Article

Fifth Circuit Overrules NLRB on Collective Action Waivers

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Dallas Bar Association Headnotes

The Fair Labor Standards Act (FLSA) has become a favorite tool of plaintiffs' attorneys who represent employees. To limit the risk of facing a collective action under the FLSA, many employers require their employees to sign agreements in which they waive their right to participate in a collective action against the company. These clauses were recently called into question by a decision of the National Labor Review Board (NLRB). The Fifth Circuit recently reversed this decision, making it easier for employers to avoid collective actions under the FLSA.

The Rise of FLSA Litigation in Texas

The surge of FLSA litigation in Texas cannot be overstated. By way of illustration, 233 FLSA cases were filed in Texas in 2003. That number has swelled to 1,050 new FLSA case filings as of December 10, 2013. The reason for the increase is obvious: FLSA cases are relatively easy to win (or settle) and the potential exposure for employers can be substantial. A prevailing plaintiff in an FLSA proceeding is entitled to an award of unpaid wages and attorneys' fees, and in most cases the plaintiff will also be awarded liquidated damages equal to two times the unpaid wages. The FLSA also provides that the plaintiff may bring the suit as a collective action on behalf of all similarly-situated employees. The threat of a collective action, combined with the potential of a large damages award, typically results in an FLSA case being settled well before trial.

Single-Party Arbitration Agreement

Many employers have attempted to shield themselves from the threat of FLSA collective actions by including single-party arbitration clauses in their employment agreements. This clause requires the plaintiff to arbitrate all claims against the company in his or her individual capacity, and not as a member of a class or collective action. A single-party arbitration clause was first upheld by the Supreme Court in the context of consumer contracts in *AT&T Mobility LLC v. Concepcion* in 2011. In *Concepcion*, the Supreme Court held that AT&T could require consumers in California to waive the right to bring a class action even though that state's laws held such waivers to be unconscionable. Attorneys who represent employers immediately recognized the *Concepcion* decision as a way to prevent collective actions under the FLSA and many began inserting them in all new employment agreements.

The NLRB Rules on Single Party Arbitration

On January 3, 2012, the NLRB held that D.R. Horton had violated the National Labor Relations Act ("NLRA") by requiring its employees to sign an agreement that precluded them from filing joint, class, or collective claims addressing their wages, hours or other working conditions (*i.e.*, a single-party arbitration agreement).

In reaching this conclusion, the Board focused on Section 7 of the NLRA, which provides that employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

29 U.S.C. § 157. The Board found that that the right to engage in concerted action included the "ability to join together to pursue workplace grievances, including through litigation." Consequently, the Board ordered D.R. Horton to cease and desist from maintaining an arbitration agreement in which employees waive the right to class or collective actions in arbitral or judicial forums.

The Fifth Circuit Reverses

D.R. Horton appealed the NLRB's decision to the Fifth Circuit and argued that the Board's interpretation of the NLRA impermissibly conflicted with the Federal Arbitration Act (FAA). On December 3, 2013, the Fifth Circuit joined several other appellate courts in reversing the NLRB's decision. The Fifth Circuit found that there was no basis to conclude that the NLRA supports a congressional command to override the FAA. While the Supreme Court may still rule on the issue in the future, the Fifth Circuit's opinion provides a relatively safe avenue for employers to limit their exposure under the FLSA.

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