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NLRB Limits Mandatory Arbitration Agreements

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According to a recent National Labor Relations Board (NLRB a/k/a Board) ruling, employers utilizing mandatory arbitration agreements (MAA) may be in violation of federal employment laws governing protected, "concerted" employee activities.

In *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012), the board issued a decision addressing the enforceability of a non-union employer's mandatory arbitration agreement, which compelled arbitration of a former employee's claim against a company and prohibited collective action as a means of pursuing that claim.

The employee worked as a non-union superintendent in the construction industry for approximately nine months. As a condition of his employment, the employee signed an MAA. In signing the MAA, the employee agreed he would not institute any claim against the company other than through arbitration, and that any claims must be arbitrated on an individual basis, rather than jointly or collectively with other employees.

Approximately two years after leaving his employment with the company, the employee suspected that while he was still an employee, the company had misclassified him as an exempt employee in violation of the Fair Labor Standards Act (FLSA). The employee gave notice to the company of his intent to initiate arbitration as a member of a class of similarly situated employees, who claimed they had been damaged by the same misclassification under the FLSA.

The company responded by arguing the MAA prohibited the employees from bringing their FLSA claims against the company collectively. The employee then filed an unfair labor practice charge with the Board, alleging the company had violated Section 8 of the National Labor Relations Act (NLRA) by prohibiting employees from bringing claims against the company collectively and by interfering with employees' right to bring charges against the company to the board.

In its decision, the board sided with the employee.

Section 7 of the NLRA permits employees to "engage in other concerted activities for the purpose of . . . mutual aid or protection." Section 8 of the NLRA states it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise" of the employee's rights under Section 7. It is also an unfair labor practice under the NLRA to lead employees to believe they are prohibited from filing unfair labor practice charges with the board.

The board determined that the collective pursuit of employment-related grievances through litigation, arbitration or another forum is protected by Section 7 as a concerted activity for the purpose of mutual aid or protection. The board found the company's MAA, because it prohibited employees from consolidating their claims against the company, violated Section 8 of the NLRA. Furthermore, the board held the MAA was unlawful because employees could reasonably interpret the MAA to prohibit filing charges with the board.

While the board's decision will likely be appealed, it is, at least for now, the law. It would be prudent for all employers, both union and non-union, to review their pre-employment agreements and policies relating to dispute resolution to ensure those policies are in line with this new legal precedent, even in the context of non-union employees, as was the case in *D.R. Horton*.

For assistance with the application of this new legal precedent, please contact the authors of this Rapid Report or any member of Plunkett Cooney's Labor and Employment Law Practice Group.

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