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Arbitration Agreements Can Protect Employers from Class-Action Litigation

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Arbitration provides an alternative to the expense of formal litigation, but in January 2012, the National Labor Relations Board ("NLRB") appeared to limit the efficacy of employment arbitration agreements when it held that arbitration agreements containing class-action waivers violate the National Labor Relations Act ("NLRA"). *D.R. Horton Inc. & Cuda*, 357 N.L.R.B. No. 184 (2012). In labor and employment litigation, class-action lawsuits give employees tremendous leverage by exponentially increasing the risk of employer liability and the cost of litigation. This is especially true in the wage and hour context, in which individual employees' claims are usually small and may not be economically worth pursuing, but class-wide liability can be enormous, thus allowing employees to obtain legal representation. The *D.R. Horton* decision raised questions as to whether arbitration agreements could effectively protect employers from the threat of class litigation.

Since that time, however, the only federal courts of appeals and the majority of district courts to have considered the issue have declined to follow *D.R. Horton*. The Ninth Circuit has not explicitly addressed the issue, but it has hinted that it would follow the majority of courts in refusing to follow the NLRB's decision. Given this trend and recent decisions of the U.S. Supreme Court on the enforceability of arbitration agreements, it seems likely the Ninth Circuit would also reject *D.R. Horton* if squarely faced with the issue.

On June 23, the Ninth Circuit issued two opinions that, without explicitly addressing *D.R. Horton*, affirmed class waivers in arbitration agreements. In the first case, *Johnmohammadi v. Bloomingdale's, Inc.*, the employer had given the plaintiff an arbitration agreement that included a class waiver as part of her new-hire packet. The arbitration agreement was to be binding unless the plaintiff opted out within 30 days. She didn't opt out, and the court held that the class waiver did not violate the NLRA because even though the plaintiff waived her right to collective action under the NLRA, she was not coerced to do so: she was free to opt out.

In the second case, *Davis v. Nordstrom, Inc.*, the court considered whether an employer-imposed arbitration agreement could be unilaterally amended to include a class arbitration waiver. The Ninth Circuit held that the employer provided sufficient notice of the amendment and that the plaintiff in that case accepted the amendment by her continued employment. The court explicitly refused to consider whether this employer-mandated arbitration agreement violated the NLRA. But again, the Ninth Circuit has hinted that it would uphold class waivers even in agreements mandated by an employer.

On the same day, the California Supreme Court issued a decision that explicitly rejected *D.R. Horton* and affirmed an employer's right to require employees to sign a class-action waiver as part of an arbitration agreement, despite prior state law to the contrary. The California decision, *Iskanian v. CLS Transportation Los Angeles, LLC*, is not binding on Washington courts. But California has historically been protective of employees' rights, and the decision shows the trend toward enforcing class waivers in arbitration agreements is likely to be followed, even in other employee-friendly states like Washington.

In *Iskanian*, the employee signed an arbitration agreement that prohibited the employee from asserting any class or representative claims. The court first considered whether the Federal Arbitration Act ("FAA") preempted California public policy and required state courts to enforce class waivers in arbitration agreements. Citing U.S. Supreme Court precedent, and the growing trend toward enforcing class waivers, the court held that federal law required it to enforce class waivers despite state law to the contrary. This is significant because the same federal laws would require enforcement of class waivers in Washington as well, assuming that Washington courts agree with California's reasoning.

The court next considered whether the NLRA, which protects employees' right to engage in concerted activity (*e.g.*, class-action litigation), preempted the FAA. The court ultimately concluded that the FAA's "liberal federal policy favoring arbitration" trumped the NLRA.

The court carved out one exception that is important for employers with California connections. Because the arbitration agreement prohibited representative actions in addition to class actions, it prevented employees from suing under California's Private Attorney General Act ("PAGA"). The court held that employees may not waive the right to bring PAGA claims in state courts. In California, therefore, employers who wish to take advantage of arbitration agreements to protect themselves from class claims will not be protected from PAGA claims.

These cases are a great reminder that employers that haven't used arbitration agreements in the past should consider doing so now, and employers with arbitration agreements should consider including class waivers. Employers wishing to take advantage of class waivers should be aware, however, that courts may refuse to enforce arbitration agreements that they find are unconscionable, *i.e.*, where the employee was denied a reasonable opportunity to understand the agreement or where the substantive terms are too favorable to the employer. Just a few of the factors that have led courts to invalidate arbitration agreements for unconscionability are:

- The agreement severely limits the applicable statute of limitations
- The agreement limits the statutory remedies available to the employee
- The cost of arbitration to the employee is prohibitive
- Important terms are hidden in a maze of fine print; and others

If you would like help navigating this tricky area, you may contact us with questions or for review of your existing arbitration agreement.