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FIFTH CIRCUIT HOLDS THAT NLRB ERRED IN FINDING THAT ARBITRATION AGREEMENTS WITH CLASS ACTION WAIVERS VIOLATE NLRA

On December 3, the Fifth Circuit, in *D.R. Horton, Inc. v. National Labor Relations Board,* rejected the National Labor Relations Board's ruling that Horton's mandatory arbitration agreement containing a class action waiver violated § 7 of the National Labor Relations Act. No. 12-60031, 2013 WL 6231617 (5th Cir. Dec. 3, 2013). The court reasoned that the NLRB "did not give proper weight to the Federal Arbitration Act," which made the arbitration agreement enforceable. *Id.* at *1. And according to the court, the NLRA, which protects the right of employees to engage in concerted activity, "should not be understood to contain a congressional command overriding the application of the FAA." *Id.* at *13. While this ruling certainly constitutes good news for employers, the Fifth Circuit added one cautionary note. The court found that although the class waiver was enforceable, Horton's arbitration agreement violated §§ 8(a)(1) and (4) of the NLRA because it included language that could lead employees to reasonably believe that they were precluded from filing unfair labor practice charges. *Id.* at *14. As a result, the court enforced the Board's order that Horton revise the document.

CASE BACKGROUND

Beginning in 2006, Horton required all employees to sign, as a condition of their employment, an agreement to submit all of their employment-related disputes to binding arbitration. Under this agreement, employees were barred from pursuing class or collective claims in an arbitral or judicial forum, and all employment-related disputes were to be resolved through individual arbitrations. In 2008, former Horton employee Michael Cuda sought to initiate a nationwide collective action via arbitration, claiming that he and similarly situated employees had been

misclassified as exempt from the overtime provisions in the Fair Labor Standards Act. Noting that the arbitration agreement prohibited collective actions, Horton invited Cuda to file an individual arbitration proceeding. In response, Cuda filed an unfair labor practice charge in which he alleged that the class-action waiver violated the NLRA.

THE BOARD'S DECISION

The NLRB concluded that Horton violated § 7 of the NLRA, which allows employees "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. According to the Board, the NLRA protects the right of employees to "join together to pursue workplace grievances, including through litigation and arbitration." *Horton*, 2013 WL 6231617, at *7. Thus, in the Board's opinion, by requiring employees to refrain from collective or class claims, Horton's arbitration agreement infringed on employees' substantive § 7 rights. The Board also held that Horton's arbitration agreement violated § 8(a)(1) of the NLRA because it contained language that could lead employees to believe that they were barred from filing unfair labor practice charges.

THE FIFTH CIRCUIT'S ANALYSIS

Reviewing the NLRB's decision, the Fifth Circuit recognized that the Board is entitled to judicial deference in interpreting the NLRA. The court also recognized, however, that the Board cannot interpret the NLRA in a manner that infringes on other federal statutory schemes, such as the Federal Arbitration Act ("FAA").

It is well-settled that the FAA requires that arbitration agreements be enforced according to their terms. The *Horton* court noted that there were two potentially applicable exceptions to this rule. The first was the FAA's "savings clause," which provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. According to the Board, Horton's arbitration agreement violated the collective action provisions of the NLRA, thereby triggering the application of the savings clause. But the Fifth Circuit disagreed, relying on the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

Like the California statute that the Court invalided in *Concepcion*, the Board's interpretation prohibits class action waivers. The Board claimed, however, that its interpretation was different, arguing that, unlike the California statute, employers could prohibit class-wide arbitration as long as they left open a judicial forum for class and collective claims. The Fifth Circuit found this to be a distinction without a difference. Ultimately, such an arrangement would only operate to discourage arbitration. Plaintiffs' lawyers would have virtually no incentive to arbitrate individual claims when they may do so for a class and earn much higher fees. Likewise, when faced with inevitable class litigation, employers would have less incentive to continue resolving potentially duplicative claims on an individual basis. Thus, the Fifth Circuit concluded that "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA." *Id.* at *11.

The second potential exception was whether another statute's "congressional command" precluded the FAA's application. *Id.* at *11. So the question in *Horton* was: Did the NLRA contain a congressional command that overrode the FAA? The Fifth Circuit said no. In order for such a command to exist, it must be "discoverable in the text," the statute's "legislative history," or "an inherent conflict between arbitration and the [statute's] underlying purposes." *Id.* at *11 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). Here, the NLRA's text contains no language overriding the FAA. The legislative history contains no disavowal of arbitration either. And there is no inherent conflict between the FAA and the NLRA's purpose. To the contrary, the NLRA actually permits and requires arbitration. As the Board itself acknowledged, "arbitration has become a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award." *Id.* at *12.

Accordingly, because the FAA's savings clause does not apply to the Board's interpretation and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Fifth Circuit held that Horton's arbitration agreement must be enforced according to its terms. The court also held, however, that Horton's arbitration agreement could reasonably be understood by employees to bar them from bringing an unfair labor practice case before the NLRB. Horton was simply not clear enough in carving out its employees' right to bring such agency charges, and as a result, the *Horton* court enforced the NLRB's order that the company revise the document.

OTHER ISSUES

In addition to the underlying merits, the court also acknowledged the existence of the constitutional question of whether the Board's decision was valid in light of the D.C. Circuit's opinion in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted* 133 S. Ct. 2861 (U.S. June 24, 2013). But Horton never challenged the constitutionality of the panel's appointment during the life of the case, and this particular question is not a jurisdictional one. Rather, it is a discretionary one, and such discretion should be exercised only in "rare cases." *Horton*, 2013 WL 6231617, at *3. Thus, given the current circuit split on this question, which the Supreme Court is set to resolve in the near future, the Fifth Circuit declined to weigh in, reasoning that it had little to add "to the percolation of the issue other than to declare which side of the split we take." *Id.*[1]

1 The court also unanimously disposed of Horton's other arguments that the NLRB lacked authority to decide the unfair labor practice case, including Horton's claim that the Board did not have authority to act because it lacked the necessary quorum of three members and Horton's claim that one panel member's appointment expired before he participated in the NLRB's decision.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Noting that it was "loath to create a circuit split," the Fifth Circuit by virtue of its 2–1 decision in *Horton* has now joined the Second, Eighth, and Ninth Circuits in rejecting the Board's view that class action waivers in arbitration agreements are unenforceable. *Id.* at *14. With this growing body of law, coupled with recent Supreme Court decisions like *Concepcion* and *American Express v. Italian Colors Restaurant*, it is becoming increasingly safe for employers to craft arbitration agreements requiring employees to waive their right to proceed collectively or on a class basis, and to submit their employment-related disputes to binding individual arbitration. But there is still cause to proceed with caution. Some courts, including some in California, are still refusing to enforce class waivers in arbitration agreements. *See*, e.g., *Franco v. Arakelian Enterprises, Inc.*, 149 Cal. Rptr. 3d 530, 533 (Cal. Ct. App. 2012), *review granted*, 294 P.3d 74 (Cal. 2013). And until the Board changes its position that class waivers in mandatory arbitration agreements violate the NLRA, or until the Supreme Court weighs in, employers may still be forced to engage in costly litigation over unfair labor practice charges challenging such waivers. Finally, as the Fifth Circuit in *Horton* held, it is important that these agreements make clear that employees may still bring certain agency charges. In light of these developments, employers should reevaluate any existing arbitration agreements and take care in drafting new ones to ensure, among other things, that they include plain language explaining the requirement that employees resolve all of their employment-related claims through individual binding arbitration does not preclude these employees from filing charges or complaints with the NLRB, the EEOC, or other federal and state administrative agencies.

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