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NLRB Holds Class Action Waivers Violate the National Labor Relations Act

Posted by [John Lewis](#) on January 09, 2012

In the much anticipated ruling in [D.R. Horton, Inc. and Michael Cuda.pdf](#), released Friday, January 6, the National Labor Relations Board ("NLRB") held that the Company violated Section 8(a)(1) of the National Labor Relations Act ("NLRA") by "requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial." The decision, which will have a far-reaching impact on all employers, also concluded that recent United States Supreme Court rulings on the Federal Arbitration Act and class arbitration were not implicated. To many management observers, the ruling elevates a procedural device, a class or aggregate proceeding, to the status of an individual statutory right applicable to any employment claim. The decision reasoned:

"an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7."

The Company and the Arbitration Agreement

The Company, D.R. Horton, Inc., builds homes and operates in more than 20 states. Starting in 2006, the Company required employees to sign a Mutual Arbitration Agreement ("MAA") that essentially provided that all employment-related disputes be resolved through individual arbitration. The Charging Party Michael Cuda worked for the Company as a superintendent and had signed the MAA. His attorney later informed the Company that it was misclassifying superintendents as "exempt" under the Fair Labor Standards Act and that he had been retained to represent Cuda and a nationwide class of superintendents. Cuda's attorney also attempted to give notice of intent to arbitrate on a class or collective basis. When the Company resisted, Cuda filed an unfair labor practice charge with the NLRB.

A Necessary Substantive Right?

Several groups that filed Amici Curiae briefs with the NLRB urged that employees' Section 7 rights were not impacted because they could jointly discuss their claims, pool their resources to hire a lawyer, seek litigation advice and support from a union, seek support from other employees and coordinate the filing of claims. The Board majority was unpersuaded, responding,

"if the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity it is no defense that employees remain able to engage in other concerted activities."

The decision also categorically rejected arguments that the right to bring a class or collective action was "procedural" rather than substantive.

"Any contention that the Section 7 right to bring a class or collective action is merely 'procedural' must fail."

According to the decision, the salient issue is:

"Whether [the Company] may lawfully condition employment on employees' waiving their right under the

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NLRA to take the collective action inherent in seeking class certification Rule 23 may be a procedural rule but the Section 7 right to act concertedly by invoking Rule 23 . . . or other legal procedures is not" (emphasis added).

Supreme Court Precedent Found Not Implicated

The ruling also found that the U.S. Supreme Court's opinions in *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (discussed in detail in other blog articles [here](#) and [here](#)) were not implicated. The Board majority reasoned that "[n]either involved the waiver of rights protected by the NLRA or even employment agreements." *AT&T Mobility* (which arose in a consumer context) was distinguished by the majority because it involved a conflict between the Federal Arbitration Act ("FAA") and state law not where two federal statutes potentially conflict. The FAA did not preempt the NLRA which gave employees a federally protected right to engage in concerted action. And, the *Cuda* decision emphasized it did not require class arbitration to protect employees' rights under the NLRA. Instead, it held "only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial.

Impact and Next Steps

The decision was completed last Tuesday and signed by the two Democratic Board members, before one, Craig Becker, had his recess appointment expire. The Board's sole Republican member, Brian Hayes, recused himself, without explanation.

The decision, which applies both to union and non-union workforces, will undoubtedly be appealed to a federal court of appeal.

The Bottom Line: The controversial NLRB has created another potential obstacle to the enforcement of class action waivers. A federal appellate court or the Supreme Court will likely resolve these important issues.

 Tags: **AT&T Mobility, class action waivers, D.R. Horton, FAA, FLSA, mutual arbitration agreements, NLRA, NLRB, Stolt-Nielsen**

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NLRB Judge Follows D.R. Horton Despite Differences In Company's Arbitration Procedure

Posted by [John Lewis](#) on July 12, 2012

A National Labor Relations Board ("NLRB") Administrative Law Judge ("ALJ") found a company's mandatory arbitration agreement violated the National Labor Relations Act ("NLRA") despite the fact that its arbitration procedure permitted employees to act concertedly to challenge the terms of the agreement and provided the parties could jointly agree to class claims.

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On July 2, 2012 ALJ Margaret Brakebusch followed the Boards' oft-criticized decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (discussed [here](#) in a January 9, 2012 post) by determining that Advanced Services Inc. ("Advanced"), an affiliate of General Electric, had violated the Act in two ways that will be of concern to companies with arbitration procedures. See [Advanced Services, Inc. and Tabita Sheppard Howard, Case Nos. 26-CA-6318 and 26-CA-71805.pdf](#). Advanced, which runs a call center for appliance customers in Memphis, Tennessee, had mandatory arbitration procedures which prohibited class claims and also required confidentiality in the procedures.

The Arbitration Procedures Involving Class Waivers

The Advanced procedures do contain a class action waiver but also have provisions different than those in *D.R. Horton*. The procedures state:

Covered Employees and the company waive their right to bring any covered claims as, or against a representative or member of a class or collective action (whether opt-in or opt-out) or a private attorney general capacity, unless all parties agree to do so in writing. All covered claims must be brought on an individual basis only . . . Without waiving the Company's right to enforce this Procedure's provisions regarding class and collective action waivers, nothing in this Procedure prohibits employees from acting concertedly to challenge the terms of the [arbitration agreement] by pursuing class or collective actions and they will not be subject to discipline or retaliation by the Company for doing so. (Emphasis added).

Advanced argued that the *D.R. Horton* decision was wrongly decided and inapplicable because its arbitration agreement language was "sufficiently dissimilar" to that in *D.R. Horton*. Indeed, the Advanced language specifically authorizes collective challenges to the agreement itself. And, the class-waiver provision could be waived if both parties agreed. Yet, the ALJ found that the language "does not eliminate the requirement for employees to bring their claims individually rather than collectively."

The ALJ also found the agreement did not specify when the class action waiver provision can be avoided:

The agreement does not clarify the circumstances in which [Advanced] would enter into such [a waiver agreement]. Without these written assurances, the language is hollow. Employees may reasonably conclude that there are few, if any, circumstances in which [Advanced] would agree to relinquish the class waiver clause."

Given these conclusions, the ALJ found that the agreement's language "is likely to have a chilling effect on employees' Section 7 rights and violates Section 8(a)(1), even in absence of enforcement."

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The Advanced arbitration agreement also contains confidentiality procedures, which are relatively common in these type of procedures. The language provided:

I understand and agree that all proceedings under this Agreement . . . including the arbitration hearing and record, all documents exchanged in discovery or otherwise used, and all communications in connection with the resolution or arbitration of my covered claims shall be confidential and not disclosed to the public, except (a) to the extent that the company and I agree in writing otherwise; (b) as may be appropriate in subsequent proceedings to enforce or invalidate the arbitrator's decision under this Agreement; or (c) as may be appropriate in response to a government agency or legal process.

Advanced justified the confidentiality provisions as fostering trust and protecting personal information from distribution to other employees or the public in general. Nevertheless, the ALJ determined the confidentiality provisions were unlawful:

[T]he total record evidence reflects that the confidentiality language in issue would reasonably bar employees from discussing the issues or circumstances related to the arbitration process in which they are involved. Inasmuch as this prohibition would reasonably be construed by employees to bar them from discussing matters concerning their conditions of employment, employees are thus prohibited from engaging in activity that is protected by Section 7 of the Act.

So, the ALJ found the confidentiality language violates 8(a)(1) of the Act.

The Advanced decision illustrates the fact that the Board and its ALJs will follow *D.R. Horton* and find any agreement requiring individual arbitration to violate the Act. Carefully drafted provisions allowing employees collectively to challenge the terms of the procedure will not make a difference. Hence, if *D.R. Horton* stands, class action waivers in arbitration agreements subject to Board jurisdiction will be problematic.

***The Bottom Line:* The Board and its ALJs will continue to enforce *D.R. Horton* as written and likely will reject class waiver provisions regardless of language that preserves employees' rights to challenge the class waiver, as long as the agreement at issue generally provides that claims must be brought individually. This makes the challenge to the *D.R. Horton* decision pending in the Fifth Circuit (*D.R. Horton, Incorporated v. NLRB*, Case No. 12-60031) critically important.**

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