



# LABOR BOARD PURPORTS TO INVALIDATE CLASS ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS

## *CONTROVERSIAL DECISION LIKELY TO BE CHALLENGED*

In an unprecedented, sweeping ruling affecting both unionized and nonunion employers alike, a two-member panel of the National Labor Relations Board (“NLRB” or “Board”) has held that an agreement that precludes employees from filing class or collective actions in any forum—whether in court or in arbitration—violates Section 8(a)(1) of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 158(a)(1).

### EXECUTIVE SUMMARY

In *D.R. Horton, Inc.*, 357 NLRB No. 184 (January 3, 2012), the Board held that employers who require employees to agree to class action waiver clauses as a condition of employment unlawfully “interfere” with employees’ Section 7 right to engage in “concerted activities for ... other mutual aid or protection,” regardless of whether the employees at issue are unionized. In a less controversial part of the decision,

the Board also held that an employment arbitration agreement that does not contain a clear exemption allowing the employee to file administrative charges with the NLRB violates the NLRA. Board Chairman Pearce and now-departed Member Becker authored the decision; Republican Board Member Brian Hayes was, for unstated reasons, recused and did not participate in the decision.

The Board’s *D.R. Horton* decision is sure to be challenged on numerous fronts. In finding that the NLRA prohibits arbitration agreements that include class or collective action waivers in all forums, the Board has given short shrift to U.S. Supreme Court rulings interpreting the Federal Arbitration Act (“FAA”), including *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). Indeed, *D.R. Horton* appears to be an attempt by the Board to reach well beyond the authority provided by the NLRA to begin to regulate the mode of resolution

of non-NLRA employment claims. Significant procedural questions may also exist concerning the timing of the decision, which, while dated January 3, was released several days after Member Becker's term expired, at which point the Board was prohibited from taking any action due to the loss of its quorum. *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). The decision comes on the heels of President Obama's controversial announcement of his intent to recess appoint three additional members to the Board, despite the ongoing *pro forma* sessions of Congress that may arguably prevent recess appointments.

The Board's decision will not be the final word on the issue of class action waivers in arbitration agreements. The Board's decision is enforceable through Unfair Labor Practice ("ULP") charges filed with the Board; however, any order of the Board will be reviewed by a federal court of appeals, where the agency's ruling is likely to come under heavy criticism in view of the decisions of the U.S. Supreme Court and other courts enforcing class action waivers in mandatory arbitration agreements. But employers, whether unionized or not, should brace themselves for a potential onslaught of litigation, both in court and before the Board, seeking to invalidate such waivers. Employers also should review their employment arbitration agreements to determine whether the agreements are at risk under the Board's decision. In principle, employment arbitration agreements that do not contain class action waiver provisions are not at risk under the Board's ruling. Particularly given the uncertainty as to the Board's authority to act at this time and the likelihood of a court challenge to this decision, employers should consult with counsel before modifying their arbitration agreements.

## **D.R. HORTON'S ARBITRATION AGREEMENT**

Like many employers, D.R. Horton required employees to sign a Mandatory Arbitration Agreement ("MAA") as a condition of employment. The MAA did not clearly exempt administrative charges filed with the NLRB or the EEOC. In addition, the MAA prohibited the arbitrator from allowing a dispute to proceed on a class or collective action basis in any forum.

One of D.R. Horton's nonunion employees who signed the arbitration agreement sought to initiate a collective arbitration under the Fair Labor Standards Act ("FLSA") alleging that he was misclassified as exempt from overtime. After the employer refused to process the arbitration request as a collective action, the employee filed an ULP charge with the NLRB. The employee alleged that the class and collective action waiver in the Agreement violated Section 8(a)(1) of the NLRA and that the MAA violated both Sections 8(a)(4) and 8(a)(1) by potentially leading employees to believe they were prohibited from filing charges with the Board.

An Administrative Law Judge ("ALJ") at the NLRB concluded that the MAA violated the NLRA by appearing to prohibit the filing of ULP charges with the Board but that the MAA's prohibition on class or collective actions did not violate the NLRA. Both sides filed exceptions to the ALJ's decision with the NLRB. In June 2011, the Board invited interested parties to file amicus briefs in the case on the latter ruling. Jones Day, on behalf of several national employer associations, filed an amicus brief with the Board arguing that class action waivers were enforceable under the FAA and did not violate the NLRA.

## **THE BOARD'S DECISION**

In a relatively noncontroversial portion of the decision, the Board upheld the ALJ's finding that D.R. Horton's arbitration agreement violated the NLRA by not providing a clear exception allowing employees to file charges with the NLRB. Relying on prior decisions, the Board held that a mandatory arbitration agreement must clearly state that employees maintain the right to file ULP charges with the Board, similar to the right employees have to file administrative charges with the EEOC. Because the MAA was, at the least, ambiguous on this point, the Board found a violation of Section 8(a)(1) of the NLRA.

In a far more significant holding, the Board also concluded that the MAA's waiver of all class and collective actions, in both judicial and arbitral fora, violated employees' right under Section 7 of the NLRA to engage in concerted activities. Tracing the legislative protections of concerted activity to the Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 et

seq., the Board likened class action waivers to unlawful “yellow-dog” contracts, which prohibit employees from joining labor unions. Demonstrating clear antipathy toward arbitration agreements containing class action waivers, the Board expressly rejected a 2010 NLRB General Counsel Memorandum directing that a class action waiver in a pre-dispute arbitration agreement did not violate the NLRA, as long as the agreement made clear that certain employee rights were preserved.

The Board acknowledged that, under various judicial decisions, class action waivers contained in arbitration agreements are enforceable under the FAA. See, e.g., *AT&T Mobility v. Concepcion*. Nonetheless, in purporting to “accommodate” the interests of two federal statutes—the FAA and the NLRA—the Board found that the protections for concerted activities under the NLRA encompassed the right to pursue non-NLRA statutory employment claims on a class basis, whether or not a class or collective action waiver provision otherwise conformed to the FAA and state law. 357 NLRB No. 184, at 10 (“The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.”). As a result, the Board held that an employer violates Section 8(a)(1) of the NLRA by requiring employees, as a condition of employment, to waive their right to pursue employment law claims as a class or collective action.

In its decision, the Board sought to downplay the obvious significance of its decision in several ways. For example, the Board stated that its holding applies only to employment arbitration agreements that include a class or collective action waiver in all fora. Therefore, an agreement that requires individual employees to arbitrate their disputes and that does not address the role of class or collective actions is presumably unaffected by this decision. In addition, the Board confirmed that its holding applies only to “employees” as defined by the NLRA, which would exclude supervisors and certain other types of workers.

The Board stated that it was not addressing two “more difficult questions”: (1) whether mandatory arbitration agreements with employees remain valid, if employees have the right to pursue a class or collective action in the arbitration forum; and (2) whether an employer may require a class or collective action waiver in an arbitration agreement, if the agreement is not entered into as a condition of employment, such as an agreement entered into in exchange for participating in a voluntary bonus, commission, or benefit plan. Therefore, even if the Board’s decision remains the law, an employer still may be able to enforce a mandatory employment arbitration agreement, if the agreement allowed employees to pursue class or collective actions in the arbitration forum.

The Board’s decision is truly novel. The NLRB has long held, with some judicial approval, that employees’ Section 7 right to engage in concerted activity includes the right not to be fired or disciplined by the employer for filing or participating in a group lawsuit, even where the litigation seeks redress for non-NLRA workplace rights. This is the first time, however, that the Board has sought to limit the right of employers, under the Federal Arbitration Act, to mandate arbitration agreements as the means by which those disputes must be resolved.

## THE STATUS OF THE BOARD

The Board’s *D.R. Horton* decision comes at a particularly unsettled time in the Board’s history. As noted above, under the Supreme Court’s *New Process Steel* decision, the Board is unable to act with fewer than three members. Since August 2011, the Board has been operating with only three members, one of whom—Member Becker—was an unconfirmed recess appointment. The Board has rushed through numerous important decisions and actions before Member Becker’s departure, including promulgating significant and controversial changes to its rules for conducting union elections on December 22, 2011. The two-member majority of the Board continues to announce new decisions, including *D.R. Horton*, even though Member Becker’s term expired on or even arguably before January 3. Nothing is certain about the Board’s latest controversial decisions and actions, other than the complicated and potentially lengthy litigation that will be generated.

## GOING FORWARD

Employers should be cautious about modifying their arbitration agreements based solely on this decision. The decision is most certainly going to be appealed to a circuit court of appeals, and it is uncertain whether federal or state courts will follow the guidance of this two-member decision in determining whether to enforce employment arbitration agreements. Moreover, altering arbitration agreements is a complicated and sometimes time-consuming task, particularly for incumbent employees.

Regardless of the future viability of the Board's decision, however, employers should ensure that their mandatory arbitration agreements contain an express carve-out for employees to file administrative claims with the NLRB and the EEOC.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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