The State of Class Action Waivers in Employment Arbitration Agreements

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Pennsylvania Law Weekly
November 17, 2016

Employers throughout Pennsylvania and the country routinely utilize arbitration agreements in the management of employees to minimize potential expense and exposure of litigation in courts. When used properly, these arbitration agreements can streamline employment disputes in a cost-effective and confidential manner. In fact, many arbitration agreements require that disputes be pursued individually, with employees waiving their ability to bring class and collective action claims. While these types of agreements have been enforced by courts throughout the country for many years, more recently the National Labor Relations Board (NLRB) has attempted to eradicate the use of class action waiver provisions in these agreements.

To date, the U.S. Court of Appeals for the Third Circuit and federal district courts in Pennsylvania have not addressed the specific issue of whether or not class action waivers violate the "concerted activities" provision of Section 7 of the National Labor Relations Act (NLRA). However, based upon arguments held on Oct. 5, in the case of Rose Group d/b/a Applebee's v. National Labor Relations Board, the Third Circuit is poised to weigh in on this important issue. On review before the Third Circuit is a split panel (2-1) decision of the NLRB wherein the NLRB held that arbitration agreements that employees executed at the time of hire at Applebee's violated the NLRA because they precluded class and collective actions. In its decision, the NLRB specifically relied upon its reasoning from a prior NLRB decision in D.R. Horton. Rose Group d/b/a Applebee's Restaurant, 2015 NLRB Lexis 932, *2-3 (2015).

Specifically, in D.R. Horton, 357 N.L.R.B. 2277, 2278 (2012), the NLRB determined that arbitration agreements with class and collective action waiver language violate Section 7 of the NLRA which provides employees with the right "to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection." In so finding, the NLRB determined that the ability to file class and collective actions against employers is a substantive right—as opposed to a procedural right—which cannot be infringed upon through the use of waivers, see also Murphy Oil USA, 2014 N.L.R.B. LEXIS 820 (2014) (affirming the board's decision in D.R. Horton). Subsequent to the NLRB's decision in D.R. Horton, the NLRB continues to file unfair labor practice charges against employers throughout the country, asserting that class action waivers unlawfully prohibit employees from engaging in "concerted activity" under the NLRA, even in situations where an employer has not attempted to enforce the arbitration provision.

Prior to 2016, the Fifth, Second and Eighth circuits expressly rejected the NLRB's challenges to class and collective action waivers contained in arbitration agreements, see generally, D.R. Horton v. National Labor Relations Board, 737 F.3d 344 (5th Cir. 2013); Murphy Oil USA v. National Labor Relations Board, 808 F.3d 1013 (5th Cir. 2015); Sutherland v. Ernst & Young, 726 F.3d 290 (2d. Cir. 2013); and Owens v. Bristol Care, 702 F.3d 1050 (8th Cir. 2013). The highest state courts in California and Nevada have, likewise, held that arbitration agreements that contain class and collective action waivers are enforceable, as in Iskanian v. CLS Transportation Los Angeles, 327 P.3d 129 (Cal.

2014), cert. denied 135 S.Ct. 1155 (2015); and Tallman v. Eighth Judicial District Court, 359 P.3d 113 (Nev. 2015). In fact, circuit courts that have upheld these types of arbitration agreements have explicitly relied on prior U.S. Supreme Court precedent which has held that arbitration agreements with class action waivers are valid in a variety of areas.

Notably, the Fifth Circuit's opinion in D.R. Horton v. National Labor Relations Board expressly rejected the NLRB's seminal decision on this issue. In its holding, the Fifth Circuit found that the NLRA did not contain a substantive right to class or collective action arbitration and confirmed the ability for arbitration agreements to legally contain those waivers. Despite a clear message from the Fifth Circuit, the NLRB has persisted in its pursuit of employers who utilize these types of arbitration agreements, including in circuits where class waivers have been determined to be legal. Indeed, the Fifth Circuit's decision in Murphy Oil USA expressly noted the NLRB's unrelenting disregard of "this court's contrary D.R. Horton ruling that such arbitration agreements are enforceable and are not unlawful," as in Murphy Oil USA; Cellular Sales of Missouri v. National Labor Relations Board, 824 F.3d 772, 776 (8th Cir. June 2) (noting that the NLRB "concedes that our holding in Owen is fatal to its argument 'that a mandatory agreement requiring individual arbitration of work-related claims' violates the NLRA"). In fact, the NLRB has publicly and consistently asserted that it intends to champion its position with respect to class action waivers until it is overturned by the U.S. Supreme Court. See Murphy Oil USA (noting that the "board is not required to acquiesce in adverse decisions of the federal courts in subsequent proceedings not involving the same parties" and "because only the Supreme Court is authorized to interpret the act with 'binding effect throughout the whole country,' the board is 'not obliged to accept the interpretation' of any court of appeals").

This year, the NLRB received some support in its position, most notably from the Seventh and Ninth circuits. In Lewis v. Epic-Systems, 823 F. 3d 1147 (7th Cir. May 26, 2016), the Seventh Circuit determined that an employer's arbitration agreement "insofar as it prohibits collective action ... violates ... the NLRA." In so holding, the Seventh Circuit noted that the "NLRA's legislative history and purpose confirm that the phrase 'concerted activities' in Section 7 should be read broadly to include resort to representative, joint, collective or class legal remedies." In addition, the court noted that the NLRB has "interpreted the NLRA to prohibit employers from making agreements with individual employees barring access to class or collective remedies" and that the NLRB's interpretations "are entitled to judicial deference." Like Lewis, the Ninth Circuit also determined that the employer's arbitration agreement interfered with "a substantive right protected by the NLRA" and "irrespective of the forum in which disputes are resolved, employees must be able to act in the forum together."

In the pending appeal of Rose Group d/b/a Applebee's the Third Circuit is asked to reverse the NLRB's "anti-arbitration stance" and follow multiple circuit courts who have expressly rejected the NLRB's rationale for invalidating arbitration agreements, reasoning that the "use of class and collective action mechanisms is not a substantive right under the NLRA." As the employer in Rose Group noted, "despite any protestations to the contrary, the NLRB has one goal in mind ... the invalidation of class and collective action waivers in arbitration agreements" and that the "board presents a steadfast commitment to NLRA exceptionalism, trivializing the import of the Federal Arbitration Act and maintaining an unrealistic view that the NLRA predominates over other statutes." Remarkably, this view is consistent with the lone NLRB dissenter's opinion in the NLRB's decision in Rose Group d/b/a Applebee's Restaurant which expressly noted that the Fifth

Circuit had "twice denied enforcement of board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims" and "the overwhelming majority of courts considering the board's position have likewise rejected it."

Unfortunately, without a quick and clear resolution of this issue by the Third Circuit or the U.S. Supreme Court, employees in Pennsylvania are left vulnerable to challenges by employees and the NLRB as to whether their arbitration agreements which contain class action waivers are legal. Of course, despite the current uncertainty of the law in the Third Circuit, the benefits of these types of arbitration agreements may still be worth the risk for many employers. Scores of courts across the country still favor these types of provisions, even though a few recent circuit court decisions have provided the NLRB with some late inning momentum.

As it now stands, given the obvious split among the circuit courts on this issue to date, it is becoming increasingly more likely that the U.S. Supreme Court will have an opportunity to decide whether or not class and collective action waivers are valid, legal, and acceptable for use by employers in Pennsylvania and across the country. In fact, petitions for writ of certiorari have already been filed from recent decisions rendered by the Second, Fifth, Seventh, and Ninth circuits. Further clarity on this issue, therefore, is expected in the near future.

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