CARLTON FIELDS

NLRB Rules Against Class Action Waivers

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On Friday, January 6, 2012, in *D.R. Horton Inc. v. Michael Cuda*, the NLRB issued a ruling that class action waivers of workplace claims can amount to an unfair labor practice under the National Labor Relations Act—that is, such waivers are unlawful. This ruling is highly controversial in light of recent charges of political maneuvering at the NLRB and because it may conflict with a ruling on arbitration waivers issued by the Supreme Court last year. Businesses often require customers and employees to agree to arbitrate any disputes that may arise with the business, as a way to minimize expenses when resolving disputes. These arbitration agreements often include waivers of class action claims, meaning the customer or employee is agreeing to arbitrate her claim individually. Such waivers have been challenged as unconscionable and unconstitutional. Last year, however, in the context of a consumer class action, the Supreme Court held in *AT&T Mobility v. Concepcion* that rules banning class action waivers frustrate the purpose of the Federal Arbitration Act. So, at least in the context of consumer law, class action waivers are now permitted in arbitration agreements. Friday, in *D.R. Horton*, the NLRB determined that the *AT&T Mobility* holding did not translate into the context of workplace disputes. In the context of an overtime claim, the NLRB determined that a class action waiver amounted to an unfair labor practice under the NLRA because it prevented employees from engaging in group ("associational") activity. The Board's rationale is complex, but in essence, the Board concluded that whereas *AT&T Mobility* involved a conflict between the Federal Arbitration Act and state consumer law (and so raised Supremacy Clause issues), *D.R. Horton* involved a conflict between two federal statutes (the FAA and the NLRA). This is far from over. The NLRB's ruling can be (and likely will be) appealed to either the Eleventh Circuit Court of Appeals in Atlanta, or the Court of Appeals for the District of Columbia. A ruling by one of those Courts could go up to the U.S. Supreme Court.

Authored By

James R. Wiley

D. Matthew Allen

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