



Labor & Employment Update

January 2012

Recent NLRB Decision May Require Revisions to Agreements Banning Class or Collective Actions by Employees

On January 3, 2012, the National Labor Relations Board (NLRB) held that a Florida-based home builder, D.R. Horton Inc. (Company), committed an unfair labor practice (ULP) under the National Labor Relations Act (NLRA) by requiring employees to sign, as a condition of employment, an agreement that waived their rights to participate in class or collective actions in any forum, arbitral or judicial.

The NLRB held that it is a violation of the NLRA to use a mandatory arbitration provision in a way that restricts or impairs employees' abilities to engage in class or collective actions under Title VII, the Fair Labor Standards Act (FLSA) or other federal statutes. This is the first time the NLRB has ever held that litigation of this kind under another employment statute is protected activity under the NLRA.

The ULP charge was filed by a superintendent of the Company who claimed that an agreement he and others signed as a condition of employment violated Section 8(a)(1) of the NLRA because it precluded them from pursuing collective claims that they were misclassified as exempt workers under the FLSA. The NLRB held that the agreement illegally blocked the employees from pursuing such claims through class or collective actions in court or in arbitration.

The NLRB said that when employers require employees to execute such a waiver as a condition of employment, "there is an implicit threat that if they refuse to do so, they will be fired or not hired." Under such circumstances, they concluded, a policy like the Company's "violates Section 8(a)(1) because it restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity."

The NLRB additionally stated that "we do not reach the more difficult questions of (1) whether an employer can

require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration and (2) whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court."

Many employers have adopted policies similar to D.R. Horton's, which incorporate class or collective action waivers. Any employer having an agreement with employees that prohibits class or collective actions in any forum may wish to consider having their policies reviewed by counsel.

FOR MORE INFORMATION

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