CLIENT ALERT: Federal Court of Appeals Holds that Employers Do Not Violate the NLRA through the Use of Class and Collective Action Waivers in Mandatory Arbitration Agreements

The U.S. Court of Appeals for the Fifth Circuit (the "Court") has held that employers do not violate the National Labor Relations Act ("NLRA") by requiring employees, as a condition of employment, to sign arbitration agreements containing class or collective action waivers. However, the Court further held that such agreements can violate the NLRA if their language could reasonably be interpreted as prohibiting employees from filing unfair labor practice charges with the National Labor Relations Board (the "Board").

In *D.R. Horton v. N.L.R.B.* (December 3, 2013), the Court reviewed a significant decision issued by the Board – *D.R. Horton, 357 NLRB No. 184 (January 3, 2012)* – involving an employer's "Mutual Arbitration Agreement" ("MAA"). As a condition of their employment, employees were required to sign the MAA which bound them to resolve all of their employment-related disputes through individual arbitration and prohibited them from pursuing class or collective actions in any forum.

In its controversial decision last year, the Board held that the MAA's restriction on class and collective actions barred employees from exercising their rights to engage in protected concerted activity under Section 7 of the NLRA. However, the Court rejected this position and held that the Board failed to give proper weight to the Federal Arbitration Act ("FAA") which generally requires arbitration agreements to be enforced according to their terms. The Court further rejected the Board's arguments regarding two exceptions to this rule.

First, the Board relied upon the FAA's "savings clause" arguing that because all contracts violating employees' NLRA-protected rights are unenforceable, the Board's invalidation of the MAA was no different than that of any other contract. The Court rejected this contention, noting that "[w]hile the Board's interpretation is facially neutral … the effect of this interpretation is to disfavor arbitration." Relying in part on the U.S. Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the Court held that the savings clause was not a basis for invalidating class action waivers in arbitration agreements because "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA."

Next, the Board argued that NLRA contained a congressional command precluding application of the FAA. Once again, the Court rejected the Board's argument. After reviewing the NLRA's statutory text, legislative history and purpose, the Court held that "[t]he NLRA should not be understood to contain a

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congressional command overriding application of the FAA." The Court further noted that it was "loath to create a circuit split" observing that "[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable."

While the Court found that employers do not automatically violate the NLRA through the use of arbitration agreements containing class and collective action waivers, it agreed with the Board that this particular employer's MAA violated the NLRA because its language could reasonably be interpreted as prohibiting employees from filing unfair labor practice charges with the Board. The MAA's arbitration provision spoke only to the requirement for employees to bring claims through arbitration without any reference to any exceptions for unfair labor practice charges. The Court specifically focused on the MAA's language that the employee "knowingly and voluntarily waiv[es] the right to file a lawsuit *or other civil proceeding* relating to Employee's employment with [Horton] *as well as* the right to resolve employment-related disputes in a proceeding before a judge or jury." According to the Court, "[t]he reasonable impression could be created that an employee is waiving not just his trial rights, but his administrative rights as well."

The Court's decision is a key victory for employers wishing to include class and collective action waivers in their arbitration agreements. It provides further support for the conclusion that such agreements are not *per se* violations of the NLRA – an issue which has been clouded by the Board's actions over the past few years. Yet, the decision also serves as an important reminder that employers can still be found to violate the NLRA if their arbitration agreements are not carefully worded. In particular, it is a fairly well-established principal that employers may not prohibit employees from filing charges with administrative agencies such as the Equal Employment Opportunity Commission or the NLRB. As such, employers should ensure that their arbitration agreements contain language which informs employees of these rights.

Even with the Court's decision, arbitration agreements containing class or collective action waivers continue to face scrutiny on a number of issues in a continually shifting legal landscape. Accordingly, employers should contact a Morgan, Brown & Joy attorney with questions regarding how these issues impact them and what steps they should take to protect themselves.

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