *Carey v. 24 Hour Fitness, USA, Inc.*, the United States Court of Appeals for the Fifth Circuit (with appellate jurisdiction over federal courts in Mississippi, Louisiana, and Texas) held the language in an employer's at-will handbook disclaimer retained too much authority to alter the arbitration agreement; therefore, the agreement was illusory and unenforceable.

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REMINDER:

As we notified you in Workplace Alert Volume 2011, Number 2 (December 28, 2011), the National Labor Relations Board has postponed the effective date of its employee rights notice-posting rule until April 30, 2012. The legal challenges to the NLRB rule are still pending. We will provide further updates to you via Butler Snow's E-Alerts and Workplace Newsletters. In the meantime, if you have any questions, please do not hesitate to contact the Butler Snow Labor and

Employment Group attorney with whom you usually work, or you may contact the author of the articles within this E-Newsletter, J. Wilson Eaton III, David P. Jaqua and Timothy M. Threadgill.