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NLRB Finds Class Action Waivers in Employment Arbitration Agreements Invalid

*By Katharine I. Rand**

In October of last year, the United States Supreme Court decided *AT&T Mobility v. Concepcion* (131 S. Ct. 1740), in which the Court upheld the use of a class action waiver in a consumer arbitration agreement. In light of this decision, employment lawyers everywhere encouraged employers to consider adding such waivers to their arbitration agreements or entering into arbitration agreements with class action waivers if they did not already have them. The National Labor Relations Board (NLRB), however, recently made clear that it has a different opinion about whether *Concepcion*, a consumer case, is applicable in the employment context. Employers with or considering class action waivers in their arbitration agreements should pay attention to this increasingly unsettled area of the law.

In 2008, a national home building company, D.R. Horton, Inc., started requiring its new and current employees to sign arbitration agreements. The agreements included a prohibition against employees participating in or bringing class action claims, in arbitration or in court. When a supervisor who believed he had been misclassified as such requested arbitration on behalf of similarly situated employees, the employer argued that the employee and his co-workers had waived their right to bring such a claim. The supervisor then filed a complaint with the NLRB, arguing that the arbitration agreement violated the National Labor Relations Act (NLRA).

This past January, the NLRB issued its ruling (357 NLRB 184), agreeing with the supervisor. Specifically, the NLRB held that Section 7 of the NLRA—which vests employees with the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection"—protects employees' rights to join together to bring employment-related claims on a class-wide or collective basis, and that an employer cannot require its employees to waive this right as a condition of employment.

The NLRB determined that neither the Federal Arbitration Act (FAA) nor the *Concepcion* case precluded its decision. It reasoned that, while the FAA allows employers and employees to enter into individual arbitration agreements, it does not require those employees to give up substantive rights protected by other laws.

The NLRB made clear that employers may continue to require arbitration of individual claims. It also said that employers do not necessarily have to permit class-wide arbitration, but they cannot bar both class arbitration and class action lawsuits, leaving employees with no route to a collective action. (Interestingly, the decision does not say whether employers can require employees to waive class claims in court, while continuing to allow class claims in arbitration.)

Like any other NLRB ruling, this ruling applies to both union and non-union employers under the jurisdiction of the NLRB. Although the NLRA specifically excludes certain categories of employees from its coverage (*e.g.* agricultural laborers, domestic servants of a person or family in a home, supervisors, independent contractors, etc.), salespeople or brokers are not per se outside the scope of the NLRA. Under the NLRA, the term "supervisor" means an individual with the authority to "hire, transfer, suspend, lay off, recall, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action . . . . us[ing] independent judgment." Thus, securities brokers with assistants or other employees under their supervision may well constitute supervisors, who do not enjoy Section 7 rights under the NLRA.

Similarly, brokers who are truly independent contractors are outside the scope of the NLRA. Note, however, that the NLRB, like most government agencies and courts, will look beyond the recitals in an "independent contractor agreement" when assessing whether an

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***Katharine I. Rand** is a partner with Pierce Atwood LLP, resident in the firm's Portland, ME office. Ms. Rand's client work primarily involves employment law, with a focus on discrimination, harassment, retaliation, and wage/hour disputes. She also advises employers on employment-related matters, including employee relations issues, performance management, leaves of absence, and the reasonable accommodation process.*

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individual is really an employee and not an independent contractor. The NLRB has relied primarily upon the test set forth in the Restatement (Second) of Agency § 220, which requires consideration of a number of factors, including the extent of control the employer exercises over the individual's work details, whether the person employed is engaged in a distinct occupation or business, whether the work of that occupation is usually performed under an employer's supervision, the skill required by the occupation, the length of employment, whether payment is made according to the time worked or by the job, the nature of the parties' agreement, and whether the work is part of the employer's regular business, and whether the parties are in the same line of business. This test is a difficult one to meet, particularly where a broker is working for an entity that is in the business of selling securities.

The January 3 *D.R. Horton* decision came at the very end of the term of Board Member Craig Becker, whose recess appointment expired the day he signed the decision. President Obama quickly made three new recess appointments to the NLRB. Without those appointments, the NLRB would have been down to two members and therefore unable to act. However, by bypassing the Senate, many constitutional experts believe the President has violated his recess appointment authority under Article II, Section 2 of the U.S. Constitution because the Senate is not in "recess." Moreover, because the NLRB's Republican member, Brian Hayes, recused himself from *D.R. Horton*, leaving only two members to sign onto the decision, there is a question as to whether a quorum of Board members was sitting for the case, as required by the United States Supreme Court's 2010 decision in *New Process Steel v. NLRB*.

Citing these issues and others, D.R. Horton has petitioned the Fifth Circuit for review and the parties are currently waiting for a briefing schedule. Since the NLRB's decision, several federal district courts have distinguished or rejected the NLRB's holding[1] and the Third Circuit has compelled arbitration in an employment case without even mentioning *D.R. Horton*.[2] However, at least two federal district courts have relied upon *D.R. Horton* to hold class action waivers invalid in the employment context.[3] This area of the law is extremely unsettled, and will remain that way until the appellate courts, including perhaps the United States Supreme Court, weigh in. It is clear, however, that the President and the NLRB will continue to push a strongly pro labor agenda. So, for now, if you are an employer who has agreements with NLRA-covered employees to arbitrate their claims, and those agreements include class action waivers, you are risking unfair labor practice charges.

1. Lavoice v. UBS Financial Servs, 2012 U.S. Dist. LEXIS 5277 (S.D. N.Y. Jan 13, 2012); Palmer v. Cantrell, 2012 U.S. Dist. LEXIS 16200 (M.D. Ga. Feb. 9, 2012); Sanders v. Swift Transportation Co. of Arizona, 2012 U.S. Dist. LEXIS 24234 (N.D. Cal., Jan. 17, 2012).

2. Quilloin v. Tenet Healthsystem Philadelphia, Inc., 2012 U.S. App. LEXIS 5353 (3d Cir., Mar. 14, 2012)

3. Herrington v. Waterstone Mortgage Corp, 2012 U.S. Dist. LEXIS 36220 (W.D. Wis. 2012); Owen v. Bristol Care, Inc., 2012 U.S. Dist. LEXIS 33671 (W.D. Mo., Feb. 28, 2012)

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