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

Insights
2.03.14

Arbitration is generally supposed to be faster, cheaper, and more predictable than litigation. Homebuilder D.R. Horton, like many other employers, certainly believed this when, in 2006, it began requiring employees to sign arbitration agreements preventing them from suing in court, or from bringing class-action claims in arbitration. 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 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 to back him up.

Although it took over 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.

On appeal D.R. Horton argued to the U.S. Court of Appeals for the 5th Circuit 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. But the court agreed with D.R. Horton's substantive challenges, at least in part.

The court agreed 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 it would not defer to the NLRB's rationale and held arbitration agreements containing class waivers enforceable.

The court did side 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.

What Happens Next

The opinion of this 5th Circuit panel of judges is not necessarily the final chapter in the D.R. Horton saga. The Board 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.

The Takeaway

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 towards protecting those fundamental attributes for D.R. Horton and other employers in the future.

Employers can also 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.

Take a look at your mandatory-arbitration agreement. If you think it needs to be revised, let us know.

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