



EMPLOYMENT AND LABOR UPDATE

***AT&T Mobility v. Concepcion* Notwithstanding, the National Labor Relations Board Finds That Class Action Waivers Are an Unfair Labor Practice**

In April 2011, the United States Supreme Court issued its decision in *AT&T Mobility v. Concepcion*, which upheld a class action waiver in a consumer contract for cellular services. Since then, many employers have considered whether the *AT&T Mobility* decision permits them to require employees to sign arbitration agreements which also waive the employee's right to bring a claim as a class action or to participate in a class action employment claim. On Friday, the National Labor Relations Board ("NLRB") held, in the case of *D.R. Horton and Michael Cuda*, that it is an unfair labor practice for employers to require employees to sign an arbitration agreement that waives their right to file joint or class claims. The NLRB's decision is a blow to companies hoping to extend the *AT&T Mobility* holding to the employment context.

In *D.R. Horton*, the company required that the employee sign a mutual arbitration agreement which contained a class action waiver. When the company invoked the language of the agreement to prevent the employee from initiating class arbitration, the employee filed an unfair labor charge with the NLRB contending that the class action waiver violated the employee's Section 7 rights to engage in protected concerted activity.

Section 7 of the National Labor Relations Act ("NLRA") provides in relevant part that employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights protected by Section 7.

The NLRB began its analysis by noting that employees who join together to bring collective or class-wide claims, whether in a judicial or arbitral forum, are clearly engaged in concerted activity protected by Section 7 of the NLRA. Thus, the NLRB concluded that D.R. Horton, by requiring employees to waive their rights to proceed on a class or collective action basis, violated the NLRA's prohibition against interference with employees' Section 7 rights. The NLRB specifically determined that neither the Federal Arbitration Act nor the Supreme Court's *AT&T Mobility* decision precluded its holding. The NLRB reasoned that, even under the FAA, the arbitration agreement was unenforceable because it required employees to forgo substantive rights afforded by law: namely, their right to engage in "concerted activity." The NLRB then distinguished *AT&T Mobility* both because it did not involve waivers of class actions in employment arbitration agreements and because *AT&T Mobility* involved the preemption of a state's attempt to restrict class arbitration agreements.

The NLRB did note that its holding was limited to only those arbitration agreements that implicate Section 7 rights. Thus, employers may continue requiring arbitration of individual claims. Finally, just as employers may bargain with a union for waivers of employees' right to strike, it appears that employers remain free to bargain with unions for the waiver of employees' right to bring collective, joint, or class claims in both judicial and arbitral forums.

The *D.R. Horton* decision applies to both union and non-union employers, so long as the employer falls within the jurisdiction of the NLRB. While the decision will likely be reviewed by an appellate court, it is nonetheless quite significant for employers because, as it currently stands, employers who require employees to sign a class action waiver could be subject to an unfair labor practice charge.

As always, please feel free to contact any member of the Sidley Labor and Employment Law team if you wish to discuss this case.

The Labor and Employment Practice of Sidley Austin LLP

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