CLIENT ALERT: NLRB Rules that Class and Collective Action Waivers in Mandatory Arbitration Agreements Violate the NLRA

In a significant decision issued on January 3, 2012, the National Labor Relations Board ("NLRB" or the "Board") held that an employer violated Section 8(a)(1) of the National Labor Relations Act ("NLRA") by requiring employees, as a condition of employment, to sign arbitration agreements that precluded them from filing class or collective actions against the employer in any forum, arbitral or judicial.

In *D.R. Horton*, 357 NLRB No. 184, the Board examined an employer's Mutual Arbitration Agreement ("MAA") which employees were required to sign as a condition of their employment. Under the MAA, employees were bound to resolve all of their employment-related disputes through individual arbitration and they were prohibited from pursuing class or collective actions in any forum.

The Board held that concerted legal actions addressing wages, hours or other working conditions are protected concerted activity under Section 7 of the NLRA, whether through the judicial system or an employer-mandated arbitration procedure. Accordingly, the Board reasoned that the MAA violated the NLRA because it required employees, as a condition of their employment, to refrain from bringing class or collective actions, thereby barring them from exercising their Section 7 rights.

Importantly, the Board distinguished the MAA from collectively bargained arbitration agreements and voluntary arbitration agreements. According to the Board, collectively bargained arbitration agreements can legally include waivers of class or collective action rights because they are obtained through the collective bargaining process contemplated by the NLRA. However, the Board did not address the legality of voluntary arbitration agreements which contain such waivers; rather, it simply distinguished them from the MAA. While this issue remains unresolved at the NLRB, the Board's hostility to class or collective action waivers serves as a caution to employers considering their use.

In a less controversial aspect of its decision, the Board held that the employer also violated the NLRA because the language of the arbitration agreement did not clearly express to employees that their right to file an NLRB charge was not inhibited. Indeed, the MAA's arbitration provision spoke only to the requirement for employee's to bring claims through arbitration without any reference to any exceptions. This portion of the Board's ruling is based upon the 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.

The full impact of the Board's decision is not yet clear. It is sure to face further scrutiny through either an appeal of this or a similar decision to a Federal appeals court. There are multiple judicial decisions in which courts have determined that class action waivers contained in arbitration agreements are enforceable under the Federal Arbitration Act ("FAA"). Therefore, it is likely that a Federal court may soon analyze the Board's *D.R. Horton* decision in conjunction with these countervailing decisions to determine the legality of class or collective action waivers in arbitration agreements.

In the meantime, employers with arbitration agreements containing class or collective action waivers should be cognizant of this shifting legal landscape. Currently, the Board's view on such agreements is that they may constitute unfair labor practice charges. Employers should contact a Morgan, Brown & Joy attorney with questions regarding how this issue impacts them and what steps they should take to protect themselves.

Sean P. O'Connor is an attorney with Morgan, Brown & Joy, LLP and may be reached at (617) 523-6666 or at soconnor@morganbrown.com. *Morgan, Brown & Joy, LLP focuses exclusively on*

representing employers in employment and labor matters.

This alert was published on January 25, 2012.