Important NLRB Decision to Affect All US Employers—Union and Nonunion

The NLRB has issued a controversial decision that will limit the ability of most US employers—including most nonunion employers—to implement arbitration plans with class-action waivers.

In *D.R. Horton, Inc.,* 357 NLRB No. 184 (2012), issued on the last day of NLRB Member Craig Becker's recess-appointed term, the NLRB found that class-action waivers in employee arbitration agreements violate employees' right to engage in "protected concerted activity."

In *D.R. Horton*, the employer required all employees to agree, as a condition of employment, that their employment-related disputes would be resolved through arbitration. The company's dispute-resolution policy included a requirement that the arbitrator hear each employee's claims individually, rather than on a class-wide basis. Many employers have added such "class-action waivers" to their policies following the United States Supreme Court decision in *AT&T Mobility v. Concepcion* where the Court struck down state-law doctrines banning such waivers.

The NLRB, however, was undeterred by *AT&T Mobility*. Agreeing with arguments urged by organized labor, the NLRB held that employees have a federal right to engage in "protected concerted activities," including the right to file class actions or group lawsuits against their employers. That right, according to the NLRB, supersedes the pro-arbitration policies of federal law upheld in *AT&T Mobility*. Accordingly, the NLRB held that unionized and nonunion employers alike cannot lawfully restrict—through arbitration agreements or otherwise—employees' rights to file employment class-action lawsuits.

Many nonunion employers have assumed that the protections of the National Labor Relations Act are largely limited to unionized workplaces, or to nonunion workplaces where a union is actively seeking to organize employees. While the NLRB has historically focused on those two scenarios, it is increasingly reaching out to regulate nonunion workplaces. In addition to the *D.R. Horton* decision, the NLRB under the current administration has also issued new regulations requiring employers to post notices highlighting employee rights under the NLRA, including the right to unionize; has issued complaints against nonunion employers who penalized employees' communications on social media sites such as Facebook; and has expanded the rights of unions to target nonunion employers who use nonunionized construction firms and other contractors.

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The Board's reasoning in the *D.R. Horton, Inc.* case is controversial, and an appeal to the federal courts seems likely. But unions are not waiting for any appeals. In fact, some unions have announced that they plan on filing unfair labor practice charges against nonunion employers who have arbitration policies containing class-action waivers. Employers are encouraged to review their employment arbitration policies with counsel familiar with current NLRB law. More generally, employers should recognize that the National Labor Relations Act regulates many other employment policies and practices usually not viewed as "labor law" concerns, whether or not they regulate union activity.

Nor should employers count on the NLRB losing its authority to act due to vacancies in appointments. Although observers have noted that the NLRB was about to dip below its required quorum of three members, President Obama recently recess-appointed three new members to the NLRB, bringing its total roster back to five members (three Democrats and two Republicans). The recess appointments are controversial and have already been subjected to legal challenge based on arguments that Congress was not actually in recess. In the meantime, however, expect the NLRB to continue pursuing an activist path towards regulating nonunion workplaces.

If you have any questions about any of the topics discussed in this Advisory, please contact your Arnold & Porter attorney or:

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