



just when you thought it was safe to go back in the water... nlrbs decision in *d.r. horton, inc.* sinks employer's hopes of stopping the class action flood

MSK Client Alert

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In April 2011, when the United States Supreme Court issued its decision in *AT&T Mobility v. Concepcion*, the employer community was cautiously optimistic that the holding could provide legal support for upholding class action waivers in employee arbitration agreements, which in turn could have potentially put an end to wage and hour and other class actions against employers that included such waivers in their arbitration agreements.

On January 3, 2012, however, the National Labor Relations Board ("NLRB") decided in *D.R. Horton, Inc.* that an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA") when it requires its employees to sign, as a condition of employment, an arbitration agreement that precludes them from bringing "joint, class, or collective claims" related to their employment in either arbitration or the courts. 357 NLRB No. 184. While this decision does not completely foreclose the use of class action waivers in employee arbitration agreements, it is a significant setback for any employer who hoped to limit its exposure to class action claims through the use of such a waiver.

Like many employers, D.R. Horton required all employees sign a "Mutual Arbitration Agreement" ("MAA") as a condition of employment. Pursuant to the MAA, all employment-related disputes had to be resolved through individual arbitration and employees waived their right to a jury forum. Employees also were required to agree that they would not pursue class or collective litigation of claims in any forum, arbitral or judicial.

Michael Cuda was employed by D.R. Horton as a superintendent. Cuda claimed that he, along with a nationwide class of similarly situated superintendents, had been misclassified as exempt from the Fair Labor Standards Act. When Cuda's attorney provided D.R. Horton with notice of his intent to initiate arbitration, D.R.

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Horton replied that the notice was ineffective because the MMA barred the arbitration of collective claims. Cuda then filed an unfair labor practice charge.

The NLRB ultimately found that the class action waiver contained in the MAA prohibited the exercise of substantive rights protected by Section 7 of the NLRA. Relying on what it described as decades of consistent Board precedent, the Board held 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." Therefore, by requiring employees, as a condition of employment, to refrain from bringing collective or class claims in **any** forum, the MAA "clearly and expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA."

The NLRB seemed to find two aspects of the MAA particularly troubling. First, the MAA was a mandatory condition of employment. There was an implicit threat, therefore, that, if employees refused to sign the MAA, they would be fired or not hired. Second, the MAA prohibited collective or class actions in any forum; in doing so, the NLRB contended, the MAA impinged upon a core substantive right protected by the NLRA and the foundation upon which both the NLRA and federal labor policy rest.

In reaching its decision, the NLRB also analyzed whether there was a conflict between its finding that the MAA was unlawful and the underlying purposes of the Federal Arbitration Act ("FAA"). Not surprisingly, the Board found that there was no conflict between its own decision and the FAA. Further, with regard to the Supreme Court's holding in *AT&T Mobility v. Concepcion*, the NLRB did not believe that the case was controlling because the Supreme Court case did not involve either the waiver of rights protected under the NLRA or even an employment agreement. As a remedy, the NLRB ordered the employer to either rescind the MAA entirely or revise it to make clear that the arbitration agreement did not constitute a waiver of employees' right to bring employment-related class actions and/or to file charges with the NLRB.

The immediate impact of the NLRB's decision in *Horton* is clear: arbitration agreements that include class action waivers are now unlawful for most employees. The NLRB's decision applies only to statutory employees as defined under the NLRA. As such, the decision does not apply to arbitration agreements entered into with supervisory and managerial employees. Employers who implemented arbitration agreements containing class action waivers following the Supreme Court's decision in *AT&T Mobility v. Concepcion* should have such agreements reviewed by legal counsel or risk committing an unfair labor practice and having the agreements now declared unenforceable.

The long-term implications of the decision, however, are decidedly murkier. The decision in *Horton* has been appealed to the court of appeals and, ultimately, could be headed for the U.S. Supreme Court. At least one federal court, the District Court for the Southern District of New York, expressly declined to follow the NLRB's decision in *Horton* when deciding to enforce an arbitration agreement containing a class action waiver. Similarly, a judge in the Central District of California recently clarified that *Horton* did not apply when an employee entered into an arbitration agreement voluntarily and not as a condition of his or her employment. The Supreme Court for its part issued a ruling four days after the Horton decision in *CompuCredit Corp. v. Greenwood*, No. 10-948 (Jan. 10, 2012), reaffirming the decidedly pro-arbitration position it has taken in a number of cases, including *AT&T Mobility*



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v. Concepcion. The validity of class action waivers in arbitration agreements will be before the courts for a good while. Employers who hope to compel the resolution of disputes with their employees through arbitration need to do so cautiously and with the guidance of counsel.

ASK MSK - Q&A Section:

Q: What disputes with employees, if any, can still be resolved through arbitration?

A: The *Horton* decision does not prevent an employer from compelling the arbitration of all individual employment disputes provided that the employee is still free to pursue a class action either in litigation or arbitration. While for some employers this may defeat the primary purpose of entering into an employment arbitration agreement, employers who wish to compel the resolution of individual disputes through arbitration should have their arbitration agreements revised to make sure they adequately preserve this right.

Q: Is there any situation where an employer may enforce an arbitration agreement containing a class action waiver?

A: It appears that employers may continue using arbitration agreements containing class action waivers provided that such agreements are not mandatory conditions of employment. In order for such agreements to be enforceable, employees should be able to opt out of the agreements if they do not want to be subject to binding, nonclass arbitration. As discussed above, at least one judge in the Central District of California has indicated that voluntary agreements are enforceable even where they contain class action waivers. That judge, however, has not issued a definitive ruling and instead has requested additional information about a pending claim the parties have before the NLRB centering on the enforceability of the arbitration agreement.

Q: Other than this recent prohibition on class action waivers, are there any other requirements on employers who seek to use employment arbitration agreements?

A: California law provides a number of protections against the waiver of the right to a trial by jury. In sum, arbitration agreements must comply with traditional contract law principles and cannot be either substantively or procedurally unconscionable. Care should be taken when drafting arbitration agreements to ensure that agreements meet these standards.