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May 28, 2014

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D.R. Horton Update: Additional Guidance, and Confusion, From Recent Developments

By Aaron J. Graf

Whether, and to what extent, an employer can utilize arbitration agreements to avoid class action claims has been a hot issue in the federal circuits. Last year, GSH published several articles concerning these very issues and their impact on employers. Since that time, there have been a number of interesting developments throughout the country worthy of your attention.

In late 2013, the Fifth Circuit (covering Louisiana, Mississippi, and Texas) addressed an appeal in the matter of *In re D.R. Horton*, 357 NLRB No. 184 (2012), in which the National Labor Relations Board (the "NLRB") held that the arbitration agreement utilized by D.R. Horton violated section 8(a)(1) of the National Labor Relations Act (the "Act"). Pursuant to the language of the agreement, employees agreed to "voluntarily waive all rights to trial in court before a judge or jury on all claims between them," and that "all disputes and claims" would "be determined exclusively by final and binding arbitration." This expressly included claims for "wages, benefits, or other compensation." The NLRB found that it violated the Act because: (1) the waiver meant that employees could not pursue collective and class action claims, which infringed on employees' rights under Section 7 of the Act to engage in concerted activities; and (2) the arbitration agreement could be reasonably interpreted to prohibit an employee's right to file an unfair labor practice charge with the NLRB.

However, the Fifth Circuit reversed the NLRB's holding as to the first issue, finding that the NLRB, in reaching its decision, did not give proper weight to the Federal Arbitration Act, which, the Fifth Circuit noted, "has equal importance in [its] review." The Fifth Circuit further noted that the use of class action procedures was a procedural right, not a substantive right, and it denied enforcement of the NLRB's ruling on the class and collective action waiver issue. At the time, this decision brought the Fifth Circuit in line with the Second, Eighth, and Ninth Circuits in generally upholding a class action waiver in an employment arbitration agreement. The NLRB subsequently filed a petition for hearing of the case, but on April 16, 2014, the Fifth Circuit denied the NLRB's petition. The NLRB has until July 15, 2014, to petition for Supreme Court review.

In the meantime, as some expected, the NLRB has seemingly chosen not to recognize the Fifth Circuit's holding in subsequent actions. In fact, as recently as January 17, 2014, the NLRB's General Counsel authorized a complaint under the Act in *Leslie's Pool Mart*, Case 21-CA-102332 (January 17, 2014), in which the administrative law judge was required to determine whether the employer's mandatory arbitration agreement violated the Act. In the arbitration clause at issue, employees did not expressly waive their rights to engage in collected or class actions, but they did agree to "the resolution by arbitration of all claims or controversies . . . past, present or future, whether or not arising out of [their] employment (or its termination), that the Company may have against [them] or that [they] may have against [it]." A former employee filed a class action on behalf of himself and other current employees alleging that employees had been improperly denied certain overtime pay by the employer.

The administrative law judge found that Leslie's Pool Mart had engaged in an unfair labor practice in that, while the arbitration agreement did not on its face prohibit class actions, it had the practical effect of doing so as demonstrated by the employer's actions in seeking to compel arbitration and to preclude a class action. Thus, not only is it evident that the NLRB intends to continue enforcing its *D.R. Horton* rule, but the NLRB has also apparently expanded this rule to include situations in which the arbitration agreement effectively, even if not explicitly, precludes employees from pursuing class actions.

In addition, there is another case pending before the U.S. Supreme Court that could potentially impact various recent NLRB decisions, including those pertaining to arbitration agreements and class actions. Oral argument was heard on January 13, 2014, in *National Labor Relations Board v. Noel Canning*. As a reminder, *Noel Canning* involves the NLRB appointments made by President Obama in early 2012, while Congress was in pro forma sessions. These appointments have been challenged as unconstitutional. If

these appointments to the NLRB, which allowed it to have sufficient members for a quorum and issue decisions, are found unconstitutional, then it would call into question many decisions issued by the NLRB over the last several years, including decisions related to arbitration agreements and class actions. A decision in *Noel Canning* is expected in the next several weeks.

Needless to say, there are many unanswered questions and unresolved issues regarding the use of arbitration agreements to limit exposure to class action claims, though we hope some answers are on the horizon. GSH continues to assist clients in developing and implementing mandatory arbitration programs and in navigating the complicated, and ever-changing, waters regarding class actions and arbitration agreements.

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