The 5th Circuit Delivers Crippling Blow to Controversial NLRB Class Action Waiver Theory

12.12.13

The 5th Circuit Delivers Crippling Blow to Controversial NLRB Class Action Waiver Theory

But when employee Michael Cuda and a class of similarly situated employees sought to pursue collective arbitration of their claims against D.R. Horton for alleged unpaid overtime wages in 2008, none of those expectations held true.

**Background:** D.R. Horton refused to arbitrate the claimants’ claims on a collective basis. This, of course, was not an unreasonable position, given that the employees had all signed arbitration agreements expressly acknowledging that they would never pursue claims against the company collectively. Cuda, however, believed that the agreement he and others signed wasn’t worth the paper it was written on. And he reached out to the historically employee-friendly National Labor Relations Board (the board) to back him up.

**The Board’s Decision:** Although it took more than three years to get a ruling on his unfair labor practice charge challenging the validity of D.R. Horton’s mandatory arbitration agreement, the board did not disappoint Cuda. On January 3, 2012, it issued a decision holding that D.R. Horton’s agreement was unlawful because (1) it prevented employees from filing class action claims in court or in arbitration and (2) it could reasonably be read as prohibiting employees from filing unfair labor practice charges.

**The 5th Circuit Appeal:** On appeal to the 5th Circuit Court of Appeals, D.R. Horton argued that the board’s decision should be rejected on procedural grounds because the board lacked a valid quorum at the time it was issued, and on substantive grounds
primarily because it conflicted with the Federal Arbitration Act (FAA), which generally requires that arbitration agreements be enforced as written. The 5th Circuit rejected D.R. Horton’s procedural challenges, concluding that the arguments were either not timely raised or otherwise failed on the merits. The court, however, agreed with D.R. Horton’s substantive challenges, but only in part.

The court agreed with D.R. Horton that the FAA trumps the National Labor Relations Act (NLRA) to the extent that the NLRA renders unlawful an arbitration agreement that prevents employees from pursuing class action claims. The court explained that its conclusion was consistent with a long line of Supreme Court cases holding that the use of class action procedures is not a substantive right and that parties should not be compelled to arbitrate as a class unless they agreed to do so. The court also pointed out that every one of its “sister circuits” to have considered the issue has indicated that they would not defer to the NLRB’s rationale and held arbitration agreements containing class waivers enforceable.

The court sided with the board in finding that D.R. Horton’s agreement could reasonably be read as prohibiting employees from filing unfair labor practice charges. The court explained that an arbitration agreement violates the NLRA if it prohibits employees from filing charges because, unlike the use of class action procedures, the filing of a charge with the board is a substantive right. Given that D.R. Horton’s agreement expressly mandated arbitration of “all disputes and claims relating to the employee’s employment,” without listing any exception for unfair labor practice charges, the board’s conclusion was reasonable, the court held.

**What Happens Next:** The 5th Circuit’s opinion is not necessarily the final chapter in the D.R. Horton saga. The board and/or D.R. Horton could petition the entire 5th Circuit Court of Appeals for a rehearing of their respective losing positions, or they could petition the Supreme Court for review. Moreover, the board is not precluded from advancing the same arguments against other employers, should it choose to do so. Only if and when the Supreme Court rejects the board’s position will it be legally bound to change it in other cases. Regardless of how the board elects to proceed from here, however, the 5th Circuit’s decision is undeniably the most devastating blow yet to the board’s novel theory that seems to fly in the face of Supreme Court precedent.

**Takeaway for Employers:** Unfortunately for D.R. Horton, requiring employees like Cuda to arbitrate their claims individually has not, thus far, proven to be faster, more predictable or likely cheaper than litigation. But the 5th Circuit’s decision goes a long way toward protecting those fundamental attributes for D.R. Horton and other employers in the future. Employers also can learn from the 5th Circuit’s explanation of why D.R. Horton’s arbitration agreement was, in part, unlawful – it failed to make clear that not all claims were truly subject to mandatory arbitration. Had the agreement expressly provided that unfair labor practice charges were not covered by the agreement and that nothing in the agreement should be construed as prohibiting employees from exercising their right to file unfair labor practice charges, the agreement likely would not have been invalidated on those grounds.
Employers should consider consulting with an experienced attorney to draft or revise mandatory arbitration agreements including class action waivers, in order to ensure compliance with this evolving area of the law.

This article by Reyburn Lominack was also featured on the Corporate Compliance Insights website.