Seventh Circuit Agrees with NLRB on Unenforceability of Class Action Waivers in Employment Agreements

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Over recent years, the National Labor Relations Board ("NLRB") and state and federal courts have danced back and forth in a struggle over the enforceability of arbitration agreements that require employees to waive the right to pursue labor law and wage and hour related class and collective actions. That struggle continues to percolate in 2016, as the Seventh Circuit released a decision in June upholding the NLRB's position that such agreements are unenforceable, and increasing the tension between federal appellate circuits on the same question.

Since its 2012 decision in *D.R. Horton, Inc.*, 357 NLRB 184, NLRB has consistently maintained that the National Labor Relations Act ("NLRA") prohibits arbitration agreements that require employees to waive the right to pursue labor-related class and collective actions, even if those provisions allow employees to opt out of the waiver. The NLRB has held that such agreements violate the NLRA by unlawfully restricting employees' rights to engage in protected concerted activity.

Many state and federal courts have rejected the NLRB's position and upheld class action waivers. Courts have done so by concluding that the NLRA or FLSA includes no congressional mandate for an employee's right to engage in class actions; therefore, the Federal Arbitration Act prevails. In 2013, the Fifth Circuit used this reasoning and overturned the Board's *D.R. Horton* decision (*D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). The Second, Eighth, Ninth, and Eleventh Circuits followed suit and rejected *D.R. Horton* in upholding class action waivers. (*Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013); *Walthour v. Chipio Windshield Repair*, 745 F.3d 1326 (11th Cir. 2014)).

The NLRB has since insisted on its interpretation and has continued to strike down class waivers in employment agreements. Ignoring federal decisions, it issued a second decision in *Murphy Oil USA, Inc.*, 361 NLRB 72 (2014), to reinforce its *D.R. Horton* ruling. In October 2015, the Fifth Circuit reversed *Murphy Oil* (*Murphy Oil USA, Inc. v. NLRB*, No. 14-60800 (5th Cir. Oct. 26, 2015)) (and the NLRB's *en banc* petition was denied without recorded dissent).

Undeterred, the NLRB has continued to hold firm. In 2015, the Board issued 35 decisions finding arbitration agreements unlawful based on the *D.R. Horton* and *Murphy Oil* decisions. The Board issued 15 of those rulings in the second half of December alone. Employers have brought at least two of these decisions back to the Fifth Circuit for review, which likely will follow its past decisions reversing the NLRB.

In June 2016, the NLRB won its first victory in a federal appellate court on this issue, when the Seventh Circuit upheld the Board's position on class waivers. In *Lewis v. Epic Systems*, the 7th Circuit considered a mandatory arbitration agreement, which: (1) required that wage-and-hour claims could be filed only through individual arbitration and that the employees waived "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding;" (2) included a clause stating that if the "Waiver of Class and Collective Claims" was unenforceable, "any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction;" and (3) "deemed [employees] to have accepted this Agreement" if they "continue[d] to work at Epic," with no option to opt-out of the agreement and remain employed.

The plaintiff claimed that Epic misclassified him as exempt and unlawfully refused him overtime pay, and sued in federal court, challenging the arbitration agreement under section 7 of the NLRA. The 7th Circuit agreed with him, finding that the arbitration agreement violated the plaintiff's rights under Section 7 of the NLRA. *Lewis* stands in directly conflict with *D.R. Horton* and the other Fifth Circuit rulings, meaning we now have a clear split between the 7th and 5th Circuit, which only the Supreme Court can resolve. The Board to this point has shown no interest in approaching the Supreme Court for review of this question. Given the split in circuits, only the nation's highest court can fully resolve the matter. In the meantime, the NLRB will likely enforce its aggressive stance against arbitration agreements that limit class or collective actions for employment-related claims.

While the majority of federal courts to consider the issue have ruled in favor of class action waivers, the Seventh Circuit's June 2016 ruling has given new life to the Board's position. Given the steadfastness with which the NLRB has struck down class action waivers in arbitration agreements, plaintiffs with potential class or collective actions and arbitration agreements are wise to file an unfair labor practice charge with the NLRB. This is particularly true in the Sixth Circuit, which has not yet considered the issue.