

Labor & Employment Bulletin



NLRB's JANUARY 3, 2012 DECISION BARS ENFORCEMENT OF CLASS/COLLECTIVE ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS

On January 3, 2012, Members Pearce and Becker of the National Labor Relations Board ("NLRB") issued a decision holding that a non-union Florida homebuilder could not rely on arbitration agreements with its job superintendents to force individual arbitration of their FLSA collective action for overtime violations. *D.R. Horton, Inc.* 357 NLRB No. 184. In doing so, the Board relied exclusively on the National Labor Relations Act's ("NLRA") provisions prohibiting an employer's interference with employees' rights to engage in concerted activities for their mutual aid or protection, otherwise known as "Section 7" rights.

The NLRB found that Congress intended Section 7 of the NLRA to override any conflicting mandate to arbitrate such claims under the Federal Arbitration Act ("FAA") because the NLRA was passed seven years after the FAA and thereby implicitly repealed conflicting FAA provisions. Horton will almost certainly appeal the Board's strained reconciliation of these two statutes to the Eleventh Circuit where Horton will likely obtain relief, especially after the United States Supreme Court's January 10, 2012 decision in *Compucredit Corp. v. Greenwood*, 2012 WL 43514.

SUPREME COURT FAVORS BRIGHT LINE TEST ENFORCING ARBITRATION AGREEMENTS OF FEDERAL STATUTORY RIGHTS

In *Compucredit*, the Supreme Court found that the 1996 Credit Repair Organizations Act's ("CROA") silence on the arbitrability of claims arising from that Act must be interpreted to permit mandatory arbitration of such claims. In doing so, the Supreme Court delineated a bright line test for all lower courts to use in determining if the federal rights created by Congress are arbitrable, namely, does the federal statute explicitly preclude mandatory pre-dispute arbitration of claims arising from the statute? If it does not, then **"the FAA requires the arbitration agreement to be enforced according to its terms."**

The NLRA, much like the CROA, is silent on whether an employer can mandate individual arbitration of collective/class action claims implicating Section 7 rights like those at issue in *D.R. Horton*. As such, *D.R. Horton* and other similarly situated employers will have a much more forceful argument for compelling individual arbitration of collective/class action claims despite the NLRB's January 3, 2012 decision.

GOING FORWARD AFTER D.R. HORTON

Although some commentators interpreting the Board's *D.R. Horton* decision have recommended that employers immediately delete all class/collective action waiver provisions in their mandatory arbitration programs, such advice may be premature for several reasons. First, as indicated by the Supreme Court's more recent *Compucredit* decision, the Board's strained reconciliation of the NLRA and FAA is untenable and likely to be reversed by the Eleventh Circuit and other federal courts facing this issue. Indeed, district courts in Georgia and Texas rejected the Board's reasoning in 2008 and 2010. Second, most employers already have a "severability" provision in their arbitration programs that will result in a court enforcing the agreement's valid provisions while striking any invalid portions, such as a class action waiver. Severability provisions are lawful in most states, and they act as a buffer against the courts' invalidation of the entire plan even if one section is deemed unlawful. Finally, the Board's decision only affects workers defined as "employees" under the NLRA, meaning that statutory

"supervisors" cannot rely on *D.R. Horton* to avoid individual arbitration of class/collective action claims covered by an employment arbitration agreement.

In any event, employers with existing arbitration programs or those considering the adoption of such plans should review their plans with counsel to address the impact of the Board's *D.R. Horton* decision. Members of Balch's Labor & Employment Practice Group have drafted and enforced arbitration agreements for many years in both state and federal courts. As such, we have the knowledge and experience to advise those employers affected by the Board's *D.R. Horton* decision.

Jeff Starling
Partner, Birmingham
jstarling@balch.com
+1 205 226 3406

Lisa Sharp
Partner, Birmingham
lsharp@balch.com
+1 205 226 8723

Brent Cobb
Partner, Birmingham
bcobb@balch.com
+1 205 226 3477

Aaron Dettling
Partner, Birmingham
adettling@balch.com
+1 205 226 8723

Doug Kauffman
Partner, Birmingham
dkauffman@balch.com
+1 205 226 8758

Dorman Walker
Partner, Montgomery
dwalker@balch.com
+1 334 269 3138

Charlie Paterson
Partner, Birmingham
cpaterson@balch.com
+1 205 226 8745

Armin Moeller
Partner, Jackson
amoeller@balch.com
+1 601 965 8158

Pepper Crutcher
Partner, Jackson
pcrutcher@balch.com
+1 601 965 8158

Rusty Turner
Partner, Jackson
rturner@balch.com
+1 601 965 8159

David Thomas
Partner, Jackson
dthomas@balch.com
+1 601 965 8157

Chris Anulewicz
Partner, Atlanta
canulewicz@balch.com
+1 404 962 3562

Balch & Bingham | www.balch.com

The Labor & Employment Bulletin is published as an informational resource for clients and friends of Balch & Bingham LLP. It does not contain legal advice, and is not a solicitation to perform legal services. No representation is made that the quality of legal services performed by Balch & Bingham LLP is greater than the quality of legal services performed by other lawyers. Design, logo, and content © 2012 Balch & Bingham LLP.

To opt-out from future communications please [click here](#).